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SPICe Briefing
Judicial Review

8 July 2016

16/62

Sarah Harvie-Clark

Judicial review is the process by which a court reviews a decision, act or failure to act by a public body or other official decision maker. It is only available where other effective remedies have been exhausted and where there is a recognised ground of challenge.

This briefing provides an introduction to this area of law in Scotland. It covers topics including who can bring an action for judicial review, what the grounds of judicial review are, and the remedies that can be awarded by the court if an action for judicial review is successful. It also considers recent policy developments relating to judicial review, including the important changes introduced by the Courts Reform (Scotland) Act 2014 (asp 18).

The UK's membership of the EU has an important influence on the nature of judicial review in Scotland. At the time of writing, there is no information available on the likely impact of the referendum vote to leave the EU on this area of law. At present, the law as described in this briefing remains in place.

The Scottish Parliament
Pàrlamaid na h-Alba

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EXECUTIVE SUMMARY

There have been some significant developments in the nature of judicial review since the introduction of the current judicial review procedure in Scotland in 1985.

These relate to: a) the accession of the UK to the European Community (now the European Union); b) the Human Rights Act 1998 (c 42) which made 'Convention rights' part of UK law; and c) the creation of a devolved Scottish Parliament and Government, with their powers limited by the Scotland Act 1998 (c 46)).

Most fundamentally, these developments have created new grounds of judicial review and opened up the possibility of challenge to legislation by way of judicial review to a much greater extent than was the case previously.

Despite this, judicial review remains primarily concerned with the process or legality of official decision making, rather than the substance of the decisions themselves. Consequently, an action for judicial review is not equivalent to a statutory right of appeal which may involve examination of the merits of a decision. Even after a successful action for judicial review, the decision maker may be able to make the same decision again, so long as it does so in a lawful way and following the correct process.

The rules on 'standing' determine who may bring an action for judicial review. The previous law on standing in Scotland was widely criticised and was changed by the UK Supreme Court in 2012. The current test requires that the person or body raising an action has 'sufficient interest' to do so. This new test should help those seeking to represent a public interest, such as the protection of the environment.

A recent Act of the Scottish Parliament, the Courts Reform (Scotland) Act 2014 (asp 18), is the latest important development impacting on judicial review in Scotland. The 2014 Act made provision for wide-ranging reforms to the Scottish civil courts system in Scotland, as well as several important reforms to the court procedure associated with judicial review.

Judicial review should be seen as part of a wider system designed to provide remedies for grievances associated with official decision making or failures to act. Alternatives to judicial review include using a body's internal complaints procedures or complaining to an ombudsman or other external complaints handling body. In this regard, the Scottish Public Services Ombudsman is the main complaints handling body in Scotland. In some instances there may be a statutory right of appeal of a decision to a court or tribunal.

In recent years, judicial review actions in Scotland have mainly related to immigration and asylum issues, prisons, and, to a lesser extent, the planning system. It would appear that, at present, judicial review actions are concentrated in policy areas where the stakes are very high for those litigating or there are gaps in the available alternative remedies. Furthermore, a remaining hurdle to raising a judicial review action is the cost of doing so. Accordingly, the suggestion is that those currently litigating have access to the resources to do so. This may include financial support via legal aid.

INTRODUCTION

This briefing is divided into a number of sections. The first section aims to provide an overview of the topic of judicial review as a whole, highlighting key issues associated with the law and the court process. It is intended as a useful introduction to the subject. Later sections of the briefing explore important topics in greater detail.

AN OVERVIEW OF JUDICIAL REVIEW

THE COURT PROCESS

In Scotland, a court action for judicial review is begun using a document known as a 'petition'. The person or body bringing the court action is called a 'petitioner' and the person or body defending the action is called 'the respondent'.

To bring an action for judicial review the petitioner must have 'standing', that is to say a 'sufficient interest' in the outcome of the case (see pp. 14–15).

The court may permit interventions in court proceedings by third parties ('interveners'). These are becoming more common. They involve third parties providing written or oral arguments on key legal issues relating to the case (see p 17).

WHICH COURT?

A court action for judicial review in Scotland can only be raised in the Outer House of the Court of Session in Edinburgh. It can be appealed to the Inner House of the Court of Session and thereafter to the UK Supreme Court.

If the judicial review case relates to EU law a national court may also refer it to the Court of Justice of the European Union (CJEU) in Luxembourg for a preliminary ruling. The CJEU can be asked to interpret EU law or to check the validity of a particular piece of EU law. It does not actually decide the substance of the case. Instead, having given its ruling, the case returns to the national court for them to decide.

In some limited circumstances, a judicial review case beginning in the Court of Session may also be transferred to the Upper Tribunal of the Scottish or UK tribunal system (see pp. 34–35).

THE GROUNDS OF REVIEW

Traditionally, the grounds of judicial review have been divided into three main categories:1) that the decision maker acted unlawfully ('illegality'); 2) that the decision was made using an unfair procedure ('procedural impropriety'); and 3) that the decision was so unreasonable as to be irrational ('irrationality' or 'unreasonableness') (see pp. 18–22, 25–28). However, the categories are overlapping and the grounds are still evolving.

In particular, there are now grounds for review based on breaches of EU law and breaches of 'Convention rights' – that is to say the rights protected by the European Convention on Human Rights which have been incorporated into UK law (see pp. 10–12, 22–24).

LEGAL REMEDIES

If a judicial review action is successful the court has the discretion to decide what legal remedy it should grant, and a variety of remedies are possible. Some remedies require a decision-maker to take a decision again. However, in keeping with the nature of judicial review, the court will not stipulate what the content of any new decision should be.

An award of financial damages to an aggrieved individual or organisation is only available in limited circumstances (see p 30).

THE COSTS OF A JUDICIAL REVIEW ACTION

A petitioner in a judicial review action can be exposed to considerable financial risk. The costs of engaging lawyers to present this type of case can be significant. It is also the usual practice for the losing party in a civil court case to be responsible for paying the wining party's legal expenses in relation to the case, as well as their own.

On the other hand, legal aid may be available to a party raising a judicial review action (see p. 35). In addition, where the petitioner is acting in the public interest, a court may grant a 'protective expenses order' protecting the petitioner, at least to some extent, from the normal rule relating to expenses (see pp. 35–37).

THE SCOPE OF JUDICIAL REVIEW

Public bodies and government ministers

The public bodies whose decisions, acts or omissions can be reviewed include UK and Scottish government departments, non-departmental public bodies, health boards and local authorities.[1] Judicial review can also be used to challenge the actions of (or the failure to act by) Scottish and UK Government ministers.

However, just because a body is a public body does not mean that all of its acts and decisions can be subject to judicial review. For example, private contractual disputes between a public sector employer and its employee cannot form the basis for an action for judicial review.

Private bodies

Unlike in England and Wales, it is possible, where certain conditions are satisfied, for the acts and omissions of private bodies in Scotland to be the subject of an action for judicial review (see p 18).

Legislation

Legislation of the UK and Scottish Parliaments can be the subject of an action for judicial review, although, in the case of Acts of Parliament, not on the full range of grounds which are available in other circumstances.

There are also some important differences of approach towards review of legislation of the Scottish Parliament, compared to the review of the legislation of the UK Parliament (see pp. 10–14).

[1] A full list of Scottish public bodies can be found on the Scottish Government's website: http://www.gov.scot/Topics/Government/public-bodies

JUDICIAL REVIEW IN PRACTICE

A very small part of the courts' total caseload[2]

In 2014–15, 399 judicial review cases were begun ('initiated') in the Court of Session. This represents around 8% of the cases begun in the Court of Session for that period.

However, the vast majority of cases on civil law disputes are raised in the local sheriff courts. There were 76,769 civil law cases initiated across the Court of Session and sheriff courts in 2014–15, with judicial review cases representing less than 1% of that total (Scottish Government 2016, tables 1 and 23).[3]

Examples of recent high profile judicial review cases

Two recent high profile judicial review cases are described in Box 1 below.

Box 1: Some recent high profile judicial review cases

Scottish Whisky Association and Others v Lord Advocate (2013–2016)

The Scottish Whisky Association is currently challenging the Scottish Parliament's Alcohol (Minimum Pricing)(Scotland) Act 2012 (asp 4).This Act empowers Scottish Ministers to set a minimum price per unit of alcohol and the Association's key ground of challenge to the legislation is that it contravenes EU law.

The Association's case was originally rejected by the Court of Session in 2013 but, on appeal in 2014, the Court of Session decided to refer to the case to the CJEU.

In December 2015 the CJEU ruled that a minimum price per unit for alcohol is contrary to EU law if other tax options exist. The case has returned to the Court of Session in Edinburgh.

Christian Institute v Lord Advocate (2015–2016)

The Children and Young Person (Scotland) Act 2014 (asp 8) contain provisions would see a 'named person' assigned to almost every child in Scotland. Four charities and three individuals have challenged this aspect of the legislation by way of judicial review.

The petitioners' arguments include that the provisions in question are incompatible with Convention rights and some aspects of EU law. The Court of Session initially ruled against them early in 2015 and, again, on appeal, late in 2015. The case was appealed to the Supreme Court and there was a hearing in March 2016. A judgement is expected in the coming months.

[2] The statistical information prior to 2008 is incomplete and of lower quality compared to the more recent period covered by the Scottish Government's statistics (i.e. 2008–2015). On the quality of the Scottish Government's statistics see also: http://www.gov.scot/Publications/2016/03/6429/14

[3] Not including 'summary applications'. On these, see further: https://www.scotcourts.gov.uk/taking-action/summary-applications

What are judicial review cases raised on?

Table 1: Petitions for judicial review initiated and disposed of in the Petition Department of the Court of Session, 2008-09 to 2014-15

	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	*% change since 2013-14*
Environmental	0	0	2	2	1	3	4	33
Housing	2	1	4	1	0	1	2	100
Immigrants	177	210	266	195	224	231	323	40
Licensing Board	0	1	1	0	1	1	1	0
Planning Permission	5	10	8	11	8	6	12	100
Prison Authorities	18	107	7	3	10	17	17	0
Social Security Benefits	0	0	0	0	1	0	1	n/a
Other	30	49	54	31	48	49	39	-20
Total	**232**	**378**	**342**	**243**	**293**	**308**	**399**	**30**

Source: Scottish Government 2016, table 23

Whilst some types of judicial review case are more likely to make the headlines, judicial review petitions are currently raised in the Court of Session in relation to a wide variety of matters devolved to the Scottish Parliament. These include prisons, planning, housing and licensing.

However, the number of housing and licensing cases (prominent in the earlier years of the judicial review procedure) has been much reduced in recent years (Page 2015 p 346; Thompson 2015, p 428; Scottish Government 2016, table 23).

Judicial review petitions are also raised in relation to matters reserved to the UK Parliament, such as immigration control and social security benefits.

Immigration and asylum cases

Immigration and asylum cases have in recent years been the largest single area for judicial review, comprising between 60% and 80% of all judicial review actions initiated in the last five years (Scottish Government 2016, table 23; Thompson 2015, p 427–428). In addition, the immigration caseload has been steadily increasing since the judicial review procedure was introduced just over thirty years ago (Page 2015, p 347).

Prisons cases

The next largest area of recent workload is prisons cases. However, whereas the immigration caseload has seen a steady increase, with prison cases there have been two main surges, one in 2003–2004, one in 2009–2010. Numbers have dropped dramatically since the second surge in 2009–10. Both surges are thought to relate to cases connected to the use of 'slopping out', which it was ultimately established by case law contravened prisoners' human rights and gave rise to a claim for damages (Scottish Government 2016, table 23; Page 2015, pp 343 and 345).

Planning cases

The only other substantial category of cases in recent years has been cases to do with the planning system.[4]

[4]However, in the Scottish Government's statistics a relatively high number of judicial review petitions (around 10%) are classified as 'other' (without any further breakdown). This makes it difficult to say what other significant categories there might be, as well as how the judicial review caseload has changed in recent years.

Possible factors behind the current caseload

Thompson (2015, p 428), in a recent academic article, reflects on the current trends in the judicial review caseload. He suggests a major part of the explanation is that, in some policy areas, there are alternative remedies, such as a right of appeal to tribunals. This, he suggests, tends to concentrate judicial review in the areas where rights of appeal do not exist or where there are gaps (as in immigration control).

Other factors he suggests include the importance of the issue for the litigant; the availability of suitably expert legal advice and representation; and the ability of the potential petitioners to finance the litigation. In the field of immigration and asylum all these factors come together: the importance of the dispute is often very high (sometimes a matter of life and death) so there is a strong incentive to challenge decisions, even if the prospects of success are not high. There are specialist solicitors and advocates available and many prospective litigants qualify for legal aid (Thompson 2015, p 428).

In the field of planning, cases may concern substantial development, so the potential benefit of challenging the refusal of an appeal against a refusal of planning permission may be high. Petitioners are often commercial organisations who can afford to finance litigation and, again, there are specialist solicitors and advocates available.

Several of these factors come together again in prison cases and here again most litigants qualify for legal aid.

Trends in the judicial review caseload

The judicial review caseload has been steadily increasing since the procedure was introduced in 1985. There was an average of around 60 cases a year in the first full five years of the procedure, compared to an average of around 320 cases in the most recent five years (Page 2015, p 339; Scottish Government 2016, table 23).

However Page (2015, p 347), in his recent academic article, argues that the overall upwards trend is driven by the significant volume of immigration and prison cases. Once these categories are removed from the picture, the remaining judicial review caseload has been declining in recent years. Levels of cases are not much higher than those recorded when the procedure was first introduced.

EU LAW AND JUDICIAL REVIEW

The UK joined the European Community (now the European Union) in 1972. Since the judicial review procedure was introduced, membership of the EU has been at the heart of a number of important developments relating to judicial review.

KEY CONCEPTS IN EU LAW

Supremacy of EU law

Prior to accession to the EU, the UK Parliament was recognised by the UK courts as sovereign. This meant that Acts of Parliament were treated as the supreme law of the land and were immune from judicial review.

However, since accession, the position has become more complicated. The CJEU has consistently said that the courts of member states have a duty to apply EU law, whatever its

source, in preference to any inconsistent rules of domestic law – the principle of 'supremacy of EU law'.

That principle is incompatible with the principle of sovereignty of Parliament as traditionally understood. However, the UK courts have accommodated the two principles to the extent that they have consistently given effect to EU law in cases of an apparent conflict with UK law. On the other hand, it is not clear how the UK courts would respond if the UK Parliament was to pass an Act of Parliament expressly derogating from a rule of EU law (Craig and De Búrca 2015, p 303).

Direct effect

Another key EU concept is the doctrine of 'direct effect'. This provides that, where certain conditions are satisfied, rules of EU Law can be relied upon directly by litigants in national courts. (It does not matter that the law in question has not been specifically incorporated into a member state's domestic legal system.)

A NEW GROUND FOR REVIEW – BREACH OF EU LAW

A very important consequence of the above is that an Act of the UK Parliament can now be the subject of a judicial review action in the national courts on the basis it is incompatible with EU law. A petitioner can also argue that there has been a breach of EU law in relation to other forms of UK legislation (e.g. statutory instruments) and in relation to decision-making by public bodies.

Such a judicial review action can be based on a number of sources of EU law, discussed in more detail under 'Grounds for Review' at pp 22–23.

HUMAN RIGHTS AND JUDICIAL REVIEW

THE HUMAN RIGHTS ACT 1998

Another key constitutional development is the Human Rights Act 1998 (c 42) ('the Human Rights Act') which came fully into force in 2000. It provides for certain rights protected by the European Convention on Human Rights ('ECHR') to be part of UK law ('Convention rights').

A NEW GROUND OF REVIEW – BREACH OF CONVENTION RIGHTS

One effect of this is that it is now possible to bring an action for judicial review in the Court of Session based on an alleged breach of one of the Convention rights. (Previously, an aggrieved citizen had to take his or her case to the European Court of Human Rights in Strasbourg.)

More information on the content of the Convention rights are provided under 'Grounds for Review' at pp 23–24.

PUBLIC BODIES

Section 6 of the Human Rights Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, unless the wording of an Act of the UK Parliament means they have no choice.

Section 6 allows people whose rights have been infringed to challenge both specific administrative decisions and the validity of subordinate legislation under which decisions are made.

ACTS OF THE UK PARLIAMENT

Obligation to interpret

Under the Human Rights Act, courts are obliged to interpret acts of the UK Parliament consistently with Convention rights so far as it is possible to do so (section 3). Therefore, some cases of potential inconsistency between provisions of Acts of Parliament and Convention rights can be resolved by interpretation.

Declaration of incompatibility

Where it is not possible to interpret an act of the UK Parliament so as to make it compatible with Convention rights, a “higher court” can issue a ‘declaration of incompatibility’ in relation to that act (section 4). Such a declaration can be made by the Court of Session in the context of judicial review proceedings.

In contrast to the position with a breach of EU law, a declaration of incompatibility does not make the Act of Parliament invalid. It is not binding on the parties against which it is issued. It does not have any effect on the rights of the parties to the case in which it is made. Instead UK Government ministers are empowered to make an order repealing or amending the legislation in question, as they think appropriate, to remove the incompatibility (section 10).

However, UK Government ministers will be aware that there is the possibility that the European Court of Human Rights in Strasbourg could find the United Kingdom in breach of the ECHR. Providing all domestic judicial remedies have been exhausted, it is always an option for an aggrieved individual to take a case against the United Kingdom to Strasbourg because he or she feels he or she has been denied a remedy under the ECHR.

JUDICIAL REVIEW AND THE SCOTTISH GOVERNMENT AND PARLIAMENT

THE SCOTLAND ACT 1998

Another major constitutional milestone was the Scotland Act 1998 (c 46)(‘the Scotland Act'). This created the Scottish Parliament and the Scottish Government. It devolved significant statutory powers from a UK level to the Scottish Government (or to the Scottish Executive as it was then known) and to the newly created parliament.

Legislative competence

The Scotland Act has significant implications for the nature of judicial review.

In particular, section 29 of the Act says that an Act of the Scotland Parliament is not law in so far as any of its provisions are outwith the ‘legislative competence’ of the Scottish Parliament. Section 57 imposes similar limitations on subordinate legislation and acts of (or failures to act by) members of the Scottish Government.

Alleged non-compliance with these provisions of the Scotland Act by the Scottish Parliament or the Scottish Government fall into a new category of legal questions known as 'devolution issues' and can be the subject of a petition for judicial review before the Court of Session.

Provisions outwith legislative competence include those addressing matters reserved to the UK Parliament and those which are incompatible with EU law or Convention rights.

A different approach for Acts of the Scottish Parliament

In respect of a petition for judicial review, the Court of Session has much greater powers in relation to Acts of the Scottish Parliament than it (or any other UK higher court) has in relation to Acts of the UK Parliament. In the case of the latter, the review can only relate to EU law or Convention rights.

Furthermore, an act of the Scottish Parliament which is found to be incompatible with a Convention right is invalid (Scotland Act, section 29). On the other hand, as noted above, an act of the UK Parliament which is incompatible with a Convention right remains valid. However, it can be the subject of a declaration of incompatibility (Human Rights Act, section 4).

The relationship between the Human Rights Act and the Scotland Act

Along with the Scotland Act, the Human Rights Act applies to the Scottish Parliament and the Scottish Government.

Where the issue is an alleged breach of Convention rights by Scottish Ministers or a member of the Scottish Government, it was decided by the House of Lords in 2007 that parties have a choice of raising an action under either piece of legislation (Somerville v Scottish Ministers (2007)). This choice was of most significance when the approach to time limits for raising an action differed between the two pieces of legislation. Now they are subject to the same time limit.[5] (On time limits, see p 16 below).

Legislative competence in practice

There have been many legislative competence challenges in Scotland and almost all have failed. However, an example of a successful challenge is Salvesen v Riddell (2013) a legislative provision relating to agricultural tenancies was found to violate article 1 of Protocol 1 of the ECHR (which protects property rights). It was accordingly outwith legislative competence.

ACTS OF THE SCOTTISH PARLIAMENT AND THE 'TRADITIONAL' GROUNDS OF REVIEW

The so-called 'traditional' grounds of judicial review fall under the broad headings of 1) illegality; 2) procedural impropriety; and 3) unreasonableness or irrationality (see pp 18–22, 24–27).

Procedural impropriety is thought not to apply to Acts of the Scottish Parliament (see section 28(6) of the Scotland Act).

Furthermore, when an Act of the Scottish Parliament is reviewed because it is outwith the legislative competence of the Scottish Parliament then this can be viewed as a specific (statutory) example of illegality. However, beyond this, for a while it was not clear what role, if

[5] Prior to the coming into force of the Convention Rights Proceedings (Amendment)(Scotland) Act 2009 (asp 11) there was a statutory time limit applicable to actions raised under the Human Rights Act but not the Scotland Act. (On the current approach to time limits see further below at p 16).

any, the traditional grounds of illegality and unreasonableness have in relation to Acts of the Scottish Parliament.

In 2012, the matter was finally settled. The Supreme Court clarified that, in all but the most exceptional circumstances, these grounds of review did not apply to Acts of the Scottish Parliament (AXA General Insurance Ltd & Ors v Lord Advocate & Ors (Scotland) (2012)). The exceptional circumstances referred to by the court were a breach of fundamental rights or a breach of the rule of law (on the rule of law see further below under 'Standing').

(Note that the 'traditional' grounds of review also do not apply to Acts of the UK Parliament.)

STANDING

THE GENERAL POSITION

Problems associated with the previous test of standing

In Scotland, until recently, for a petitioner to have 'standing' to bring a judicial review action the outcome of the case would have to materially affect his or her private rights. This caused particular difficulties for petitioners in the context of 'public interest standing'. This is where an individual, group or organisation seeks to represent the general public or some part of it.

In general, the Court of Session took a far more restrictive approach to public interest standing than the High Court did during the same period in England and Wales.

The current test of standing – 'sufficient interest'

The previous law on standing in Scotland was widely criticised and was changed by the UK Supreme Court in the case of AXA General Insurance Ltd & Ors v Lord Advocate & Ors (Scotland) (2012) ('the AXA case'). The Supreme Court held that the more liberal test of 'sufficient interest' used in England and Wales should be used in Scotland.

Lord Hope, who gave one of the leading judgements in the AXA case, explained the rationale for the new test in terms of the important constitutional principle of the 'rule of law'. In its most basic form this is the principle that no one is above the law. He said:

> "The essential function of the courts is…the preservation of the rule of law, which extends beyond the protection of individuals' legal rights…There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual…A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights" (para 169)

The new test has now been placed on a statutory footing by section 89 of the 2014 Act (inserting section 27B(2)(a) into the Court of Session Act 1988 (c 36)). However, no further explanation of 'sufficient interest' was provided by the 2014 Act, meaning that, in future, the law as set out in the decided cases of the Supreme Court and the Court of Session will remain significant.

The explanation of the new test

In explaining the substance of the new test in AXA, Lord Hope said:

> "…I would not like to risk a definition of what constitutes standing in the public law context. But I would hold that the words 'directly affected'…capture the essence of what is to be looked for. One must, of course, distinguish between the mere busybody…and the interest of the person affected by or having a reasonable concern in the matter to which the application related." (para 63)

Lord Reed, who gave the other leading judgement in the AXA case, highlighted that what is required by the new test of standing can depend on the context:

> "In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of…In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought to court, and that in turn might disable the court from performing its function to protect the rule of law. ...What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus conferring standing, depends therefore upon the context, and in particular what will best serve the purposes of judicial review in that context." (para 169–170)

Developing the new test of standing

Shortly after the AXA case, the Supreme Court again had to consider the Scottish test of standing in Walton v Scottish Ministers (2012). In this case the issue was whether Mr Walton was "a person aggrieved" in the context of a statutory appeals process. When the case was appealed the Court of Session observed that, had it been an action for judicial review, Mr Walton would not have had 'sufficient interest'. When the matter ultimately came before the Supreme Court, it strongly disagreed and took the opportunity to reemphasise the new liberal approach to standing in the context of judicial review.

A leading Scottish academic, Professor Tom Mullen, writing recently on the new test of standing and how it might develop in future, commented:

> "Two uncertainties remain. One is whether the Court of Session will apply the new approach…in the spirit which the Supreme Court intended. The other is what more detailed guidance the courts should create on the application of the sufficient interest test for standing. The judgements of Lord Reed and Hope in *AXA* and *Walton* provide only a general statement of the new approach to standing and the rationale for it. They do not resolve all of the issues that might arise when litigants assert that they have standing to sue in the public interest, in particular the factors which the court should take into account in deciding whether to recognise the standing of a public interest litigant" (Mullen 2015b, pp 371–372)

CASES RELATING TO CONVENTION RIGHTS

For judicial review cases relating to Convention rights, the test for standing requires the person raising the action to be a 'victim', as defined in Article 34 of the ECHR (Human Rights Act, section 7; Scotland Act 1998, section 100). The meaning of 'victim' in this context is the subject of extensive case law.

Mullen (2015b, p 377–378) has argued that, if the victim test is the sole gateway to standing, the result may be that the UK's obligations under the Convention are not adequately supervised by the court. For those who do have standing as victims (based on personal interests) may choose not to take their case to court.

The Inner House of the Court of Session had to consider this issue recently in Christian Institute v Lord Advocate (2015) (where one of the grounds of challenge was a breach of Convention rights). The Inner House expressed the view that the practical effect of the restriction in the victim test was limited in cases in which a public interest body was willing to support an individual's legal challenge or apply to intervene in any case raised by a potential victim.

COURTS REFORM (SCOTLAND) ACT 2014

Section 89 of the Courts Reform (Scotland) Act 2014 (asp 18)('the 2014 Act') made several important changes to the court procedure associated with judicial review, by inserting new provisions into the Court of Session Act 1988 (c 36).

TIME LIMIT FOR RAISING A JUDICIAL REVIEW ACTION

What the 2014 Act does

Section 89 of the 2014 Act introduced a three month time limit for raising a judicial review action. It also gives the court discretion to depart from this time limit where it would be 'equitable' to do so (2014 Act, section 89, inserting section 27A into the Court of Session Act 1988 Act (c 36)). This new time limit applies to all judicial review actions, including those relating to Convention rights.

The previous law

Under the law before the 2014 Act came into force there was no general time limit in Scotland within which an application had to be brought. This differed from the position in England and Wales.

However, a petitioner who delayed in raising an action could be met with a challenge of 'mora, taciturnity and acquiescence'. All three elements had to be present and were hard to establish in practice.[6] Judicial review actions relating to Convention rights were formerly subject to a one year time limit (Human Rights Act, section 7(5); Scotland Act, section 100(3B)).[7]

PERMISSION TO SEEK JUDICIAL REVIEW

Prior to the 2014 Act there was no requirement to obtain 'leave' or permission from the court to bring a judicial review action. This could be contrasted with the position in England and Wales.

The 2014 Act introduces such a requirement and provides that the court may grant permission where a) the applicant can demonstrate 'sufficient interest' in the subject matter of the application (this reflects the new test for standing discussed above); and b) the application has a real prospect of success.

Under the Act, if permission is refused by the court, the petitioner has a right to an oral hearing before a different judge, as well as a further right of appeal to the Inner House of the Court of Session (section 89 of the 2014 Act inserting sections 27B–27D into the Court of Session Act 1988 (c 36)).

[6] Mora related to delay beyond reasonable time; taciturnity referred to a failure to speak out when a reasonable person would be expected to do so. Acquiescence in law is where there is assent to what has taken place, as inferred from a person's inaction and silence.

[7] However, see also footnote 5.

THIRD PARTY INTERVENTIONS

Interventions by third parties in judicial review proceedings with an interest in the case are permitted in two ways under the current court rules.

WHERE THE PERSON IS 'DIRECTLY AFFECTED'

In the first place, a party who considers that he or she is 'directly affected' by the issues raised in the case, may apply to enter the process and become a party to the case under Rule 58.14. (This is what individuals affected by an asbestos-related condition in the aforementioned AXA case sought to do.)

PUBLIC INTEREST INTERVENTION

There is also a separate procedure contained in Rules 58.17–20 for a 'public interest intervention'. This allows a person to make an application to the court for leave to intervene in a judicial review petition where he or she believes that any issue in the case raises a matter of public interest. The court may grant permission if it considers that certain requirements are satisfied.

In the Court of Session, public interest intervention is generally in written form and is subject to rules as to length. Oral intervention is only permitted in exceptional circumstances. This contrasts with the approach of the UK Supreme Court which has demonstrated a greater willingness to hear oral interventions.

Until relatively recently, public interest interventions were rare in practice in Scotland but they are becoming more common.

A recent example of the approach to interveners in the Court of Session is given in Box 2 below.

Box 2: Sustainable Shetland v Scottish Ministers (2013)

In this case an environmental campaign group sought judicial review of a decision of Scottish Ministers to grant consent for the construction of a windfarm.

One of the grounds of challenge was alleged failure of Scottish Ministers to take proper account of the effect of the windfarm on a migratory bird, the whimbrel.

When the case was appealed to the Inner House of the Court of Session the Royal Society for the Protection of Birds applied for leave to intervene in the public interest.

The Inner House refused on two grounds. First of all, the court said they should have intervened at an earlier stage – in proceedings in the Outer House of the Court of Session. Secondly, the court appeared to be saying that as the legal issue was already being argued by one of the actual parties to the case, there was no benefit to be derived from the intervention.

The approach of the Inner House to interveners in this case has been the subject of some academic criticism (Mullen 2015b, pp 379–381).

THE SCOPE OF JUDICIAL REVIEW

THE GENERAL POSITION

In England and Wales, a distinction has developed between cases involving ‘public law rights’ and those involving ‘private law rights’, with judicial review only being competent in relation to the former. The effect of this distinction in judicial review cases south of the Border is that the decisions of private bodies are not usually open to judicial review.

Some earlier decisions of Scottish judges contained hints of this public/private divide. However, in the important case of West v Secretary of State for Scotland (1992) the English approach was rejected for Scotland and it was confirmed that the actions and decisions of private bodies could be subject to judicial review.

The judges in West stated that what was required for a competent judicial review action was a tripartite relationship between the source of the decision making power, the person or people to whom that decision making power has been delegated and the person or people affected by that decision making power. Later case law has suggested that the tripartite relationship is not an exhaustive statement of all the circumstances where judicial review is possible, nor should it be interpreted too literally (Crocket v Tantallon Golf Club (2005)).

CASES RELATING TO CONVENTION RIGHTS

There is a special rule applicable to judicial review cases concerning Convention rights. The Human Rights Act provides a right of challenge in respect of ‘public authorities’ acting in contravention of Convention rights – meaning that the public or private nature of the body remains important in this context (Human Rights Act, sections 6–7).

GROUNDS OF JUDICIAL REVIEW

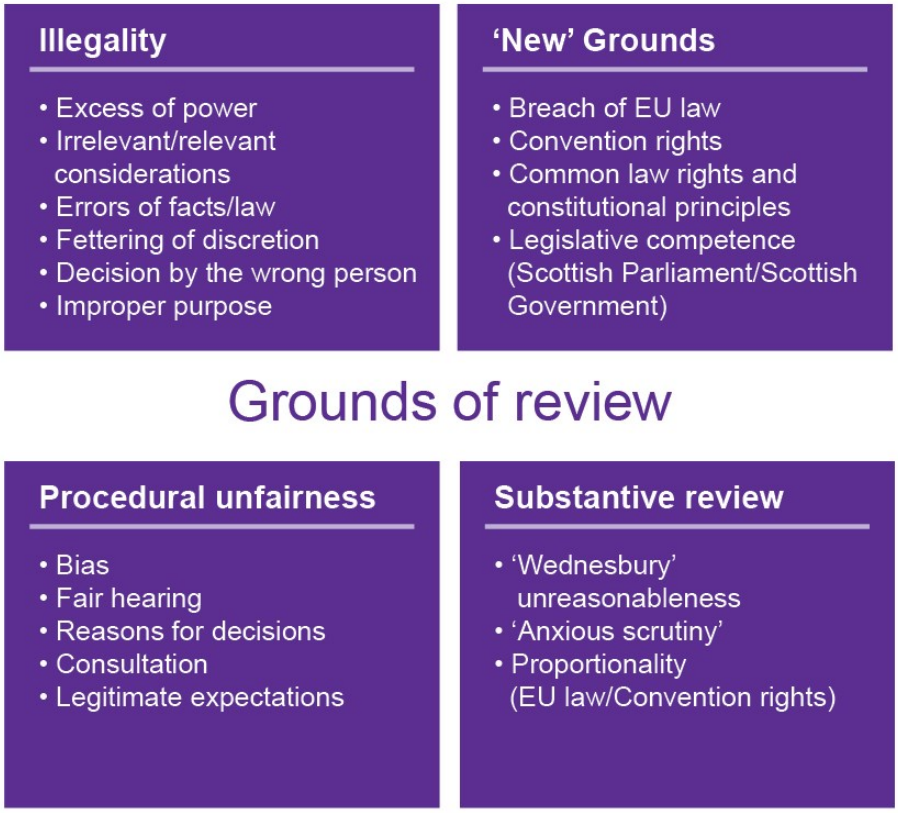
This section of the briefing explores the current grounds for judicial review in detail.

Although the grounds have been divided into categories for this purpose, any type of categorisation is somewhat artificial. The grounds for judicial review are (perhaps increasingly) fluid and overlapping.

Despite other differences between judicial review north and south of the Border, the grounds of judicial review are intended to be the same in both jurisdictions. Scottish judges in the Court of Session frequently refer to case law from England and Wales.

[briefing continues on the next page]

Figure 1: grounds of review



ILLEGALITY

In one sense it can be said that the sole ground of judicial review is that of unlawfulness – all the particular respects in which decisions or actions can be challenged by way of judicial review may be seen as aspects of this basic ground. However, when the specific ground of judicial review of illegality is referred to, a narrower meaning is being attributed to the term. The various specific principles underpinning this ground of review are considered in more detail below.

Exceeding powers

The basic principle is that public bodies may not make any decision or take any action that is not authorised by law. Any decision or action going beyond that body's legal powers is unlawful and may be challenged as such. This is sometimes referred to by the Latin phrase 'ultra vires'.

Breach of a statutory duty

One way of acting beyond powers is to fail to comply with a duty imposed by statute. A court may find an action, or failure to act, is unlawful where this is in breach of a particular duty imposed by statute.

Wording, scope and purpose of the duty

Not all alleged breaches of statutory duties will be treated the same way by the court. The court will look at the wording used in the statute, as well as the whole scope and purpose of the Act to

work out what is required and what the effect of the particular breach at issue should be (Woolf *et al* 2013, para 5-053 and 5-057).

Duties to carry out particular tasks

The courts are much more willing to enforce duties to carry out particular tasks, for example, a duty to produce a strategy or to follow a particular procedure (see also below on 'procedural impropriety' at p 25).

Where there is a broad discretion

Some statutory duties are actually framed broadly enough that, in practice, they represent an aspiration rather than an enforceable obligation.

Some duties also give the bodies significant discretion as to what is actually required in practice. Sometimes the language used in the duty contains significant qualifications – such as the obligation to do something 'so far as reasonably practicable' or to 'take reasonable steps'.

The courts allow much greater flexibility in relation to these types of duty. Since they normally require the decision to allocate scarce resources among competing needs, the courts will not interfere readily (Woolf *et al* 2013, paras 5-068 and 5-069).

Review of the legality of discretionary decision-making is considered in more detail below at p 21–22.

'Outcome' duties

Several academics (Woolf *et al* 2013; Reid 2012) have identified a new type of duty in the UK climate change legislation (Climate Change Act 2008 (c 27); Climate Change (Scotland) Act 2009 (asp 12) and the Child Poverty Act 2010 (c 9). These are so-called 'outcome' duties which impose an obligation to achieve a broad but measurable and very specific strategic outcome in relation to complex problems. For example, section 1 of the Climate Change (Scotland) Act 2009 requires Scottish Ministers to reduce carbon emissions by 80% by 2050.

There has been academic discussion as to how outcome duties will be treated by the courts, but the matter has not yet been tested in court (Woolf *et al* 2013; Reid 2012).

Errors of law and errors of fact

In some circumstances, the court will recognise that an error relating to the applicable law by a decision maker (an 'error of law') amounts to a ground for judicial review. Likewise, an error relating to the facts of a dispute (an 'error of fact') can constitute a ground for judicial review.

The rules in this area are underpinned by the fundamental principle that the courts in judicial review actions are primarily concerned with the legal validity of decisions taken, not the merits of those decisions.

Errors of law

Scottish courts would traditionally only intervene in relation to errors of law which caused the decision maker to exceed its powers and take a decision it was not authorised to take ('jurisdictional errors'). However, they would not otherwise pronounce on the proper interpretation and application of the law in relation to decisions which were within the scope of the decision maker's powers.

Himsworth, commented on this in a recent academic article, as follows:

> "For some, this was a wholly justifiable restriction on the boundaries of judicial review. Parliament has deliberately permitted a situation where statutorily created bodies were free (and should be free), within the bounds of the autonomy granted to them, to make some types of legal mistake without sanction in judicial review. But was it not, on the other hand, a failure of the rule of law? How could it be tolerated that courts should be seen to close their eyes to demonstrably 'illegal' decision making?" (Himsworth 2015, p 354)

The highly legal technical distinction has been significantly eroded by case law, in particular, by the landmark Supreme Court case of Eba v Advocate General for Scotland (2012). Accordingly, the basic position is now that any error of law on which the decision depends is subject to judicial review. However, in practice, this approach still shows deference to the traditionally recognised scope of judicial review actions.

Errors of fact

The court does not have a general power to correct errors of fact. However, in some circumstances, errors of fact are reviewable. So, for example, the court in a judicial review action will intervene when material findings of fact are reached on the basis of no evidence. It may also intervene when findings of fact are manifestly contrary to the weight of the evidence. However, otherwise it will consider that dealing with errors of fact is the function of an appeal court rather than a court in a judicial review action.

Review where there is discretion

It is easy to understand that a decision that is inconsistent with the terms of a statute is subject to judicial review. However, as alluded to above, many statutory powers and duties confer discretion. The decision maker may have a range of choices available as to what to do in the light of the facts. The next few sub-headings relate to the review of the discretionary element in decision-making.

Failure to take account relevant matters

The decision of a body or individual which fails to take into account all relevant matters is potentially subject to review on the ground of illegality.

For example, the court reduced the decision of a local authority to increase the number of taxi licences in its area on the ground that it had failed to take into account all relevant considerations. The council based its decision on the report of a company of transport consultants it had engaged to consider the issue. However, it did not take into account the dissenting views of a further external consultant engaged by that company (City Cabs (Edinburgh) Ltd v City of Edinburgh District Council (1988)).

Taking into account irrelevant matters

A decision maker should not take into account irrelevant matters.

For example, in Reid v Secretary of State for Scotland (1998) an individual had been ordered to be detained in Carstairs State Hospital without limit of time, following his plea of guilty to a charge of culpable homicide in the 1960s.

He sought judicial review of a decision of a sheriff to continue to detain him under the mental health legislation then in force. The sheriff had refused the appeal on grounds, among others, that it remained necessary for his own health and safety and the protection of the public that he remained in Carstairs.

Before the Inner House of the Court of Session the petition for judicial review of the sheriff's decision was successful on the basis that the sheriff had taken into account matters other than those to which the terms of the statute in question had specifically directed him.[8]

Improper purpose

Sometimes an authority exercises its lawful powers for a purpose other than that for which they were specifically intended or conferred. Then the resulting decision may be struck down by the courts as being in breach of the principle of legality.

So, for example, a local authority used its powers to grant or refuse an entertainment licence on the basis of an animal welfare policy seeking to discourage the use of live animals in performance. It was found to have acted illegally (Gerry Cottle's Circus Ltd v City of Edinburgh District Council (1990)).

Fettering of discretion

Decision makers may formulate general policies to guide the exercise of their discretion. However, these policies must not be applied as if they were rigid rules. Regard must still be had to the special circumstances of the case under consideration.

For example, the court quashed a decision of the immigration authorities to refuse the petitioner leave to remain in the United Kingdom following his marriage to a British national. This was on the ground that the authority had unlawfully fettered their discretion. In particular, it had rigidly applied a policy in marriage cases of excluding from consideration all marriages of less than two years standing (Salah Abdadou v Secretary of State for the Home Department (1998)).

Exercise of power by the wrong person

A power may have been validly exercised. However, the exercise of it may be struck down on the ground that it was exercised by someone other than the person entitled to exercise it.

For example, in the case of Vine v National Dock Labour Board (1957) the court decided that the dismissal of a dock worker was invalid because the Board, instead of deciding the matters itself, had improperly entrusted the decision to its disciplinary committee.

However, there is a special rule applicable to the exercise of power by a government minister, whereby it is well accepted that the power in question may validly be exercised by an official in the minister's department. This is known as the 'Carltona' principle after the case Carltona Ltd v Commissioner of Works (1943).

EU LAW

Where a petitioner in judicial review proceedings alleges an incompatibility with EU law this can be based on a number of sources of EU law.

The EU Treaties

A very important source is the two treaties, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), together the 'EU Treaties'.

These are the binding agreements between the EU member countries. Together they set out matters including the objectives of the EU; the policy areas in which the EU is competent to act;

[8] The matter was ultimately appealed to the House of Lords who did not find in favour of the petitioner (Reid v Secretary of State for Scotland (1999)).

the rights associated with EU citizenship; and the relationship between the EU and its member countries.

Regulations, directives and decisions

Provisions of regulations, directives and decisions, the so called 'secondary legislation' of the EU, are also key sources of EU law.

The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union ('the Charter') is another important source, which is given legally binding effect in the TEU (article 6).

The Charter sets out a series of individual rights and freedoms from: 1) the case law of the Court of Justice of the European Union; 2) the ECHR and 3) the common constitutional traditions of EU countries, as well as other international legal instruments.

It is easy to get confused between the well-known ECHR and the Charter. There is an overlap in content – when rights in the Charter stem from the Convention their meaning and scope is the same. However, the Charter draws on a broader range of sources than the ECHR. It also aims to be a very modern codification, including 'third generation' fundamental rights. These include those related to data protection and bioethics.

General principles of EU law

The general principles of EU law can be relied upon by litigants in judicial review actions. These principles have been developed by decided cases of the Court of Justice of the European Union and supplement the written sources of law. The principles include proportionality; equal treatment and non-discrimination; legal certainty; and the protection of legitimate expectations (Woolf 2013, para 14-100). Proportionality and legitimate expectations are discussed in more detail below at pp 27–29.

CONVENTION RIGHTS AND FUNDAMENTAL RIGHTS

Incompatibility with Convention rights

The Convention rights

The Convention rights enshrined in UK law by the Human Rights Act are as follows:

- Right to life (Article 2)
- Freedom from torture and inhuman or degrading treatment (Article 3)
- Freedom from slavery and forced labour (Article 4)
- Right to liberty and security (Article 5)
- Right to a fair trial (Article 6)
- No punishment without law (Article 7)
- Respect for your private life, home and correspondence (Article 8)
- Freedom of thought, belief and religion (Article 9)
- Freedom of expression (Article 10)
- Freedom of assembly and association (Article 11)

- Right to marry and start a family (Article 12)
- Protection from discrimination in respect of these rights and freedoms (article 14)
- Protection of property (Protocol 1, Article 1)
- Right to education (Protocol 1, Article 2)
- Right to elections (Protocol 1, Article 3)
- Prohibition of the death penalty in peacetime (Protocol 6)

Although the rights enshrined in 1950 have remained unchanged, the scope of those rights has developed. This is largely due to the way in which the European Court of Human Rights has interpreted the Convention.

Absolute, limited and qualified rights

Not all rights in the Convention and its Protocols have the same weight. There are three broad types. In the first place, there are 'absolute rights.' As the name suggests, these rights, such as the protection against torture (article 3), are absolute and cannot be removed or limited by member states.

There are also 'limited rights', that is to say those which can be limited under specific and finite circumstances. For example, Article 5 (right to liberty) allows for people to be imprisoned, provided there is a "lawful detention of a person after conviction by a competent court".

Lastly there are 'qualified rights'. These are rights which require a balance between the rights of the individual and other interests. These include the rights to: respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); peaceful enjoyment of property (Protocol 1, Article 1); and, to a degree, the right to education (Protocol 1, Article 2).

Accordingly, depending on the right in question and the specific circumstances, a policy or decision which restricts a Convention right may or may not be incompatible with the Convention.

Fundamental rights and constitutional principles

Since its entry into force in 2000, the Human Rights Act has become largely synonymous with human rights adjudication in the UK. In particular, the notion of constitutional principles or fundamental rights developed by the case law of national courts ('the common law') was largely eclipsed by the new legislation.

However, in recent years, there has been political uncertainty concerning the future of the Human Rights Act. Accordingly, the courts have begun to place a renewed emphasis on the common law as an independent source of fundamental rights and constitutional principles. The rights and principles referred to by the courts in recent years include certainty, consistency, access to justice, free expression and equality.

PROCEDURAL IMPROPRIETY

Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

Sources of procedural requirements

There are three broad bases on which a decision maker may owe a duty to exercise its functions in accordance with fair procedures. These are considered in turn below.

In addition, a requirement to follow a specific procedural requirement can result from the protection of 'legitimate expectations' (see pp 27–28).

Legislation or other instrument

In the first place, legislation or another legal instrument which gives a decision making power may impose a duty to follow specific procedures.

The requirements relating to procedure contained in the statute or other instrument must be complied with. However, failure to comply with required procedures does not automatically mean that the decision which follows is invalid. The courts take a range of factors into account in deciding whether or not to nullify a decision.

Convention rights and EU law

Convention rights and EU law are also significant sources of procedural requirements.

Article 2 of the ECHR imposes a specific procedural requirement – namely an effective official investigation where an individual is killed as a result of the official use of lethal force or where public authorities have failed to protect life.

Article 6 of the ECHR creates a right to a fair trial in civil and criminal matters. This Convention right has been very influential in practice.

The common law

The common law, that is to say the law developed through the decisions of the courts, requires a fair procedure to be followed. This is sometimes referred to as the requirement to observe the 'principles of natural justice'.

As with the ground of illegality, the concept of procedural unfairness covers a variety of more specific principles which are considered in more detail below.

Rule against bias

No-one may be the judge of his or her own cause. This strikes at decision making where the decision maker is connected with the party to the dispute or the subject matter of it. In this context, justice should not only be done, but should be seen to be done. Consequently, appearance of bias may be as relevant as actual bias (as well as being more common).

Right to a fair hearing

No person against whom an adverse decision might be taken should be denied a fair hearing to allow them to put their side of the case.

What constitutes a fair hearing depends on the particular circumstances of the case. These include the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it has to work.

It is not the case that procedural fairness will require in every case that the parties interested in a decision must be allowed an oral hearing. However, oral hearings will certainly be required in some contexts.

As mentioned above, article 6 of the ECHR guarantees a right to a fair trial in the determination of a person's civil rights and obligations. The case law associated with this right has influenced judicial understanding of what constitutes a right to a fair hearing, even in cases which are not being brought on the ground of a breach of a Convention right.

Duty to give reasons

Statutes often require that decisions made under them should be supported by reasons.

It is often said that, statutory requirements apart, there is no general duty to provide reasoned decisions. However, developments in this area have been such that the sum of exceptions to the general principle probably outweighs the principle itself.

Generally speaking, the more important or fundamental the nature of the individual's right or interest in question, the more likely the principle of procedural fairness will require reasons to be given.

Furthermore, there is EU case law to the effect that an administrative authority is bound to give reasons for a decision which has an impact on an individual's rights under EU law (Case 222/86 Union National des Entraineurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens [1987] ECR 4097). This case law applies where the ground of judicial review is an alleged breach of EU law.

Where reasons are given they must be adequate. In particular, they must be sufficiently detailed to show that an appropriate thought process has taken place (Nzolameso v Westminster [2015] UKSC 22).

Consultations

To avoid successful challenge, a decision maker must, where required by statute, carry out public consultation prior to any change to policy or law. Such an exercise may also be required according to the developing law of legitimate expectations (see further below).

Furthermore, in the case of R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry (2007) EWHC 311 (Admin)) the judge said that in the field of environmental policy, even in the absence of a statutory requirement or legitimate expectation, the Government is under a duty to consult. This is because the UK Government is a signatory to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention'). Article 7 of this requires signatories to provide opportunities for public participation in the preparation of environmental policies.

Where a consultation exercise is undertaken by a decision maker, it must be conducted properly. In particular, the following requirements must be met (R (on the application of Moseley) v London Borough of Haringey (2014)):

- the consultation must be at a point when the proposals are still at an early stage;
- it must include sufficient reasons for particular proposals to allow those consulted intelligent consideration and response;
- it must also include explanation of alternative proposals which the decision maker has discarded;

- adequate time must be given for consideration and response; and
- the product of the consultation must be consciously taken into account in finalising any proposals

LEGITIMATE EXPECTATIONS

In the law relating to judicial review, a 'legitimate expectation' may be recognised by the court as a result of an express promise, assurance or representation by the decision maker. It also may be inferred by the court from the past practice or the conduct of the decision maker.

Procedural protection

In some situations, the existence of a legitimate expectation may entitle people to a level of procedural protection which, in the absence of the expectation, they would not have received.

An example of a case where a legitimate expectation was created is that of Attorney General of Hong Kong v Ng Yuen Shiu (1983). The Hong Kong authorities had announced that illegal immigrants would be interviewed, each case being dealt with on its merits, before any decision was taken to expel them from the territory. The applicant was an illegal immigrant who the authorities sought to expel without an interview. The court held that whilst the duty to act fairly might not generally extend to illegal immigrants, the Hong Kong authorities had by their assurances created a legitimate expectation of a hearing.

Protecting the substance of the expectation

For a time, in the developing law of legitimate expectations, whether legitimate expectations attract only procedural protection, or whether the courts may go further and protect the substance of the expectation was a controversial issue.

In the English case of Coughlan (referred to above), the Court of Appeal held that, in certain limited circumstances, a legitimate expectation of a substantive benefit could, as a matter of fairness, be enforced by the courts.

In this case the applicant had been seriously injured in a road traffic accident. She was moved to a purpose-built NHS facility which she was assured by the authority would be her home for life. In 1998, however, the health authority decided to close the facility.

The court decided that a clear promise had been made to the applicant, although a public authority could reasonably resile from such a promise if the overriding public interest demanded it. However, the health authority had failed to establish that there were such compelling circumstances justifying the closure, and therefore it had to adhere to its promise.

The judge in this case indicated that substantive benefits would be most likely to be protected in legitimate expectations cases where they involve a promise or representation having the character of a contract, being made to only one person or a small number of people. However, this is not an absolute rule.

Whilst it is clear that substantive expectations can sometimes be protected, the law in this area is still developing and future case law will be important.

UNREASONABLENESS AND PROPORTIONALITY

Unreasonableness and proportionality are both grounds for review where the court engages in a review of the substance of a decision or the justification for that decision. These grounds are considered in turn below.

Unreasonableness/irrationality

Decision makers must not exercise their powers in a wholly unreasonable or irrational way.

"Wednesbury unreasonableness" – extremes of administrative behaviour

This ground of judicial review is often referred to as 'Wednesbury unreasonableness', a reference to the case where the principle was set out. In this case it was said that the decision in question must be "so unreasonable that no reasonable decision-maker could come to it" (Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948)). A more modern formulation of the test requires the decision-maker to act "within the range of reasonable responses" (see, for example, Gokool v Permanent Secretary for the Ministry of Health and Quality of Life (2008) at para 18).

Variable intensity of review

The traditional view of unreasonableness is that it does not give judges much opportunity to review the merits of administrative decisions. It has often been said that the ground has a high threshold for judicial intervention which is very rarely satisfied.

However, it seems that, in recent years, the intensity of the review which the courts are willing to carry out does vary, depending on a number of factors (Woolf 2013, para 11-086). For example, where fundamental rights or constitutional principles are a stake, the courts will engage in a deeper scrutiny of the decision, sometimes referred to as 'anxious scrutiny' (Woolf 2013, para 11-093–11-096).

A key factor the court takes into account in deciding the appropriate intensity of review is the nature of the relationship between the original decision-maker and the court. In particular, it will look at the respective expertise of the court compared to that of the decision-maker. For example, where the decision-maker is an expert in a highly technical field, the court will be extremely reluctant to intervene (see, for example, R (Great North Eastern Railway Limited) v Office of Rail Regulation (2006)). Courts will also be reluctant to intervene where the governmental decision involves the allocation of scarce resources (see, for example, R v Cambridge DHA Ex p B (1995)).

Proportionality

Breaches of EU law

A structured test of 'proportionality' has replaced reasonableness for cases involving alleged breaches of 'directly effective' rules of EU law. In this regard the court addresses a series of questions.

First the court will ask whether the measure which is being challenged is suitable to attaining the identified ends (the test of 'suitability'). The next step asks whether the measure is necessary and whether a less restrictive or less onerous method could have been adopted (the test of 'necessity', requiring **'**minimum impairment' of the right or interest in question). If the measure passes both tests the court may then go on to ask whether it attains a 'fair balance' between means and ends.

The burden of justification in each case falls on the public authority against whom the action has been taken (Woolf 2013, para 11-078).

Breaches of Convention rights

Proportionality is employed in a similar way for alleged breaches of Convention rights, particularly in relation to the 'qualified rights' under articles 8–12 (see above at p 24).

The public authority will normally be required to demonstrate that:

- the measures are "prescribed by law";
- that they pursue a legitimate end or an end specified in the relevant article (e.g. public safety or national security);
- that they are rationally connected to that end; that no less restrictive alternative could have been adopted; and
- that they are necessary (and not merely desirable) (Woolf 2013, para 11-079).

Proportionality in other cases

The Court of Session's position is that proportionality is not a free-standing ground of review and its applicability is limited to cases relating to Convention rights and questions of EU law (Somerville v Scottish Ministers (2007); see also Somerville v Scottish Ministers (2008); Fargie, Petitioner (2008)).

However, in several recent cases the Supreme Court suggested that there might be a role for proportionality where: a) fundamental rights recognised by the common law are at stake; and b) the exercise of power at issue amounts to a significant interference with those rights (Phan v Secretary of State for the Home Department (2015); Keyu v Secretary of State for Foreign and Commonwealth Affairs (2015)).

More significantly, in one of those cases the Supreme Court was invited to replace Wednesbury unreasonableness with a general proportionality standard potentially applicable in all judicial review cases. The (five-judge) court was not willing to do this on that occasion, saying that it would be a decision for the Supreme Court when sitting as a nine-judge court (Keyu v Secretary of State for Foreign and Commonwealth Affairs (2015)).

There is still a great deal of uncertainty surrounding these (related) issues and future case law will be important.

[briefing continues on the next page]

REMEDIES AVAILABLE IN JUDICIAL REVIEW ACTIONS

Where an action for judicial review is successful, the Court of Session may award various legal remedies against the decision maker. These are outlined in Box 3 below.

Box 3: Remedies in judicial review actions

Reduction

Reduction is the most common of the remedies sought. This involves the court quashing the original decision and giving the issue back to the decision maker to look at again. However, in keeping with the nature of judicial review, the court will not say what it thinks the ultimate decision should be.

Declarator

A declarator is another popular remedy. It is an authoritative statement that an individual or body has a specific right or duty. It is useful where the petitioner wants to establish that a particular right exists, or that a particular status applies; which has been doubted or denied.

Suspension and interdict

An order for suspension stops something currently being done. An interdict is used to prevent a threatened wrong occurring or the continuance of current wrongdoing.

These remedies can be applied for separately but it is more common for them to be applied for together and in conjunction with other remedies.

Specific performance or specific implement

Specific performance (also referred to as specific implement) is where the court orders the respondent to do something which they are under a legal duty to do.

Liberation

As the name suggestions, this order gives the petitioner their liberty and is used where there has been wrongful or illegal imprisonment. At present, liberation most frequently arises in immigration and asylum cases.

Interim orders

Interim orders can be applied for at the start of a case, pending a final decision. They will be awarded where the court thinks that the petitioner has a convincing case and the balance of convenience supports it. Interim interdicts are the most common type of interim order.

Damages

Damages are financial compensation for a loss suffered. Damages can only be awarded in judicial review actions if there can be shown to be a ground entitling the petitioner to such an award by virtue of another specific part of the law. For example, under the law of negligence, or where certain conditions are satisfied, for a breach of EU law or Convention rights.

Note that an order for reduction, suspension, interdict or specific performance is not competent where the respondent is the Scottish Parliament. Instead a declarator is the competent remedy in such circumstances (Scotland Act, section 40(3)).

JUDICIAL REVIEW AS PART OF A WIDER SYSTEM FOR ADDRESSING GRIEVANCES

ALTERNATIVES TO JUDICIAL REVIEW

There are various alternatives to judicial review.

Internal complaints or review procedures

In the first place, an aggrieved individual may be able to make a complaint using a body's internal complaints or review procedures (where these exist). Any public body is free to set up an internal complaints procedure and in recent years all public bodies have been encouraged to do so. In some cases (eg under homelessness legislation) there is a statutory requirement to carry out an internal review on request.

Whereas judicial review focuses on the legality of the decision made, internal complaints procedures can encompass a broader range of issues. These include delay, failure to provide a service or the provision of a poor service.

Alternative Dispute Resolution

An aggrieved individual can also ask a public body to go to mediation or some other form of alternative dispute resolution.

There is usually no obligation on the body in question to participate and any decision reached through this process is not binding on the parties concerned, unless all parties reach a formal agreement to this effect.

The website of the Scottish Mediation Network has a search facility to allow the identification of mediation providers in a specific geographical area.

Ombudsmen and other external complaints handlers

Another option is to complain to an ombudsman or other external complaints handling body.

In contrast to the position with judicial review, an ombudsman considers a wider range of issues associated with administrative decision making. They are also more accessible than judicial review because they are typically free of charge to the citizen and because they assume the burden of investigating complaints.

The main ombudsman in Scotland is the Scottish Public Services Ombudsman (SPSO). The SPSO has jurisdiction to consider complaints relating to most devolved Scottish public bodies. (The most notable exception is complaints relating to the police, which are considered by the Police Investigations and Review Commissioner.)

However, the SPSO is not the aggrieved citizen's first port of call. The complainant should first have raised the complaint with the body which caused the problem, unless it is not reasonable to expect him or her to exhaust the body's procedures. In addition, the SPSO must not investigate any matter in respect of which the person aggrieved has or had a right of appeal or redress in court (see further p 32).

The SPSO can provide a wide range of remedies. These include an apology; the carrying out of work, for example, repairs to a house; the reconsideration of a decision and making financial redress.

The other key ombudsman is the Parliamentary and Health Service Ombudsman who is responsible for considering complaints relating to UK Government departments and agencies. (The health service aspect of this ombudsman's jurisdiction applies to England only).

Statutory right of appeal

In some instances it will be possible to exercise a right of appeal provided for by statute.

Compared to the position with judicial review, the individual or body considering the appeal will often be empowered to look at the substance of the original decision and substitute their own decision.

The local sheriff courts in Scotland consider appeals in relation to a wide range of matters, and tribunals also play an important role in this area (see further below at pp 33–35 in relation to tribunals).

THE RELATIONSHIP BETWEEN JUDICIAL REVIEW AND OTHER REMEDIES

Judicial review and statutory appeal or review

Where a suitable statutory right of appeal or review exists, a person will be expected to use it before seeking judicial review, unless special or exceptional circumstances apply.

In the recent case of McCue v Glasgow City Council (2014) Lord Jones held that the rule relating to the exhaustion of alternative remedies could apply to remedies not created by statute. This might be an expansion of the original scope of the rule (Thompson 2015, p 432) and future case law is likely to be important.[9]

Judicial review and the SPSO

As referred to above, the SPSO must not investigate any matter in respect of which the person aggrieved has or had a right of appeal or redress in court. However, there is also an exception where the SPSO is satisfied, in the particular circumstances, that it is not reasonable to expect the person aggrieved to resort or have resorted to the remedy (Scottish Public Services Ombudsman Act 2002 (asp 11), section 7(8)).

On one hand the SPSO will routinely reject complaints where there is a right of appeal. However, where the only remedy is judicial review the SPSO would probably invoke the exception.

Alternative remedies and time limits

Another interesting issue is the relationship between the three month time limit now applicable to judicial review cases (2014 Act, section 89 – see p 16) and the obligation to exhaust alternative remedies. Initially judicial review might not be competent due to the existence of an alternative remedy. On the other hand, once that remedy is exhausted the relevant decision might have been made more than three months ago. No specific provision is made in the 2014

[9]See also the later case of Smart's Guardian v Fife Council (2015). This case highlights that the importance of the respondent in the case providing enough information to the court on the nature of the possible alternative remedy. In this case Lord Jones found that he did not have enough information on the council's complaints procedure to form a view on whether it was an effective alternative remedy to judicial review.

Act to address this issue, although the court has a general discretion to extend the time limit in a particular case.

TRIBUNALS AND JUDICIAL REVIEW

AN OVERVIEW OF THE TRIBUNAL SYSTEM

A tribunal is a specialist forum for resolving disputes which is intended to be more accessible and user-friendly than the courts. There are many different tribunals operating in Scotland, dealing with numerous and varied issues. Some deal with devolved matters such as housing and mental health ('devolved tribunals'), whilst others cover issues reserved to the UK Government such as child support and immigration and asylum ('reserved tribunals').

Tribunals, Courts and Enforcement Act 2007

In 2008 the Tribunals, Courts and Enforcement Act 2007 (c 15)('the 2007 Act') came into force and created the new centralised tribunal system for tribunals dealing with reserved matters.

The new structure is split into a First-tier Tribunal (where a case is first heard and decided) and the 'Upper Tribunal' (which usually only hears appeals). Both the First-tier Tribunal and the Upper Tribunal are, in turn, split into specialist chambers.

Tribunals (Scotland) Act 2014

The Tribunals (Scotland) Act 2014 (asp 10)('the 2014 Act') made equivalent provision for a new unified tribunal structure in Scotland for devolved tribunals.

The First-tier Tribunal for Scotland will initially hear appeals in housing and property cases. The jurisdictions of the Private Rented Housing Panel and the Homeowner Housing Panel will transfer in to the First-tier in December 2016.

The full integration of all tribunals into the centralised structure is not planned to be complete until August 2023.

The Scotland Act 2016

In another key development, section 39 of the recent Scotland Act 2016 (c 11) allows the functions of a reserved tribunal to be transferred to a Scottish tribunal on a case by case basis. The procedure involves an Order in Council laid before, and approved by, the UK and Scottish Parliaments. Some reserved tribunals are exempted from the scope of this power. The UK Government anticipates that the transfer will take place in tranches and that it will be "an extended process" (Explanatory Notes to the Scotland Bill, para 236).

THE RELATIONSHIP BETWEEN THE TRIBUNAL SYSTEM AND JUDICIAL REVIEW

In the context of judicial review there are two distinct issues associated with the relationship between the courts and the tribunal system which it is useful to be aware of. These are considered in turn below.

Decisions of the Upper Tribunals which cannot be appealed

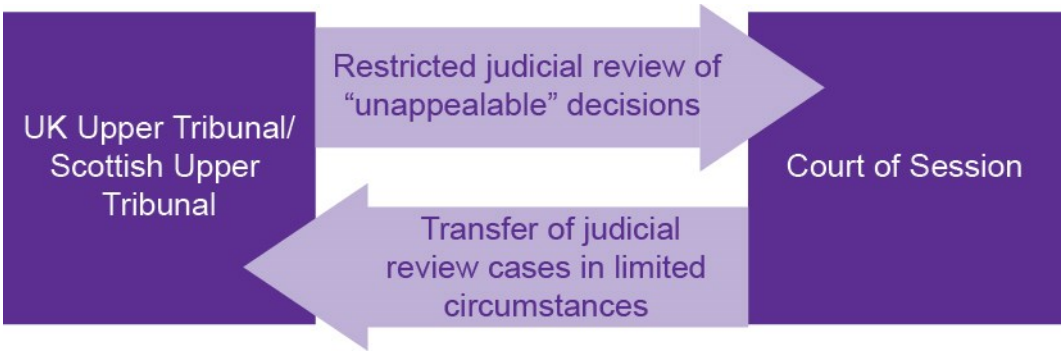
Some decisions of the UK Upper Tribunal can be appealed to the higher courts. However, others cannot be.

Some of these 'unappealable' Upper Tribunal cases have a Scottish element, for example, the person raising the action lives in Scotland. It was thought that they (in theory) might be able to be the subject of a judicial review action before the Court of Session.

In the case of Eba v Advocate General for Scotland (2012) the UK Supreme Court said that the availability of judicial review is restricted. Specifically, it is available only where the Upper Tribunal decision in question raises an important point of principle or practice or there is some other compelling reason.

Section 89 of the Courts Reform (Scotland) Act 2014 (asp 18) provided the equivalent rule in relation to decisions of the Upper Tribunal for Scotland. (Section 89 inserted section 27B(3)(c) into the Court of Session Act 1988 (c 36)).

Figure 2: The relationship between the tribunal system and judicial review



Transfer of judicial review cases from the Court of Session to the Upper Tribunals

Transfer of cases from the Court of Session to the UK Upper Tribunal

The 2007 Act contains important provisions relating to the relationship between judicial review cases commenced in the Court of Session and the UK Upper Tribunal.

For judicial review petitions relating to reserved matters, the Court of Session **may** transfer the petition to the UK Upper Tribunal where certain conditions are satisfied (2007 Act, section 20).

Furthermore, where the subject matter of the case falls within a category prescribed by secondary legislation, the Court of Session **must** transfer it (2007 Act, section 20). So far only one minor category of case has been introduced, namely, where the petition seeks to challenge a procedural decision or a procedural ruling of the UK First-tier Tribunal (Act of Sederunt (Transfer of Judicial Review Applications from the Court of Session) 2008 (SSI 2008/357)).[10]

Originally, immigration and asylum cases were excluded from the scope of the reforms. Reducing the jurisdiction of the courts in this area was viewed as particularly controversial given that such cases often relate to fundamental rights. However, the law was subsequently amended in 2009 (and again in 2013) to allow for such transfer.[11] So far such transfers are rare in practice. (For a successful example see A Petitioner (2014)).

[10] For an illustrative example of section 20 in operation see Currie, Petitioner [2009] CSOH 145; 2010 SLT 71.
[11] Section 53 of the Borders, Citizenship and Immigration Act 2009 permitted (but did not require) such transfer in relation to certain types of immigration and asylum case. Section 53 was repealed on 1 November 2013 by section 22 of the Crime and Courts Act 2013 (c. 22). This also made amendments to the original version of section 20 of the 2007 Act removing the exclusion relating to immigration and asylum cases.

Transfer of cases from the Court of Session to the Upper Tribunal for Scotland

The 2014 Act contains similar provisions relating to the relationship between judicial review petitions commenced in the Court of Session and the Upper Tribunal for Scotland. However, unlike the position relating to the UK Upper Tribunal, there is no requirement for a mandatory transfer in any circumstances.

One of the conditions which must be satisfied for the court to exercise its discretion to transfer is that the petition falls within a category specified in secondary legislation (2014 Act, section 57). To date, no relevant secondary legislation has been made.

FUNDING A JUDICIAL REVIEW ACTION

As already alluded to, a petitioner in a judicial review action can be exposed to significant financial risk. Consequently, a key issue for any would-be petitioner is how to fund court action.

LEGAL AID AND JUDICIAL REVIEW

It is possible for a private individual to qualify for either (or both) 'Advice and Assistance' and 'Civil Legal Aid' in relation to an action for judicial review.

Advice and Assistance funds legal advice from a solicitor but does not cover the solicitor appearing in court and representing the person. Ordinarily a solicitor can offer advice, up to an initial limit of £95, without any recourse to the Scottish Legal Aid Board (SLAB), assuming the client qualifies on financial and other grounds (SLAB 2013; SLAB 2014a).[12]

Civil Legal Aid can fund the solicitor appearing in court in the judicial review action itself. However, Civil Legal Aid is only granted by SLAB where a number of tests are met. One of the tests is that it is "reasonable in the particular circumstances of the case" that the applicant should receive Civil Legal Aid (Legal Aid (Scotland) Act 1986 (c 47), section 14(1)(b)). It is this test which, in practice, can create a barrier to funding for judicial review cases. For example, in relation to this test, where a number of people have the same interest in the case, Civil Legal Aid will not be provided to one individual unless it can be shown that that individual will suffer serious prejudice (Civil Legal Aid (Scotland) Regulations (SSI 2002/494), regulation 15).

In assessing reasonableness, another issue is that SLAB will also examine the likely costs of any case and balance these against the benefit an applicant will get from the proceedings. As noted above, judicial review actions are particularly expensive from the outset because they must be raised in the Court of Session, yet the matters they relate to may not be significant in financial terms. On the other hand, a particularly important matter of law or status could justify the expense in the analysis by SLAB (SLAB 2014a, paras 3.20 and 3.25).

PROTECTIVE EXPENSES ORDERS

Overview

As mentioned earlier in the briefing, the normal rule of litigation is that 'expenses follow success'. In other words, the losing party will usually pay the legal expenses of the wining party. However, this rule has been modified for cases in which the litigant seeks to advance the public

[12] However, SLAB (2014b) issued guidance emphasising that if it is "abundantly clear from the outset that there is no question of judicial review being relevant" advice should be limited to diagnostic Advice and Assistance (the most basic level of Advice and Assistance) which has a financial limit of £35.

interest. The aim is to make it less likely that exposure to liability for expenses will deter litigation which is in the public interest.

In a judicial review action (and indeed in some other types of litigation) it is possible for the court to make a 'protective expenses order' ('PEO') or a 'protective costs order' (as it is known elsewhere in the UK). This limits the financial liability of the person raising the action. A PEO can limit liability to a specific sum or declare that, regardless of the outcome of the case, the party raising the action will not be required to pay the expenses of the opponents.

Where the court makes a PEO it may also impose a 'cost capping' order limiting the amount of expenses that the party raising the action may recover in the event of success. The cost capping element where imposed upon petitioners is intended to address the potential for a PEO to operate as a 'blank cheque', enabling a petitioner to litigate it in an unreasonable or disproportionate fashion in the knowledge that they will not incur any liability in expenses (Smith 2011).

There are currently two separate legal regimes in relation to PEOs in Scotland. These are considered in turn below.

PEOs in environmental cases (Chapter 58A)

Chapter 58A of the Court of Session rules make provision for the granting of protective expenses orders in certain proceedings, including judicial review proceedings, relating to the environment. These rules were introduced in 2013 and significantly amended in January 2016, extending the categories of case to which they applied.

Financial limits

Chapter 58A makes provision in relation to how the parties' liability for the other side's expenses can be limited under a PEO. In the case of the applicant, the applicant's liability can be limited to £5,000 or to a lower sum – where he or she satisfies the court that there is a reasonable basis for doing this (rule 58A.4(1) and (2)). Where a PEO is made it must also contain provision limiting the respondent's liability in expenses to the applicant to £30,000 – or such higher sum that the applicant can demonstrate to the court is reasonable (rule 58A.4(3) and (4)).

'Prohibitively expensive'

The court must grant an application for a PEO where the proceedings are "prohibitively expensive" for the applicant (rule 58.2A(4) and rule 58.2B(3)). A case falls into this category if the applicant "could not reasonably proceed with them" in the absence of such an order (rule 58A.1(2)). Various recent Court of Session cases have provided guidance on the nature of this test (Carroll v Scottish Borders Council (2014); John Muir Trust v Scottish Ministers (2014); Gibson v Scottish Ministers (2016)).

Other public interest cases

For other public interest cases not falling under the regime in Chapter 58A, the decision to award a PEO in a particular case, and at what level, is still a matter for the discretion of the courts.

In 2009, the report of the Scottish Civil Courts Review recommended that there should be a new regime for all PEOs in public interest litigation, with the court being required to have regard to specified criteria in their decision-making process (Scottish Civil Courts Review 2009b, recommendations 155 and 156). However, the Review of Expenses and Funding of Civil

Litigation (2013), the so-called Taylor Review, later made recommendations on this topic in 2013. Its report largely favoured the retention of the court's existing level of discretion.

RECENT POLICY DEVELOPMENTS IN ENGLAND AND WALES

In the recent Courts Reform (Scotland) Act 2014 (asp 18) the key procedural changes to judicial review in Scotland mirrored the changes which had been introduced some years earlier in England and Wales. The current Scottish Government has not indicated any intention to further reform the law of judicial review. However, it is always possible that recent developments relating to judicial review in England and Wales may influence Scottish policy direction at some future date. Consequently, a summary of key developments south of the border is provided below.

2013 REFORMS

There was a UK Government consultation in 2012 (Ministry of Justice 2012) on proposed reforms to judicial review. It received broadly negative responses. Thereafter the following changes were implemented by the UK Government in July and October 2013:

- **time limit:** there was a reduction in the time limit for bringing a claim on a planning matter from three months to six weeks. Likewise there was a reduction from three months to 30 days in relation to claims associated with procurement matters (Civil Procedure Rules, Part 54 as amended by the Civil Procedure (Amendment No 4) Rules 2013 (SI 2013/1412));

- **oral hearing fees:** a new fee was introduced (currently £350) for requesting an oral hearing following a refusal of permission to bring a judicial review action

- **right to an oral hearing:** where permission to bring an action is refused, there is also no longer a right to an oral hearing in certain circumstances (Civil Procedure Rules, Part 52 as amended by the Civil Procedure (Amendment No 4) Rules 2013 (SI 2013/1412));

2015 REFORMS

There was another UK Government consultation (Ministry of Justice 2013) in September 2013 on a range of further reforms. These again received broadly negative responses.

Provision was made implementing some of the proposed changes in the Criminal Justice and Courts Act 2015 (c 2). For example:

- **interveners:** In a change to previous practice, interveners may also be ordered to pay the legal costs of another party to the case, where specified conditions are met. The new rules apply unless there are exceptional circumstances which justify a different order (section 87).

- **information about finances:** where applicants apply for permission to proceed for judicial review, they must provide certain information about how the judicial review action is financed. The court has been empowered to order that a person or body identified in the financial information (even though not party to the case) must bear the legal costs of a party to the case (sections 85–86).

- **costs orders:** the ability of the court to make the English equivalent of a PEO in a judicial review case has been removed unless a) specified criteria are met, associated

with the issue of whether the case determines an important matter of public interest; or b) the case relates entirely or partly to the environment (sections 88–90).

At the time of writing sections 85–86 and sections 88–90 are not yet in force.

One of the most controversial aspects of the UK Government's second consultation was proposed changes which would restrict the availability of legal aid in judicial review actions. These had been proposed with the stated purpose of incentivising providers of legal services via legal aid to focus more rigorously on the merits of a claim before starting court proceedings. These changes were implemented via secondary legislation in 2015 (The Civil Legal Aid (Remuneration)(Amendment) Regulations 2015 SI 2015/898 inserting regulation 5A into the Civil Legal Aid (Remuneration) Regulations 2013 (SI 2013/422)).[13]

[13] The original secondary legislation came into force in April 2014. The Civil Legal Aid (Remuneration)(Amendment)(No 3) Regulations 2014 (SI 2014/607) inserted regulation 5A into the Civil Legal Aid (Remuneration) Regulations 2013 (SI 2013/422). However, certain aspects of the 2014 regulations were themselves the subject of a successful judicial review challenge in the case of R (Ben Hoare Bell and Others) v Lord Chancellor ([2015] EWHC 523; [2015] 1 WLR 4175). The 2015 regulations dealt with the specific issues raised in the case but retained the same underlying policy intention of the original regulations.

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