UNDERGRADUATE LAWS PROGRAMME BLOG

Video transcript: The UK Supreme Court case of R (on the application of UNISON) v Lord Chancellor

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Hello, I'm Charlotte Crilly, and I am a Teaching Fellow on the Undergraduate Laws Programme. Today I'm doing a short blog for public law on the subject of the UK Supreme Court case of *R (on the application of UNISON) v Lord Chancellor*. This case, along with the *Miller* case on Article 50, is one of the most important judgments by the UK Supreme Court from last year. This blog will help you to think about recent public law issues, in particular relating to the rule of law and the right of access to the court. You can read about these in chapter 4 of the Module Guide.

The Supreme Court gave judgment in the Unison case in July 2017. The main facts of the case were these. In 2013, the government brought in fees for applicants to Employment Tribunals and the Employment Appeal Tribunal. These are tribunals that have jurisdiction to determine numerous employment law related claims, for example unfair dismissal or discrimination at work. Previously there had been no fee to pay for people who wanted to bring such a claim.

The issue in this case was whether these fees were unlawful because of their effects on access to justice. It was argued that the making of the legislation which imposed the fees was not lawful, because the fees

1. Interfered unjustifiably with the right of access to justice under both the common law and EU law
2. Frustrated the operation of legislation granting employment rights, and
3. Discriminated unlawfully against women and other protected groups.

The Supreme Court largely based its reasoning on the English common law right of access to justice, rather than on EU law or the European Convention on Human Rights (although EU law was also considered in the judgment). Lord Reed, giving the court's lead judgment, made some powerful statements about the constitutional common law right of access to justice, and about the fundamental importance of the rule of law.

The constitutional right of access to the courts is, said Lord Reed, inherent in the rule of law. It is worth quoting in full paragraph 68 of the judgment, in which Lord Reed analysed the importance of the rule of law, and by association the constitutional right of access to the courts. He said:

> *At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people*

> *must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.*

We can see from this that Lord Reed is saying not only that access to the courts is inherent in the rule of law, but also that access to the courts is needed to maintain the rule of law. One cannot exist without the other.

It also follows from this that, as Lord Reed goes on to say, access to the courts is not just important to the parties who bring a case. This had been the government's argument – that the administration of justice is a public service like any other and only of benefit to the parties bringing the case and to lawyers and judges. Cases that establish general principles of law, for example *Donoghue v Stevenson*, the well-known case which established the whole law of negligence in tort, clearly benefited many more people than just the parties, lawyers and judges involved. In a clever comment aimed at the Lord Chancellor, Lord Reed pointed out that in defending the present claim, the Lord Chancellor herself had cited over 60 cases, each of which was relied on as establishing a legal proposition. The Lord Chancellor's own use of these case law materials refutes the idea that only the parties themselves benefit from bringing a case to court.

Furthermore, even in cases where no legal general principles are established, which is of course the vast majority of cases, people and businesses need to know that they will be able to enforce their rights if they have to do so, and that if they fail to meet their obligations, there is likely to be a remedy against them.

The judgment made it clear that, and I quote, 'it has been recognised that the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law' (see paragraph 64). Lord Reed even cites the Magna Carta from the year 1215 which famously states that 'We will sell to no man, we will not deny or defer to any man either Justice or Right', thus giving a guarantee of access to courts which administer justice promptly and fairly.

Among the case law relied on in the judgment is also the case of *R v Lord Chancellor, Ex p Witham*, from 1998, which you may remember from your reading of Chapter 4 of the Module Guide. In that case too, the Court of Appeal had stated that access to justice was a constitutional right, in the context of increased court fees.

Given that the Supreme Court had held that there was a constitutional common law right of access to the courts, inherent in the rule of law, what then was the outcome in the *Unison* case? The court held that the charging of fees in employment tribunals had prevented access to justice, and that the relevant legislation was therefore unlawful and would be quashed and have no legal effect. The practical result was that the government announced that not only would there be no further charging of fees in employment tribunals, but that it would also take steps to refund people who had already paid. The costs of this were estimated at the time by Unison to be around £27 million.

Thank you very much for listening to this blog and I hope you enjoyed it and found it useful.