

## **Case Summary**

### **Hounga (Appellant) v Allen and another (Respondents)**

**[2014] UKSC 47**

**On appeal from: [2012] EWCA Civ 609**

#### **1. Reference Details**

Jurisdiction: United Kingdom Supreme Court

Date of Decision: 30 July 2014

Case Status: Final

Link to full case:

[http://www.supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0188\\_Judgment.pdf](http://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0188_Judgment.pdf)

#### **2. Facts of the Case**

The issue at stake was whether a domestic worker could claim discrimination based on race regardless of her irregular immigration status and the fact that she had worked in the United Kingdom without a work permit.

The case was brought by Miss Hounga, a Nigerian national currently residing in England. She had come to the UK in 2007 to work in the house of the respondent, Mrs Allen. Miss Hounga was about 14 years old at the time. Prior to this arrangement Miss Hounga was working in the house of Mrs Allen's brother in Nigeria. During this time it had been proposed to her that she should move to the UK to work in Mrs Allen's household. She was offered the opportunity to be enrolled in education and to be paid £50 a week. Miss Hounga accepted. Mrs Allen's extended family then proceeded to help procure false identification documents for Miss Hounga. Upon presenting these documents to the relevant authorities, Miss Hounga was granted entry and a visitor's visa for six months. For the following 18 months, Miss Hounga lived in Mrs Allen's home and worked for her, taking care of her children and doing household tasks. She did not receive any salary for the work, and was not enrolled in education despite being promised these things before her arrival. During this time Mrs Allen inflicted serious physical abuse on Miss Hounga and caused her extreme concern by telling her that, were she to leave the house and be found by the police, she would be sent to prison because her presence in the UK was illegal. In July 2008, Mrs Allen violently evicted Miss Hounga from the home, terminating her employment.

Following these events, Miss Hounga issued a variety of claims and complaints against Mrs Allen in the Employment Tribunal, including a claim that she had been discriminated against on the ground of race (specifically nationality). The tribunal upheld her claim on unlawful discrimination with regard to her dismissal, and Mrs Allen was ordered to pay compensation for injury to Miss Hounga's feelings. While the Employment Appeal Tribunal dismissed a cross-appeal by Mrs Allen, the Court of Appeal upheld it. The Court of Appeal found that the illegality of the contract of employment formed a material part of Miss Hounga's complaint and that to uphold the complaint would be to condone the illegality. Accordingly, Miss Hounga could not claim compensation for discrimination. At this point, the issue before the Supreme Court was whether the Court of Appeal was correct to hold that the illegality defence defeated the complaint of discrimination.

### 3. Law

National law:

- Sections 4(2)(c), 56(1)(b) and 57(1) of the Race Relations Act 1976
- Sections 39(2)(c), 124(6) and 119(2)(a) of the Equality Act 2010
- Section 24(1)(b)(ii) of the Immigration Act 1971

Regional law:

- Articles 1 and 4 of the Council of Europe Convention on Action against Trafficking in Human Beings CETS No 197
- Article 4 of the European Convention on Human Rights
- EU Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims

International law:

- Article 3 of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (the Palermo Protocol)

### 4. Legal Arguments

#### **Appellant's Arguments**

The appellant's position was that the tribunal had been right to award her compensation for injury to feelings as a result of her discriminatory dismissal by Mrs Allen and that the Court of Appeal had been wrong to find that the defence of illegality precluded her from bringing her claim of the statutory tort of discrimination.

#### **Respondent's Arguments**

The respondent argued that as it was unlawful (and a criminal offence under section 24(1)(b)(ii) of the Immigration Act 1971) for Miss Hounga to enter into the contract of employment with Mrs Allen, the defence of illegality in principle precluded her from bringing a claim under the statutory tort of discrimination in relation to her dismissal from her employment.

The respondent's late attempts to introduce other points in the appeal, both relating to the relevant interpretation of the Race Relations Act 1976, were rejected by the court as having been introduced too late. Accordingly they were not considered.

### 4. Decision

The Supreme Court unanimously allowed Miss Hounga's appeal. In stating its reasons, the Court noted the complexities of the defence of illegality. It held that while the defence of illegality precluded Miss Hounga from enforcing her contract of employment, or claiming unfair dismissal, the application of the defence of illegality to claims in tort was highly problematic and different considerations applied. It noted that the circumstances in which the defence would defeat an action in tort had never been clearly settled by the courts. The Court considered previous case law on the issue and identified that the test usually applied was to consider

whether the illegal conduct was “inextricably linked” to the claim or was an active or effective cause of the event giving rise to the claim. The Court noted the problematic subjectivity inherent in the value judgment required to apply any such rule. Nevertheless, it went on to apply this rule and found on balance that the link between the immigration offences and the statutory tort of discriminatory treatment was not sufficiently close to bar Miss Hounga’s claim. While the Court of Appeal had viewed the complaint as inextricably linked to Miss Hounga’s participation in entering into an illegal contract, the Supreme Court saw the contract as providing merely the context in which the respondent perpetrated acts of abuse, including dismissing Miss Hounga.

In the leading judgment given by Lord Wilson (and with whom Lady Hale and Lord Kerr agreed), the majority of the Supreme Court went on to state that it considered that the bigger question was whether the defence of illegality was applicable to Miss Hounga’s case. The majority took the view that the defence of illegality rested upon the foundation of public policy and that it was necessary to consider: (i) what was the aspect of public policy which founded the defence; and (ii) was there another aspect of public policy to which application of the defence would run counter?

In considering the first question, the majority recognised that there was a policy goal lying behind the use of the defence of illegality, namely the need for the courts to preserve the integrity of the legal system. They quoted the explanation of Justice McLachlin in the Canadian Supreme Court’s decision in *Hall v Hebert* [1993] 2 SCR 159. Justice McLachlin noted that “the law refuses to give by its right hand what it takes away by its left hand”. However, the majority took the view that the tribunal’s award of compensation for injury to feelings as a result of discrimination did not allow Miss Hounga to profit from her wrongful conduct in entering the contract, nor did it enable her to evade a criminal penalty (she had received no criminal sanctions but even if she had done, the compensation would not amount to such an evasion). The idea that the award compromised the integrity of the legal system by appearing to encourage those in Miss Hounga’s situation to enter into illegal contracts of employment was “fanciful” while, conversely, not allowing the award may engender a belief that those in Mrs Allen’s situation could discriminate against those employed under an illegal contract with impunity. Accordingly, “the considerations of public policy which militate in favour of applying the defence so as to defeat Miss Hounga’s complaint scarcely exist.”

Going on to consider the second question, the majority felt it was required to consider whether Mrs Allen had “trafficked” Miss Hounga. The majority applied the accepted international definition of trafficking in the Palermo Protocol to the case and found that it was “hard to resist” the conclusion that Mrs Allen was guilty of trafficking. In any event, if the definition was not met in this case, the circumstances were so close to “trafficking” that this did not matter for the purposes of answering the second question.

The majority was of the view that it would be a breach of the UK’s obligations under Article 15(3) of the Council of Europe Convention on Action against Trafficking in Human Beings for the defence of illegality to defeat Miss Hounga’s claim that she was entitled to compensation for injury to feelings as a result of the discrimination she suffered. It considered the present discussions in international, regional and national law on human trafficking and servitude. It held that to uphold Mrs Allen’s defence of illegality would run counter to the current public policy against trafficking and in favour of the protection of its victims. The public policy against human trafficking outweighed the public policy considerations supporting the integrity of the legal system.

### **Concurrence**

Lord Hughes (with whom Lord Canworth agreed) gave a concurring judgment. They agreed with the majority that the appeal should succeed in relation to Miss Hounga’s claim for the statutory tort of discrimination, committed in the course of dismissal. They also agreed that it

followed that her claim in relation to alleged pre-dismissal harassment on grounds of race or ethnic origin (again a claim in relation to the statutory tort) should be remitted to the tribunal to determine whether the ground identified by the Court of Appeal for possible disapplication of the grievance procedure existed and, if so, whether the complaint was established.

However, they disagreed with the majority's public policy analysis. According to the minority, while the conceptual basis for the defence of illegality was hard to generalise, the defence had two connected bases: (i) that the law must act consistently; and (ii) that there must be a sufficiently close connection between the illegality and the claim for the illegality to bar the claim. Although public policy underlines the defence, it does not create a separate "trumping test of public policy". On considering the majority's reasoning in relation to human trafficking, the minority took the view that it was not possible to read across from the law on human trafficking a separate reason for the defence of illegality not succeeding.

### **Outcome**

The respondent was to pay the compensation awarded by the tribunal for injury to feelings of the appellant. Further, the appellant's complaint in relation to pre-dismissal harassment on grounds of race or ethnic or national origins would be remitted to the tribunal to determine whether the ground identified by the Court of Appeal for possible disapplication of the grievance procedure existed and, if so, whether the complaint was established.