

8 March 2018

PRESS SUMMARY

Butt (Appellant) v Secretary of State for the Home Department (Respondent) [2019] EWCA Civ. 256

On appeal from: [2017] EWHC 1930 (Admin)

JUDGES: Sir Terence Etherton MR, Lady Justice Sharp, Lord Justice Irwin.

BACKGROUND TO THE APPEAL

Dr Salman Butt is the editor-in-chief of “Islam21C”, a publicly accessible website describing itself as articulating Islamic beliefs in the 21st century. Dr Butt has been a guest speaker at a number of universities and schools. The Extremism Analysis Unit (“EAU”) is a unit within the Home Office which conducts research into extremism in the UK and abroad.

In September 2015 a Home Office press release announced the coming into force of Guidance. In that release Dr Butt was said to have been identified as a “hate speaker” by the EAU. That conclusion was based on information supplied to the EAU as part of a digest detailing events taking place on university campuses that Student Rights, a body set up by the Henry Jackson Society think tank, considered to be potentially extremist.

This appeal considers two matters. First, whether the collection and retention of information about Dr Butt’s views by the EAU is compatible with Article 8 of the European Convention on Human Rights (“ECHR”). Second, whether the Higher Education Prevent Duty Guidance issued by the Secretary of State for the Home Department is compatible with Article 10.

The Guidance was issued under the powers conferred by the Counter-Terrorism and Security Act 2015 (“CTSA”). Section 26 CTSA places certain Higher Education institutions (“RHEBs”) under a duty to have regard to the need to prevent people from being drawn into terrorism. Section 29 CTSA empowers the Secretary of State to issue guidance to RHEBs on how to discharge that duty. RHEBs are required to have regard to that guidance. Section 31 CTSA requires both the RHEB in discharging its section 26 duty, and Secretary of State in formulating guidance, to have particular regard to the duty to ensure freedom of speech.

Paragraph 11 of the Guidance states that, when considering whether to host a particular speaker, RHEBs should consider whether the views expressed constitute extremist views that risk drawing people into terrorism. “Extremist views” are defined for this purpose as views that actively oppose fundamental British values. Where the speaker is likely to express extremist views which are such as to risk drawing people into terrorism, RHEBs are advised not to allow the event to proceed unless they are entirely convinced that the risks of people being drawn into terrorism can be fully mitigated. If there is any doubt that full mitigation can be achieved, for example by strong chairing of the meeting and by placing on the platform speakers with opposing views, RHEBs should not allow the event to proceed.

Dr Butt challenges the lawfulness of the guidance and the EAU’s data collection on five grounds: the Guidance was outside the powers of Secretary of State under the CTSA; the Secretary of State failed to discharge his section 31 CTSA duty; the Guidance was a violation of Article 10 and/or Dr Butt’s common law right to free speech; the collection and retention of his data by the EAU was

contrary to Article 8; and the EAU's activities were unauthorised directed surveillance for the purposes of the Regulation of Investigatory Powers Act 2000 ("RIPA").

JUDGMENT

The Court unanimously dismisses the appeal in relation to the collection of information by the EAU. The appeal in relation to the Guidance is allowed in part, on the ground that Secretary of State failed to discharge his section 31 CTSA duty in the advice given in paragraph 11 of the Guidance. The Guidance is declared unlawful to that extent and quashed.

REASONS FOR THE JUDGMENT

Collection and retention of data by the EAU

The Article 8 challenge to the collection of Dr Butt's data is dismissed. Article 8(1) was not engaged by the collection and retention of data relating to Dr Butt. The touchstone for engagement of Article 8(1) is a legitimate expectation of privacy [66-67]. Neither the UK Supreme Court decision in *Catt* [2015] UKSC 9, nor the European Court of Human Rights' decision in *Catt v UK* (43514/15), casts doubt on this requirement, which applies even where the state systematically collects and stores data about an individual [75-76]. In relation to statements deliberately made public by him and which he wished to communicate to others, Dr Butt could have no reasonable expectation of privacy [67, 77]. Further, there was no systematic collection of information about Dr Butt by the EAU [78-82], nor did the data it retained constitute a systematic record [83].

Even if Article 8(1) was engaged, the collection and retention of Dr Butt's data was a justified interference with his right to privacy under Article 8(2) [123-138].

The challenge based on RIPA is dismissed. The provisions of RIPA were not engaged because there was no surveillance, and even if there had been, it was not covert [84]-[87], [146].

Violation of Article 10 and/or the common law right to free speech

The publication of the Guidance was within the Secretary of State's power under section 29 CTSA but, as worded, it is unlawful in one respect. Paragraph 11 is expressed in unconditional terms: an event must not be allowed to proceed if the RHEB is not entirely convinced that the risk, however small, of people being drawn into terrorism cannot be fully mitigated. RHEBs are likely to read the Guidance and assume it represents a balance of their competing duties under the CTSA. The unconditional phrasing of the Guidance was not sufficiently balanced or accurate so as to inform RHEBs of those competing obligations, which include the duty to ensure freedom of speech. To the extent that the Secretary of State had expressed the Guidance in this unconditional form, he had failed to discharge his section 31 CTSA duty [176-177].

Dr Butt's challenge to the Guidance based on Article 10 ECHR fails because he could not show that the Guidance had actually been applied to prevent him speaking at universities [179-183].

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court of Appeal is the

only authoritative document. The full judgment of the Court of Appeal and a copy of this media summary are available at www.judiciary.uk