

**Access to HMRC advice on EU law:
Kessler v HMRC**

In this case I applied to see a copy of advice which HMRC had received on an issue of EU law.

The EU law issue was important to the UK financial industry: whether the statutory definition of trustee residence, which was in force from 1965 to 2007, was compliant with EU law. HMRC said that it was not. Some leading EU lawyers, including Chris Vajda QC did not agree. Fully informed debate on the point would require HMRC to disclose why they reached their view, so I asked to see a copy of their advice. HMRC refused to provide it.

The result:

HMRC successfully persuaded the Information Tribunal not to order disclosure.

However, the Tribunal “urged HMRC to provide an updated and fuller public statement of reasoning” (decision para 81) which is essentially what the application had been asking for. The Tribunal also criticized HMRC for the way they handled the matter - HMRC’s view was “bald and substantially unexplained” - para 65.

So there was something in the decision for both sides.

Unfortunately HMRC refused to do what the Tribunal urged should be done. The Information Commissioner did not order the HMRC to disclose. By then so many years had passed that I did not take the matter back to the Information Tribunal. So no statement of the reasons for the HMRC view has ever been provided and the underlying EU law issue has never been fully debated in public, and it never will be.

Secret submissions:

The other - somewhat sinister - aspect of this case is the decision of the Tribunal to accept secret submissions from HMRC which the appellant was not allowed to see. English common law and European human rights law require that each side in litigation hears the evidence and arguments put forward by the other side. It is unfortunate that this aspect of the decision is not to be reviewed in a higher court, but after some hesitation I decided to leave this point for another litigant. I hope the Tribunal’s practice of accepting secret submissions will be stamped on when it comes to be reviewed in the higher courts.