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UK Supreme Court rules against secret evidence in civil claims

The UK Supreme Court today ruled decisively against the use of secret evidence in civil trials without parliamentary authorisation.

In a 2009 claim for damages brought by the former UK Guantanamo detainees against the security and intelligence services, the government had asked the High Court to adopt a special procedure that would have excluded the detainees, their lawyers and the public from hearing any of the classified evidence. The High Court ruled in the government's favour but this was overturned by the Court of Appeal in 2010. Although the claims were subsequently settled, the government appealed to the Supreme Court on the point of principle.

By a majority of 5 to 4, the UK Supreme Court today ruled that the courts had no power to adopt a procedure allowing the use of secret evidence, on the basis that it would cut across the constitutional principle of open justice and the right to a fair trial, including the right of each party to know the evidence put forward by the other side.

Lord Kerr, writing as part of the majority, said:

> The right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness.

Lord Kerr also referred to the 'seemingly innocuous scheme' proposed by the government as amounting to 'the deliberate forfeiture of a fundamental right which… has been established for more than three centuries'.

Lord Hope, the deputy President, said:

> This is not the time to weaken the law's defences. On the contrary, any weakening in the face of advances in the methods and use of secret intelligence in a case such as this would be bound to lead to attempts to widen the scope for an exception to be made to the principle of open justice. That would create a state of uncertainty in an area of our law which would be inimical to the concept of a fundamental right.

Lord Dyson said:

> The open justice principle is not a mere procedural rule. It is a fundamental common law principle.

In a second ruling, the Court agreed with the government that secret evidence *could* be used in the employment tribunal in a claim involving national security. This was because Parliament had legislated in 1999 specifically to create an exception in such cases. A majority of the Supreme Court also held that, in such cases, the government was not required to provide claimants with sufficient details of the secret evidence in order that they receive a fair trial. In doing so, the majority distinguished employment claims from cases involving restrictions on liberty, e.g. control orders.

Eric Metcalfe, JUSTICE's director of human rights policy, said:

> **Today's ruling has confirmed that secret evidence has no place in the common law.**
>
> **It is a clear setback for the government's plans to extend the use of secret evidence and secret hearings in our courts.**

Although it is open to Parliament to legislate further, today's ruling sets a high hurdle for any MP seeking to cut across centuries of common law tradition.

For further comment, please contact Eric Metcalfe, JUSTICE's human rights policy director, on 020 7762 6414 (direct line), 07939 119 369 (mobile) or emetcalfe@justice.org.uk.

Notes for editors

1. JUSTICE was granted leave to intervene before the UK Supreme Court in both *Deghayes* and *Tariq* in a joint intervention with Liberty. JUSTICE and Liberty were represented pro bono in the appeals by John Howell QC, Naina Patel and Herbert Smith LLP.

2. Civil claims for damages are governed by the common law and the Civil Procedure Rules rather than statute. By contrast, the power of employment tribunals to hear secret evidence in cases involving national security was introduced by Parliament by the Employment Relations Act 1999 (amending section 10 of the Employment Tribunals Act 1996).

3. In June 2009, JUSTICE published *Secret Evidence*, a major report on how the use of closed proceedings and special advocates has spread through the UK's justice system since 1997. Secret evidence has now been used in control order hearings, deportation proceedings, parole board cases, asset-freezing hearings, and even employment tribunals. PDF copies of the report are available on request.

4. The government previously announced that it would introduce a Green Paper on the use of intelligence materials in court. It is expected to do so before the end of 2011.

EXTRACTS FROM THE UK SUPREME COURT JUDGMENT IN DEGHAYES (EMPHASIS ADDED)

LORD DYSON:

> The open justice principle is not a mere procedural rule. It is a fundamental common law principle [para 11]
>
> The basic rule is that (subject to certain established and limited exceptions) the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice. [para 22]
>
> Closed material procedures and the use of special advocates continue to be controversial. In my view, it is not for the courts to extend such a controversial procedure beyond the boundaries which Parliament has chosen to draw for its use thus far. It is controversial precisely because it involves an invasion of the fundamental common law principles to which I have referred. [para 47]
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> [T]he common law is flexible. It develops over time in response to changing circumstances. Sometimes, it takes giant steps forward. More often, it evolves gradually and cautiously. But any change must be justified, otherwise the law becomes unstable. This is particularly important where a change involves an inroad into a fundamental common law right. The introduction of a closed material procedure in ordinary civil claims (including claims for judicial review) would do just that. [para 67].
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> It is true that, by a majority, this court has decided in *Tariq* … that the use of a statutory closed material procedure before the Employment Tribunal is lawful under article 6 of the European Convention on Human Rights ('the Convention') and EU law. But the lawfulness of a closed material procedure under article 6 and under the common law are distinct questions. As Lord Bingham said in *R (Ullah) v Special Adjudicator* … "[i]t is of course open to member states to provide for rights more generous than those guaranteed by the Convention". It is, therefore, open to our courts to provide greater protection through the common law than that which is guaranteed by the Convention. [para 68]

LORD HOPE:

> I have always believed that a court of unlimited jurisdiction is the master of its own procedure. But that does not mean that the court can do what it likes. Everything that it does must have regard to the fundamental principles of open justice and of fairness. The principle of legality demands nothing less than that. There is, of course, a very wide area of procedure where these issues of principle are not engaged at all. There comes a point, however, where the line must be drawn between procedural choices which are regulatory only and procedural choices that affect the very substance of the notion of a fair trial. Choices as to how the conduct of the court's business may be simplified, made less expensive or made easier to understand are one thing. Choices that cut across absolutely fundamental principles such as the right to a fair trial, the right to be confronted by one's accusers and the right to know the reasons for the outcome are entirely different. The court has for centuries held the line as the guardian of these fundamental principles. [para 72]
>
> I can see the force of the argument that there are circumstances where justice cannot be done unless a closed procedure is adopted. It is advanced, as Lord Brown puts it in para 81, as the least bad solution to a difficult problem. But I think that the court must resist the temptation to go down that road. It would, at best, be an uncertain journey, beset by problems of the kind that Lord Dyson refers to in para 43. It would also run the risk of opening the door to something else. As the Court of Appeal said, it is a melancholy truth that a procedure or approach which is sanctioned by the court expressly on the basis that it is applicable only in exceptional circumstances none the less often becomes common practice... Lord Shaw of Dunfermline's warning in *Scott v Scott* … against the usurpation of fundamental rights that proceeds little by little under the cover of rules of procedure remains just as true today as it was then. This is not the time to weaken the law's defences. On the contrary, any weakening in the face of advances in the methods and use of secret intelligence in a case such as this would be bound to lead to attempts to widen the scope for an exception to be made to the principle of open justice. That would create a state of uncertainty in an area of our law which would be inimical to the concept of a fundamental right. [para 73]

LORD BROWN:

> The rule of law and the administration of justice concern more, much more, than just the interests of the parties to litigation. The public too has a vital interest in the conduct of proceedings. Open justice is a constitutional principle of the highest importance. It cannot be sacrificed merely on the say so of the parties. [para 84]

LORD KERR:

> [T]he right to know and effectively challenge the opposing case has long been recognised by the common law as a fundamental feature of the judicial process …. The right to be informed of the case made against you is not merely a feature of the adversarial system of trial, it is an elementary and essential prerequisite of fairness. [para 89]
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> The seemingly innocuous scheme proposed by the appellant would bring to an end any balancing of, on the one hand, the litigant's right to be apprised of evidence relevant to his case against, on the other, the claimed public interest. This would not be a development of the common law, as the appellant would have it. It would be, at a stroke, the deliberate forfeiture of a fundamental right which, as the Court of Appeal has said … has been established for more than three centuries. [para 92]
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> To be truly valuable, evidence must be capable of withstanding challenge. I go further. Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. [para 93]