Optimize Public Law, Podcast 4: Judicial Review - Transcript

This is a podcast which accompanies *[Optimize] Public Law* by Ursula Smartt.

The previous podcasts dealt with the first half of your public law syllabus, which covers constitutional law and the sources of the British Constitution. You learnt about the separation of powers, that is the Executive (this is the Government), the Legislative (that is Parliament and its law making power) and the Judiciary.

We are now looking at part 2 of your public law syllabus which deals with administrative law and to a large part with judicial review. Chapters 8 and 9 in your revision guide *Optimize Public Law* by Ursula Smartt cover this part of your syllabus.

Administrative law generally concentrates on the control of the **Executive** that is Government and public authorities. In order to fully understand this somewhat tricky and rather theoretical area of public law you need to fully understand the constitutional principles covered in the earlier chapters of your *Optimize Public Law* textbook, so make sure you look back at Chapter 5, the 'Separation of Powers'.

What administrative law and the special administrative courts are then concerned with is the Executive and judicial control over the Executive. By the Executive we mean Government, and all its various authorities, such as Governmental departments, like education, health and social services, transport, immigration, prisons and so on. There are other governmental bodies, such as public authorities and local authorities, like local education and housing departments, and so on.

Sometimes, Ministers of State themselves are challenged via Judicial Review, such as the 1985 House of Lords case, *Council of Civil Service Unions v Minister for the Civil Service* (better known as the *GCHQ case*). GCHQ is the Government Communications Headquarters in Cheltenham in Gloucestershire, the British intelligence agency responsible for providing signals intelligence to the British Government. It is staffed by Civil Service personnel.

At the time of the GCHQ legal challenge in the mid-1980s, most of the 4000 or so Civil Service Staff at GCHQ were members of the Civil Service Union. Mrs

Thatcher's Conservative Government brought about abrupt legislative changes in January 1984, when the Secretary of State for Foreign Affairs announced in the House of Commons that the Government had decided that civil servants at GCHQ were no longer permitted to belong to national trade unions. There had been no consultation with the trade unions. There followed a series of selective walk-outs and strike actions. Eventually the Minister for the Civil Service relied on the Royal Prerogative to alter the terms and conditions of service at GCHQ, no longer allowing future strike action. The trade union challenged the decision at Judicial Review.

Chapter 4 of *Optimize Public Law* by Ursula Smartt gives a full explanation of the Royal Prerogative. In short, the prerogative powers are non-statutory portions of common law which gives Ministers of the Crown, that is the Executive, discretionary powers. In the *GCHQ* case the prerogative power involved the regulation of the civil service.

The sole issue before the House of Lords in the *GCHQ* case was whether the decision by the Minister for the Civil Service was fair to the staff at GCHQ. Their Lordships decided that the requirements of national security outweighed the duty of fairness in this case and that the Government must have the last word in such matters. This meant that the judicial process (that is the Judicial Review) was unsuitable for reaching decisions on national security. Lord Scarman in his summary judgement found in favour of the Minister. The fact that she refused to consult the unions before issuing her instruction of the 22 December 1983 was reasonable, in view of her fear of jeopardising national security.

Lord Diplock provided the definition in *GCHQ* of what we now call 'modern judicial review'. Judicial review is now regulated by the Rules of the Supreme Court – RSC Order 53, which provides the means by which judicial control of administrative action is exercised. Lord Diplock said in *GCHQ*:

> 'The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the "decision-maker" or else a refusal by him to make a decision.
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> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons)

> other than the decision-maker, although it may affect him [or her] too. It must affect such other person either by altering rights or obligations of that person which are enforceable by or against him in private law; or by depriving him of some benefit or advantage which
> either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.'

Obviously, you will not remember this long quotation by Lord Diplock off by heart in an exam. But you gain extra marks if you can cite all or part of the quote in your coursework essay on the meaning of judicial review. You will find the full quote in the *GCHQ* case at Lord Diplock's judgement.

What you want to take away from the *GCHQ* case is its precedent set for modern judicial review. That the exercise of a **prerogative power** by the Executive (that is a Minister of State) may be subject to judicial review. But where national security is at stake judicial review is not available or is, at the very least, subject to constraints. This means that the courts (that is the Judiciary) should not interfere with the Executive where national security is the determining factor. The decision by the House of Lords in *GCHQ* was that the requirements by the Minister of State of National Security outweighed the duty of fairness. The Government alone could make that decision and such decision was not suitable for the judicial process.

Normally judicial review deals with the lawfulness of a decision by a public authority or public body. Grounds for judicial review are usually covered under the headings of illegality, procedural impropriety and irrationality. These are covered fully in Chapter 9 of *Optimize Public Law* by Ursula Smartt.

To summarise: Judicial Review is dealt with in the Administrative Court and proceedings are initially paper-based, held in a single judge's chambers. Judicial review can be defined as a means by which the **Judiciary** controls the **Executive.**

The Administrative Court examines the way in which a decision by a public body was lawfully made. The claimant may allege that the decision was either unlawful or *ultra vires*, improper, irrational or disproportionate.

Judicial Review allows individuals, organisations, businesses and other interest or pressure groups to challenge the lawfulness of decisions made by Ministers, Government Departments, local authorities and other public bodies. Once a judicial review is heard in the Administrative Court, judges will ***not*** look at the merits of the decision itself, they will only examine whether the correct lawful procedure was used to reach that decision, or if any executive powers were abused. This means that the Administrative Court examines whether an authority or public body has acted outside its legal powers (called *ultra vires*).