is no rule stipulating that diplomatic immunity should not be available in cases of trafficking, states – including the UK and Saudi Arabia – are required by international law to criminalise trafficking and to ensure that “its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered” (Article 6(6), Palermo Protocol; see also Article 15 CAATHB).

Lord Sumption also concluded that, although employing someone who had been trafficked could result in the employer being liable for human trafficking, this alone does not turn the employer into a “practitioner[ ] of a commercial activity” for the purposes of 31(1)(c) VCDR: “if I knowingly buy stolen property from a professional fence for my personal use, both of us will incur criminal liability for receiving stolen goods and civil liability to the true owner for conversion. The fence will also be engaging in a commercial activity. But it does not follow that the same is true of me” (at [45]). As pointed out by Lord Wilson (with whom Lady Hale and Lord Clarke agreed), this analogy is far from instructive: trafficking in individuals means that a person is being treated as a commercial product. The Palermo Protocol and CAATHB both define trafficking as constituting the “recruitment, transportation, transfer, harbouring or receipt of persons” and as thereby encompassing “the whole sequence of actions that leads to the exploitation of the victim” (Explanatory Report to CAATHB). This sequence includes the victim’s so-called “employment”, as the employer “knowingly effects the ‘receipt’ of the migrant and supplies the specified purpose, namely that of exploiting her, which drives the entire exercise from her recruitment onwards” (at [62], per Lord Wilson). The divergence of (admittedly obiter) judicial opinion is yet another example of the challenge of accommodating the international prohibition of egregious conduct with the grant of immunity.

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THE RULE OF LAW AND ACCESS TO JUSTICE: SOME HOME TRUTHS

MISAPPREHENSIONS about the UK’s constitution are ten-a-penny. Most prominent among them, perhaps, are the notions that the UK “has no constitution” and that fundamental rights cannot meaningfully exist without an “entrenched” or “written constitution”. To that list of misunderstandings can now be added the ideas – brought to light by the Supreme Court’s judgment in R. (UNISON) v Lord Chancellor [2017] UKSC 51, [2017] 3 W.L.R. 409 – that the judicial system, far from being a non-negotiable feature of any constitutional democracy, is nothing more than a public service,
and that access to it can be regulated by the executive accordingly. To describe *UNISON* as a welcome corrective to such misconceptions would be to engage in rash understatement. In a tour de force that ought to be compulsory reading for every Minister and parliamentarian, the Court elucidates the true value of independent courts and tribunals, illuminates the common law’s potential as a guarantor of basic rights, and reiterates an axiomatic set of constitutional home truths.

Section 42 of the Tribunals, Courts and Enforcement Act 2007 provides that “[t]he Lord Chancellor may by order prescribe fees payable in respect of” various tribunals, including the Employment Tribunal and the Employment Appeal Tribunal. Relying upon that power, the Lord Chancellor made the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013. Its effect was to require most people who wished to make use of the Employment Tribunals to pay fees (no such fees having previously been payable). The claimant successfully argued that the Order was (and that the fees charged under it were) unlawful: an argument that turned upon whether the Act had, in the first place, permitted the making of the Order. It was contended on a number of grounds that it had not, but the central argument was that the Order restricted the common law right of access to justice to an extent that was unauthorised by the Act.

The Supreme Court thus had to consider both whether the Order impeded access to justice and, if it did, whether such an impediment was outwith the Lord Chancellor’s power under the Act. In deciding that the answer to the first of those questions was “yes”, the Court was prepared to engage in detailed consideration of relevant statistical and financial information, so as to build up a comprehensive picture of the real-world impact of the Fees Order. The Court, for instance, looked askance at some of the assumptions made by the Lord Chancellor, noting (at [93]) that they rested on the idea that people should be expected to sacrifice “ordinary and reasonable expenditure” so as to be able to afford to take a claim to the Tribunal. That, said Lord Reed (at [55]), giving the unanimous judgment of a seven-member court, raised a fundamental question about “whether the sacrifice” of such expenditure “can properly be the price of access to one’s rights”.

The terms in which Lord Reed framed that question were well chosen. They signify that in a constitutional system that continues to acknowledge parliamentary supremacy, it is insufficient to establish that the need for such sacrifices amounts to the restriction of a constitutional right. Rather, it is necessary to go further – if it is to be shown that such sacrifices cannot “properly” be required – by establishing that a fees scheme entailing such consequences was statutorily unsanctioned. It is at this point that *UNISON* demonstrates the common law’s potential when it comes to upholding fundamental rights, Parliament’s sovereign capacity to abrogate them notwithstanding. The judgment does so by leveraging the common law as an interpretative tool, and by showing that the drawing of a bright-line
distinction between (on the one hand) what common law constitutional standards require and (on the other hand) what Parliament is to be taken to have legislatively prescribed implies a false dichotomy. That is so because the courts’ preparedness to conclude that legislation has a given effect upon a constitutional right is commensurate to the normative importance of the relevant right and the scale of its putative limitation. None of this is to suggest that Parliament is incapable of legislating in breach of a given constitutional right or principle: but it will, and should, not lightly be taken to have done so.

In UNISON, the Supreme Court’s analysis of whether the statute authorised the Fees Order was thus intimately bound up with its assessment of the normative value of the right of access to justice and the rule-of-law implications of limiting that right in the way and to the extent that the Order purported to. Central to this analysis was the Court’s excoriating dismissal of the Government’s own perception (evident from, among other things, consultation papers that had foreshadowed the Fees Order) of what was constitutionally at stake. The Court pointed out (at [66]) numerous “[i]ndications of a lack of understanding” of the importance of the rule of law, including the assumptions “that the administration of justice is merely a public service like any other”, “that courts and tribunals are providers of services to the ‘users’ who appear before them”, and “that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings”.

By way of demonstrating the wrong-headedness of these views, the Court – in what reads as a primer on the rule of law – observed (at [68]) that the “idea of a society governed by law” lies “[a]t the heart of the concept of the rule of law”, that “[t]he constitutional right of access to the courts is inherent in the rule of law”, and that this requires not only the existence of courts that can “ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced” but also that “people must in principle have unimpeded access to” such courts and tribunals. Thus, when Parliament creates employment rights, said the Court (at [72]), there must be the “possibility of claims being brought by employees whose rights are infringed” if, in the first place, the rights themselves are meaningfully to exist. Against this background, it is no surprise that the Court concluded that the Fees Order was ultra vires. Applying the “principle of legality”, the Court said (at [79]) that interference with the right of access to justice would be lawful only if “clearly authorised by primary legislation”: a test which, the Court held, was not met by the general terms in which the Lord Chancellor’s fee-setting power was framed.

In one sense, UNISON breaks no new ground: it harnesses well-established interpretative methodology in the service of an acknowledged constitutional right, and certainly does not press the logic of that approach
as far as some other recent cases have (R. (Evans) v Attorney General [2015] UKSC 21, [2015] A.C. 1787 being perhaps the most notable example). Nevertheless, for three reasons, UNISON is a highly significant decision. First, it serves as a sobering reminder of the disjunction that is sometimes evident between political and judicial understandings of the constitution – a phenomenon that is particularly troubling in a “political constitution”, the smooth operation of which requires that constitutional actors of all stripes acknowledge and respect certain basic ground-rules.

Second, UNISON illuminates an important paradox that arises when legislation is invoked in the name of curtailing access to justice. In particular, it shows that to regard such circumstances in terms of a straightforward confrontation between Parliament and the courts, or between parliamentary sovereignty and the rule of law, is wide of the mark. As Lord Reed pointed out (at [68]), “[w]ithout 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”. Judicial protection of the right of access to justice might thus be conceived of as a servant of, not a challenge to, parliamentary sovereignty – on which view the strongest of interpretative presumptions against statutory displacement of that right is surely warranted.

Third, the court in UNISON held that the Fees Order was unlawful not only at common law but also according to EU law. Certainly, for as long as the UK remains a Member State, EU law operates not merely (like the common law) as an interpretative force which shapes the construction of legislation, but as a trump card. But the UK’s impending departure from the EU means that that trump card’s days are numbered – a prospect that places in sharp relief the question of the potential of the common law, taken on its own, as a guarantor of rights. There is, and should be, no question of the common law’s filling the gap that EU law will leave by morphing into a judicial tool that can be used to override, rather than interpret, legislation. But UNISON, by so clearly situating the enterprise of statutory construction within the broader context of the rule of law’s normative demands, underlines just how difficult it rightly is to dislodge some constitutional rights – the need for crystal clear contrary provision requiring, at least potentially, an investment of political capital on a scale that might be politically inexpedient or even infeasible. UNISON thus reminds us that just as it is misguided to treat independent courts and tribunals as no more than a “public service”, so it is fallacious to suppose that the absence of a “written constitution” is antithetical to the possibility of fundamental rights.

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