

Case comment - R. (Salman Butt) v Secretary of State for the Home Department

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Human Rights – Prevent Duty – Higher Education – Surveillance – Privacy – Free Speech

R (Salman Butt) v Secretary of State for the Home Department [2019] EWCA Civ 256

Court of Appeal

Facts

Section 26 of the Counter-Terrorism and Security (CTS) Act 2015 imposes a duty upon specified public authorities, including universities, to have due regard to the need to prevent people being drawn into terrorism in the exercise of their functions.

The first legal challenge to the general Prevent Duty Guidance (PDG) and the more specific Prevent Duty Guidance in higher education (HEPDG) issued by the Home Office, pursuant to the Secretary of State's power under s.29 of the CTS Act 2015, came in *R. (Salman Butt) v Secretary of State for the Home Department* [2017] EWHC 1930 (Admin). Butt's complaint was prompted by a Government press release announcing the introduction of the revised PDG, which also suggested that the applicant was an extremist who expressed views contrary to British values, which Butt himself denies. Butt claimed that he has suffered as result of the press release, as he has received far fewer invites to speak at conferences and universities on issues relating to Islamic beliefs. The claimant argued, *inter alia*, that the Secretary of State had failed to comply with the obligation under s.31 of the CTS Act 2015 to have particular regard to free speech in universities when issuing the HEPDG. The claimant also argued that the collection, recording and sharing of information by the Extremism Analysis Unit (EAU) concerning him breached his privacy rights under Article 8 of the European Convention on Human Rights (ECHR).

The High Court dismissed the claim, finding that no universities had challenged the HEPDG or provided evidence "that it has created difficulties in practice for the values of freedom of speech and academic freedom". Responding to the claim that Butt's freedom of expression under the common law and/or Article 10 of the ECHR had been violated, Mr Justice Ouseley held that the claimant had no right under Article 10 to "go on to any university premises for his own purposes" and "he has no right to be invited". In respect of Butt's privacy claim, Ouseley J held that Article 8 was not engaged as the information collected by the EAU was publicly available rather than being systematically collected, meaning that he could have no reasonable expectation of privacy. Butt then appealed to the Court of Appeal, which heard the appeal in December 2018 before delivering judgment in March 2019.

The Decision of the Court of Appeal

In a long and complex ruling, the majority of the judgment focused on the appellant's fourth ground of appeal, namely, that the collection, storage and use of information concerning him breached his right to privacy under Article 8 of the ECHR. The appellant relied upon a number of domestic and European Court of Human Rights cases, but the Court of Appeal either distinguished them on the basis that they could not be compared to the facts in the current case, or found that they did not assist the appellant. Rather, the Court indicated that it had not been referred to any case concerning a claim for privacy in respect of information publicly available by simply searching the internet and social media.

The Court remarked that the appellant had argued, simultaneously, that the collection and recording of his views breached Article 8 of the ECHR, whilst also arguing that the PDG breached his Article 10 rights to impart those views to others. Given that the appellant had disseminated his views publicly, the Court of Appeal concluded that he could not have had any legitimate or objectively reasonable expectation of privacy in relation to the EAU's collection and retention of information about him. The Court also rejected the argument that the EAU had "systematically collected" information about the appellant in such a way to engage Article 8 of the ECHR, or that any covert surveillance had occurred

pursuant to the Regulation of Investigatory Powers Act (RIPA) 2000. Ultimately the Court of Appeal concluded that the High Court was correct to determine that Article 8(1) was not engaged. Despite this, the Court of Appeal also considered whether any interference with Article 8(1) would have been justified if the right was engaged. Firstly, the Court found that there was no dispute that the policies of the EAU pursued a legitimate aim, and secondly, the Court found that the retention and use of data about the appellant was in accordance with the law, as the numerous conditions under data protection laws had been met. Given the Court of Appeal's conclusion that no surveillance of Butt by the EAU had taken place, and that if there was surveillance it was not covert, the Court determined that the RIPA 2000 had no application. As such, the fifth ground of appeal concerning the question of whether "directed surveillance" against Butt had been carried out was dismissed.

The Court of Appeal then addressed the appellant's first three grounds of appeal, namely, that the PDG and the HEPDG were *ultra vires* the power in s.29 of the CTS Act 2015; that the HEPDG was contrary to s.31(3) of the Act; and finally that the PDG and the HEPDG were contrary to the common law right of free speech and/or the right to freedom of expression under Article 10 of the ECHR.

On the first ground, the appellant argued that the PDG and the HEPDG went well beyond what was required by the CTS Act 2015. This was because, in addition to views of a terrorist and extremist nature falling within the scope of the Guidance, *non-violent* extremism also fell within its scope, even if it concerned views that did not risk drawing others into terrorism. The respondent argued that the Government did not subscribe to any "single pathway" theory of radicalisation, and that the Prevent Duty sought to prevent a *process* occurring which would be likely to draw individuals into terrorism. The Court of Appeal agreed with the High Court, finding that the PDG did not treat "terrorism", "extremism" and "active vocal opposition to fundamental British values" synonymously. Whilst views of an "extremist" nature might sometimes be legal, extremists might still draw people into terrorism by radicalising them or creating an atmosphere conducive to terrorism. The Court concluded that provided "extremism" risks drawing people into terrorism, then the Prevent Duty in s.26 of the CTS Act 2015 is legitimate and the PDG as a whole was not *ultra vires*.

The second ground centred on the particular wording of paragraph 11 of the HEPDG, which advises institutions when deciding whether to host a particular speaker. The Guidance advises that if a speaker is likely to express extremist views that risk drawing people into terrorism, or the views are shared by terrorist groups, the "event should not be allowed to proceed" except where the institution is "entirely convinced" that the risk can be fully mitigated. Moreover, if the institution is "in any doubt that the risk cannot be fully mitigated they should exercise caution and not allow the event to proceed". The appellant argued that this formulation contains a strong presumption that will skew the decision-making process, whilst also neglecting other important statutory duties which universities are subject to, namely s.31 of the CTS Act 2015 and s.43 of the Education (No 2) Act 1986 which provide that the institution must "have particular regard to the duty to ensure freedom of speech". The Court of Appeal found for the appellant, concluding that paragraph 11 in particular was "expressed in trenchant terms". Moreover, even if decision-makers were aware of their other statutory duties, the HEPDG was "likely to be perceived as the most specific and pointed in its context", and that "event organisers were likely to assume that it represented a balance of the relevant statutory duties affecting them". Ultimately, the Court found that paragraph 11 was not sufficiently balanced and recommended that it be redrafted to more accurately inform higher education institutions of their competing obligations.

On the third ground of appeal concerning the compatibility of the PDG and the HEPDG with the appellant's free speech rights, the Court of Appeal agreed with the High Court that the appellant could not be seen as a "victim" for the purpose of the Human Rights Act 1998. This was because Butt could not show that the Guidance has applied to prevent him speaking.

Analysis

The implementation of the "Prevent Duty" and the Prevent Strategy more broadly has been highly controversial, not least of all in education institutions, amidst claims that it has a chilling effect upon free speech and that it disproportionately impacts Muslims. Despite the wholly legitimate rationale and underlying objective of Prevent – "to prevent people being drawn into terrorism" – some have suggested

that its impact is counter-productive and that students and teachers are reluctant to discuss contentious issues in the classroom and at home (Rights Watch UK, *Preventing Education? Human Rights and UK Counter-Terrorism Policy in Schools* (London: Rights Watch UK, 2016)). The implementation of the Duty also generates considerable concerns from a human rights perspective, especially in respect of the proportionality of the restrictions upon the rights of political participation (Ben Stanford, 'The Multi-Faceted Challenges to Free Speech in Higher Education: Frustrating the Rights of Political Participation on Campus' (2018) *Public Law* 708-724). The Strategy has, however, been defended or supported by some within the UK (Rupert Sutton, 'Myths and Misunderstandings: Understanding Opposition to the Prevent Strategy' (September 2016), Henry Jackson Society, Centre for the Response to Radicalisation and Terrorism Policy Paper No.7). Others have sought to challenge some of the misconceptions that dominate much of the critique against the Strategy (Steven Greer & Lindsey Bell, 'Counter-terrorist Law in British Universities: A Review of the "Prevent" Debate' (2018) *Public Law* 84-105.)

At the time of writing the HEPDG remains accessible online in its disputed form, although the Home Office website states that the "government is considering the ruling and will announce its next steps in due course". Furthermore, although the *Butt* case focussed on the PDG applicable in higher education institutions, the Home Office acknowledged that the same or a very similar paragraph of the disputed Guidance is also contained in the PDG for further education institutions in England and Wales, the PDG for higher education institutions in Scotland, and the PDG for further education institutions in Scotland.

Lastly, the Government announced in January 2019 that there would be a review of the Prevent Strategy. This followed suggestions from several prominent figures, such as the former Independent Reviewer of Terrorism and the Joint Committee of Human Rights (Joint Committee on Human Rights, *Counter-Extremism*, 2016–17, HL Paper 39, HC 105), that the Strategy would benefit from an independent review. To formally establish the review, the Counter-Terrorism and Border Security Bill, which had up until then been making its way through the legislative process, was amended. Section 20(8) of the Counter-Terrorism and Border Security Act 2019 now commits the Secretary of State "to make arrangements for an independent review and report" of the Prevent Strategy within six months of the Act receiving royal assent, which occurred on 12 February 2019. The Act also provides that the report and any recommendations must be presented to Parliament within 18 months and the Secretary of State must provide a statement responding to each recommendation.

Conclusions

Following the limited success of the appellant in this case, *Butt* is seeking leave to appeal to the Supreme Court in respect of the collection, retention and use of information about him by the EAU. The prospect of further litigation, in addition to the looming independent review into the Prevent Strategy, suggests that the debate over the impact of the UK's approach to counter-terrorism and counter-extremism will persist for some time and may even intensify in the months to come.

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