

Developments in Judicial Review in 2017:

Fees, Costs and Access to Justice

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I. Introduction

1. The main part of this talk will be concerned with the role of judicial review in promoting access to justice. I will begin by discussing the recent judgment of the Supreme Court in *R (UNISON) v The Lord Chancellor* [2017] UKSC 51 quashing the fees regime in employment cases. I will then examine the successful challenge to the Government's changes to the Aarhus costs regime in *R (Royal Society for the Protection of Birds and Ors) v Secretary of State for Justice and Anor* [2017] EWHC 2309 (Admin). This second decision is of particular importance in the context of Jackson LJ's proposal to extend the Aarhus regime to the whole of JR. Finally, I will give a round-up of some of the other important JR cases that have been decided so far this year.

II. Fees, Costs and Access to Justice

A. Fees for employment claims

2. On 26th July 2017, the Supreme Court gave judgment in the case of *R (UNISON) v The Lord Chancellor* [2017] UKSC 51. It ruled that the fees imposed by the Lord Chancellor for the Employment Tribunal and Employment Appeal Tribunal were unlawful.

3. Under the new system in force since July 2013, a fee had to be paid by a claimant to issue a claim form at the Employment Tribunal and a further fee was also required for the claim to be heard by the tribunal. For a single claimant, the fees totalled £390 for a type A claim (simple cases requiring little or no work before the hearing) and £1,200 for a type B claim (which would include unfair dismissal, equal pay and discrimination claims).
4. UNISON's challenge was brought on the basis that the new fees were an unlawful interference with the right of access to justice, both under the common law and under EU law. It was also argued that the fees had such a chilling effect on claims that they represented a frustration of the operation of the Parliamentary legislation which granted employment rights. Finally, it was argued that the fees disproportionately affected women and other protected groups and therefore represented a breach of the Equality Act 2010.
5. The Government sought to justify the fees on the basis that it was right to transfer some of the cost of the employment tribunal system from the general taxpayer to those who were using the system. It was also argued that the measure would incentivise early settlements and discourage people from pursuing weak or vexatious claims.
6. The Supreme Court unanimously held that the fees were a breach of the right of access to justice. Lord Reed noted that households on low to middle incomes could only afford the

fees by sacrificing the ordinary expenditure required to maintain an acceptable standard of living. Furthermore, because it was virtually impossible to guarantee that a claim would succeed and that the fees would be recoverable, it was effectively irrational to bring low value claims to the tribunal (paras 90-98).

7. It was significant that the fees bore no direct relation to the amount sought in the claim (unlike in civil claims). As a result, the evidence was that they were acting as a dramatic deterrent to bringing claims for modest amounts or non-monetary remedies (which together form the majority of such claims).
8. It was also held that the fees were indirectly discriminatory. The higher fees for type B claims put women at a particular disadvantage because a higher proportion of women bring type B than bring type A claims. The fees were held to be a disproportionate measure.
9. Lord Reed's judgment emphasized the importance of access to a court as a core aspect of the rule of law:

“... 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.

Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance. When, for example, Mrs Donoghue won her appeal to the House of Lords (Donoghue v Stevenson [1932] AC 562), the decision established that producers of consumer goods are under a duty to take care for the health and safety of the consumers of those goods: one of the most important developments in the law of this country in the 20th century. To say that it was of no value to anyone other than Mrs Donoghue and the lawyers and judges involved in the case would be absurd. The same is true of cases before ETs. For example, the case of Dumfries and Galloway Council v North [2013] UKSC 45; [2013] ICR 993, concerned with the comparability for equal pay purposes of classroom assistants and nursery nurses with male manual workers such as road workers and refuse collectors, had implications well beyond the particular claimants and the respondent local authority. The case also illustrates the fact that it is not always desirable that claims should be settled: it resolved a point of genuine uncertainty as to the interpretation of the legislation governing equal pay, which was of general importance, and on which an authoritative ruling was required.” (paras 68-69)

10. Although the challenge under EU law was also upheld, the main part of the decision was concerned with the common law argument. It is evident that the Supreme Court is already preparing itself for the new legal landscape that we will find ourselves in after Brexit.

B. The challenge to the Government's changes to the Aarhus regime

11. The Supreme Court's decision to quash the Employment Tribunal fee regime is paralleled by the subsequent successful challenge to the Government's changes to the Aarhus costs regime.

12. Since April 2013, claimants in environmental JRs have benefited from specific cost protection rules which arise out of the UK's Aarhus Convention obligations (to which we subscribe independently of the EU). Under this regime, a claimant's costs liability in the event of an unsuccessful claim is capped at a maximum of £5,000 (or £10,000 if the claimant is a corporate entity). A defendant's liability if the claims succeeds is capped at £35,000.

13. On 28th February 2017, the Aarhus rules were substantially modified in ways that will make claimants less likely to receive the benefit of the £5,000/£10,000 caps. Important changes include a limitation of the regime to "members of the public" only (to the exclusion of e.g. local authorities), a requirement for claimants to fill in a schedule of their financial resources and a much wider discretion for the court to vary the default £5,000 cap under the new CPR r. 45.44.

14. Following this, ClientEarth, Friends of the Earth and the RSPB lodged an application for JR to challenge the changes in *R (Royal Society for the Protection of Birds and Ors) v Secretary of State for Justice and Anor* [2017] EWHC 2309 (Admin). On 15th September 2017, Dove J gave judgment for the claimants.

15. The claimants argued as follows:

- a. The variation provisions in CPR 45.44 offended the predictability required for compliance with EU law;
- b. The rules should have provided for mandatory private hearings in respect of inquiries into the financial resources of the claimant or supporters, as airing these issues in public would tend to deter both claimants and their supporters from coming forward;
- c. The assessment of what it was reasonable for a claimant to bear should include the claimant's own legal costs, not simply his liabilities in respect of the other side's costs.

16. The court held as follows:

- a. In relation to the EU law issue, it was held that the new CPR 45.44 was consistent with EU law, but only on the basis that its application was constrained by other

procedural rules, in particular para 2.7 of the Practice Direction to CPR 23.5, which states that “*every application should be made as soon as it becomes apparent that it is necessary and desirable to make it*”. The effect of this was that any disputes about the level of costs caps should be raised at the point of acknowledging service and a decision on cost capping should be made at an appropriately early stage. There would have to be a good reason for this issue to be raised after the permission stage.

- b. The challenge on the second issue was upheld on the basis that private hearings on this matter were needed not only to prevent the airing of confidential information but also to avoid the chilling effect upon the claimant and financial supporters. Therefore, changes to the rules were required to avoid deterring meritorious claims.
 - c. There was agreement between the parties on the third issue that the claimant’s own costs should be included in the assessment of what was prohibitive expense.
17. This is a significant judgment. First, it tempers the complexity of the new rules and the uncertainty that they create, particularly regarding the firm constraint placed upon applications to vary the cost cap, which should mean that a claimant can get permission and in the knowledge of what the worst outcome might be. More widely, the court interpreted the costs rules firmly against the background of domestic and EU rulings

which have consistently sought to temper the severities of the UK costs rules. This may have wider relevance.

18. Although the decision in *UNISON*'s case was not referred to, it can be seen that some of the same considerations influenced Dove J's decision in this case, particularly the importance of preventing meritorious claims from being deterred by changes to the rules relating to fees or costs.

C. Jackson LJ's proposal to extend Aarhus to the whole of judicial review

19. The decision in *RSPB*'s case is even more significant when considered in light of the fact that the next step in the Jackson Reforms is squarely focused on this area. On 31st July 2017, Jackson LJ's *Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs* was published. Under the latest proposal, the Aarhus regime will be extended to all JR claims. All individuals, including an individual who is representing the interests of other individuals, will receive the benefit of a £5,000 cap on costs liability.

20. There would be some flexibility: for example, parties could opt out if, in a complex case, they anticipated incurring more than the £35,000 maximum which they would recover from the defendant. Applications to vary the default caps would have to be made up front and determined at the permission stage, unless there are exceptional circumstances. This will mean that each side will know its ultimate liability at an early stage. There would also be some sort of confidential means testing, with the details still forthcoming.

21. In unusually heavy JRs, Jackson LJ suggested that there may need to be costs management similar to that in other civil claims, probably applicable where the predicted costs exceed £100,000 per side or the hearing estimate exceeds 2 days. This would be applied at the discretion of the judge. He also suggested that there should be no discretion to override costs budgets, which would prevent the recent attempts to unpick cost budgets which have been seen in civil claims.

22. The timescale for the introduction of the proposals is not yet clear, but the changes will surely require primary legislation. This will undoubtedly bring delay, especially given that Brexit is at the top of the Parliamentary agenda. But on the other hand, Jackson LJ made clear that a pilot scheme should not be necessary, as the Aarhus system has served as a successful pilot. This should help to speed up implementation.

23. As the Aarhus regime has been substantially protected by the decision in *RSPB*'s case, it is especially important to keep a close eye on how the Government views the proposals to extend this scheme more widely.

III. A round-up of other important judicial review cases so far in 2017

24. In no particular order:

- In *R (The Underwritten Warranty Company Limited and Anor) v FENSA Ltd, Network VEKA Ltd and Ors intervening* [2017] EWHC 2308 (Admin), the High Court gave detailed consideration to the private / public law divide and the circumstances in which a private company will be amenable to judicial review. In this case, the defendant was authorised by the Secretary of State for Communities and Local Government to operate a Competent Persons Scheme in relation to the self-certification of insurance brokers under the Building Regulations 2010. The first claimant was an insurance broker and the second claimant was its parent company. After considering the relevant authorities, the court stated that the self-regulation regime was set up as “*an alternative but not a substitute for that operated by the local authority*” (para 45). There was considerable latitude as to how it operated and if no party chose to operate it then Parliament would not intervene (para 45). Furthermore, the parties were not obliged to join the scheme and had a choice between a number of different schemes to the extent that a proper market was held to operate (para 49). As such, the arrangements made by the defendant in order to meet the requirements of the Conditions of Authorisations was held to be a private law matter.
- In *Re M (Withdrawal of Treatment: Need for Proceedings)* [2017] EWCOP 19, the Court of Protection held that a decision to withdraw treatment from a patient in a minimally conscious state as a result of Huntington’s disease could lawfully be taken by the doctors without need for a court determination of the patient’s

best interests. It is expected that the Official Solicitor will seek to appeal this decision.

- In *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2017] EWHC 1754 (Admin) the Administrative Court held that the UK Government may lawfully sell arms to Saudi Arabia on the basis that it was rationally open to the Secretary of State to conclude that there was no “clear risk” that UK-supplied weapons would in future be used to commit serious violations of international humanitarian law (despite reports suggesting violations by the Saudi-led coalition in Yemen). The claimant is likely to seek permission to appeal.
- In *R (A and B) v Secretary of State for Health* [2017] UKSC 41 the Supreme Court held that the Government is not required under article 8 to provide free NHS abortions to women from Northern Ireland, as the difference in treatment was justified under the devolved scheme for health services. Since this decision, Parliament has accepted an amendment to the Queen’s Speech by Stella Creasy MP to give women from Northern Ireland access to NHS abortions.
- In *R (Palestine Solidarity Campaign Ltd) v Secretary of State for Communities and Local Government* [2017] EWHC 1502 (Admin) the Administrative Court held that the statutory guidance which prevented local authorities from using pension investment policies to pursue boycotts against foreign nations and UK

defence industries in the absence of formal sanctions by the UK Government were unlawful on the basis that they went beyond the Secretary of State's statutory powers.

- In *R (ClientEarth) v Secretary of State for the Environment* [2017] EWHC B12 (Admin) the Administrative Court ruled that Purdah did not prevent the Government from being required to publish its consultation draft on nitrogen dioxide pollution in circumstances where there had already been extensive delays to publication.
- In *R (T) v HM Senior Coroner of West Yorkshire* [2017] EWCA Civ 318 the Court of Appeal ruled that a coroner may investigate the death of a baby who may have been stillborn.
- In *R (P) v Secretary of State for the Home Department and Ors* [2017] EWCA Civ 321 the Court of Appeal upheld a challenge to the police system of retaining information about past misconduct on the basis that it was incompatible with article 8.
- In *R (Conway) v Secretary of State for Justice* [2017] EWHC 640 (Admin) the Administrative Court permitted a motor neurone disease sufferer to proceed in a challenge on article 8 grounds to s. 2 (1) of the Suicide Act 1961 (which creates a criminal offence of encouraging or assisting the suicide of another person).

- In *R (Minton Morrill Solicitors) v The Lord Chancellor* [2017] EWHC 612 (Admin) the Administrative Court ruled that the Human Rights Act 1998 did not directly give force of law to the ECHR in England and Wales. As such, legal aid funding for ECHR applications could lawfully be excluded by s. 32 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

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