



Law Society
of Scotland

Law Society of Scotland Response

The Independent Review of Administrative Law from
the Constitutional Law Sub Committee

September 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law Sub-Committee welcomes the opportunity to consider and respond to the Independent Review of Administrative Law. The sub-committee has the following comments to put forward for consideration.

General Comments

Preliminary Views

There is a preliminary question as to what extent this review applies to judicial review in Scotland. The Courts Reform (Scotland) Act 2014 (asp 18), is the most significant legislation impacting on judicial review in Scotland. This Act made provision for wide-ranging reforms to the Scottish civil courts system in Scotland, as well as several important reforms to court procedure for judicial review.

The IRAL Terms of Reference set out the Scope of the Review in Note A and states

“The review should consider public law control of all UK wide and England & Wales powers that are currently subject to it whether they be statutory, non-statutory, or prerogative powers “

In their Call for Evidence, the IRAL indicated that, in accordance with their Terms of Reference,

“The panel are therefore interested in receiving evidence in relation to judicial review in its application to reserved, and not devolved, matters.”

However, this appears to misunderstand how judicial review is at present applied in Scotland. Scottish courts do not at present apply different judicial review principles, grounds and procedures depending upon whether the decision being reviewed relates to a reserved matter, such as the Home Secretary's decision in an immigration or a devolved matter, such as the decision of Scottish Ministers relating to salmon fishing.

It may, however, be envisaged that IRAL might consider whether there should be special rules of judicial review applying to specific reserved areas, such as immigration. This could be regarded as part of the law

on reserved matters by virtue of paragraph 2(3) of Schedule 4 to the Scotland Act 1998 because judicial review forms part of Scots private law by virtue of the definition in section 126(4) of that Act.

However, this would fragment the general approach of Scots law to judicial review. It could involve the Court of Session applying different principles and procedures according to the subject matter of the case. It might even be unworkable. This fragmentation is therefore considered to be undesirable.

There is a further matter to be taken into account, namely that the supervisory jurisdiction of the Court of Session, within which judicial review falls, is a matter of constitutional significance. This can be seen from Article XIX of the Acts of Union of 1706 and 1707, whose opening provision states:

“That the Court of Session or Colledge of Justice do after the Union and notwithstanding thereof remain in all time coming within Scotland as it is now constituted by the Laws of that Kingdom and with the same Authority and Priviledges as before the Union subject nevertheless to such Regulations for the better Administration of Justice as shall be made by the Parliament of Great Britain.”.

This preserves the Court and its jurisdiction, whilst permitting reforms for its better operation. Indeed a modern example of new provision for the better administration of justice in the Court of Session's supervisory jurisdiction can be seen in section 89 of the Courts Reform (Scotland) Act 2014 - an Act of the Scottish Parliament, under devolution amending the UK Parliament's Court of Session Act 1988. But care always has to be taken so as not to render the Court's jurisdiction in judicial review ineffective. If matters went that far it could be argued that this would be in breach of the Acts of Union and that the matter was justiciable. Although the courts so far have been able to sidestep whether such a challenge would be justiciable, we do not consider that the IRAL should attempt to resolve this particular issue of justiciability - that would be a highly controversial move in Scotland. The fundamental law issues raised by this matter can be seen from the speech of Lord Hope of Craighead in a case that went before the Committee for Privileges of the House of Lords, namely *Lord Gray's Motion* 2000 SLT 1337 at page 1345.

Conclusion

It is of course quite legitimate to ask whether the law does strike the correct balance between challenging the lawfulness of administrative action and the interests of the administration but, in our view, this is what the courts have always attempted to do both substantively and procedurally.

Therefore, our answer to the question upon which we have been asked to submit evidence is that the courts should be left, and trusted, to develop their jurisprudence in this area and to find the correct balance on their own.

If, however, contrary to the view stated in our answer above, legislation is proposed, we cannot emphasise enough that no attempt should be made to exclude judicial review, even in a class of case. Our constitutional democracy depends on Parliament making laws; the Executive acting within those laws and within any prerogative powers which it exercises at common law; and, individuals with sufficient interest being able to petition the Court for it to supervise the legality of the Executive's acts. It surely is the measure of good quality, modern, democratic government, to which all in the UK have aspired, that the Executive should achieve its objectives only by lawful means and that the Courts should remain able effectively to hold it to account.

1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

The Press Release which accompanied the Call for Evidence referred to “the elected Government’s right to govern”.

However, the Government has no inherent powers to govern, the powers which it exercises are mainly conferred upon it by Parliament in statute or subordinate legislation or, to a limited extent, by the prerogative at common law.

Judicial review is about the process or legality of official decision making, rather than the substance of the decisions themselves. What the courts are doing by judicial review is to ensure that the Government exercises those powers within their statutory or common law limits. This is an essential aspect of the rule of law and is a fundamental constitutional principle. In this way, they provide the balance which is referred to in the question

A constant theme which seems to underlie most judicial review cases is the distinction, as Professor Elliot puts it, between judicial review challenges that are concerned with whether the impugned executive action lies within the scope — or, as it is sometimes put, the “four corners” — of the power, and challenges which contend that a power exercised within its “four corners” has nevertheless been used unlawfully (e.g. on the ground that the rules of natural justice were not observed in its exercise).

Statutory powers

1 When Parliament confers powers or duties upon the Government, it is for the courts to determine how those powers and duties are to be interpreted and therefore how they are to be exercised.

2 In doing so, the courts are interpreting how Parliament intended that those powers and duties should be exercised by Ministers. In this sense, the original jurisprudential basis of judicial review may be said to have been an aspect of statutory interpretation

3 However, the courts have also made it clear that their object in doing so is to maintain the rule of law, As Lady Hale said in *R (on the application of Cart) v The Upper Tribunal* [2011] UKSC 28, para 37

“..the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law – that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise”.

So the courts have construed those statutory powers and duties in such a way as would accord with what the rule of law considers to be the fundamental rights of the individual and “ will decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear”(Lady Hale in *R (Jackson) v Attorney General* [2005] UKHL 56 para 159).

4 Therefore, for example, the courts will construe so called ouster clauses in such a way as not to remove the right of individuals to seek judicial review of actions or decisions of the executive or tribunals. See *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, *R (on the application of Cart) v The Upper Tribunal* [2011] UKSC 28, *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

5 It is sometimes said that cases such as *Cart and Privacy International* illustrate that the Supreme Court fails to give effect to Parliament's intention as expressed in clear words in the ouster clauses and therefore conflicts with the doctrine of parliamentary sovereignty.

6 However an analysis of these decisions shows that they are based on the precedent of *Anisminic* which established that all legal errors are jurisdictional and open to review. It is, however, the case that they also refer to the common law rights of individuals under the rule of law to seek judicial review. The clearest expression of this view was by Lord Neuberger in, *Evans v Attorney General* 2015 UKSC 21 but he did not claim that the rule of law principles prevail over parliamentary sovereignty.

5 Accordingly, the current approach to statutory interpretation in most judicial reviews cases involving statutory provisions will be an interpretation which takes into account the common law principle of legality or the rule of law as described by Lord Reed in *Axa General Insurance Ltd and Others v The Lord Advocate* [2011] UKSC 46 para 152

“The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.”

This approach can be regarded as part of the ordinary development of case law and does not involve any subversion of the doctrine of parliamentary sovereignty.

Prerogative powers

1 Before the *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9 the courts took the view that they could only rule on questions about whether a prerogative power existed (and, by implication, whether its scope had been exceeded), but not on questions about whether such a power had been lawfully exercised.

2 However, today, the courts appear to regard prerogative powers (other than declarations of war) as just another source of executive powers and their exercise is subject to judicial review in the same way as statutory powers.

Justiciability

1 One of the matters which IRAL are required to investigate is whether certain subject/areas should be regarded as non-justiciable and not be subject to judicial review.

2 It is sometimes said that the Supreme Court has shown more judicial activism and interfered more in the action taken by the Government than the House of Lords did. This is said to be illustrated in particular by the decision of the Supreme Court in *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [2019] UKSC 41 that the Prime Minister's advice to the Queen to prorogue Parliament for no adequate reason at a critical time of the Brexit process was unlawful. There were mixed views as to whether the Supreme Court had trespassed into a political area.

3 However it should be noted that the Supreme Court in that case did not follow the Court of Session's decision that the exercise of the prerogative by the Prime Minister was unlawful because it was motivated by an improper purpose. The Supreme Court instead held that the scope of the prerogative power had been exceeded because there was no adequate reason given for it. This followed the traditional distinction between scope and exercise of prerogative powers which was referred to above.

4 Accordingly, if IRAL was to recommend that decision in that case was in effect to be overturned and the prerogative of prorogation was not to be subject to judicial review in the future, it would be necessary provide not only that the exercise of that prerogative was non-justiciable but also that the courts could not even examine the scope of it. Despite such express words, such a provision could itself be subject to challenge by judicial law as to its compatibility with the rule of law and might raise the very issue which Lord Neuberger avoided in *Evans*, namely whether parliamentary sovereignty could override the rule of law. We do not suggest, therefore that any such recommendation should be made.

Balance

- 1 The courts should be trusted to find
- 2 the appropriate balance "between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government."

2 Both the Scottish and English courts have shown that they are capable of doing this. For example, they have held that unappealable decisions of the Upper Tribunal are subject to judicial review but only in cases where some important point of principle or practice or some other compelling reason is involved – see *Cart v the Upper Tribunal* 2011 UKSC 28. This decision was followed in relation to the supervisory jurisdiction of the Court of Session in *Eba v Advocate General for Scotland* [2011] UKSC 29.

Additional cases in Judicial Review

Judicial Review in Scotland has allowed effective challenges to occur. The following examples show where significant individual rights have been capable of being asserted to the benefit of the public at large and to ensure ultimately that the rule of law is applied and democracy in its broadest sense is maintained:

Napier v The Scottish Ministers in April 2005 CSIH 16 was a case about prisoners' conditions where a declarator was pronounced confirming a breach of a prisoner's human rights. It ultimately brought about the end of slopping out and other conditions in Scotland to the benefit of many individuals who are classified as "vulnerable" - being under the total control of a Government organisation, some on remand.

Davidson v Scottish Ministers [2004] UKHL 34 where the Supreme Court confirmed that there could be interim orders against the Crown in Scotland.

Somerville (AP) (Original Appellant and Cross-respondent) v. Scottish Ministers (Original Respondents and Cross-appellants) (Scotland) [2007] UKHL 44 which dealt with the issue of segregation and time limits for bringing claims.

The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51 which resulted in the Supreme Court striking down the legislation relating to appointing a named person to every child in Scotland.

The consultation paper's title is *Does judicial review strike the right balance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government?*

Our answer to this question is an unequivocal yes. The paper fails to establish any imbalance between enabling citizens to challenge the lawfulness of government action and allowing the executive and local authorities to carry on the business of government.

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.

2. Section 2 – Codification In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

We do not favour any statutory codification of the principles or grounds of judicial review in Scotland. These should be left to the courts to develop in the ordinary way. Further, as regards the procedure of judicial review in Scotland, in light of its recent reform by section 89 of the Courts Reform (Scotland) Act 2014, we consider that any review of that should be undertaken by the Scottish Parliament's Public Audit and Post-Legislative Scrutiny Committee.

Certainty and Clarity

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

No for the reasons stated above.

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

We consider that it is clear what decisions and powers are subject to judicial review in Scotland.

Generally, judicial review is an administrative action designed to ensure those persons and public bodies with delegated powers act within the scope of the power conferred upon them by Parliament (i.e. the doctrine of *intra vires*).

It is important to remember that judicial review is concerned with the process by which decisions are made, not with the merits of the decisions themselves (see *R v Secretary of State for Scotland* [1999 SC (HL) 17] at 41 - 42 per Lord Clyde). Nor is it concerned with the merits of the legal rules being applied by the administrative body.

In *West v Secretary of State for Scotland* [1992 SC 385], Lord Hope, undertook a review of the supervisory jurisdiction of the Court of Session. He held that a person to whom a 'jurisdiction' has been delegated or entrusted by statute, or agreement, or other instrument may be judicially reviewed. A person to whom a jurisdiction has been delegated can be a natural or non-natural person (e.g. *Air Ecosse Ltd. v Civil Aviation Authority* [1987 SLT 751]).

In *West*, Lord Hope outlined the scope of judicial review in terms of a tripartite relationship between:

- the source of the decision-making power
- a person who exercises that power, and
- the person(s) affected by the decision

Specifically, Lord Hope noted, at p 413 of *West v Secretary of State for Scotland* [1992 SC 385], that:

'Contractual rights and obligations, such as those between employer and employee, are not as such amenable to judicial review. The cases in which the exercise of the supervisory jurisdiction is appropriate involve a 'tripartite relationship' between the person or body to whom the jurisdiction, power or authority has been delegated or entrusted, the person or body by whom it has been delegated or entrusted and the person or persons in respect of or for whose benefit that jurisdiction, power or authority is to be exercised'.

Lord Hope noted that the principal purpose of a judicial review is to ensure that a decision maker does not exceed its authority, or fail to perform its duty, and should not be viewed as akin to an appeal against a decision. The court is not in a position to review the decision, or omission, on its merits. The Court of

Session has power to ensure that public bodies act lawfully. It will not intervene in the merits of the decision taken as Parliament has entrusted public bodies to carry out its functions.

These cases set out clearly the nature of judicial review and the decisions which are challengeable. Judicial review exists in order to provide individuals and organisations the ability to hold bodies accountable for the decisions that they take, and the manner in which those decisions are taken. This is an integral part of the democratic process. Any attempts to limit the scope of judicial review should be of concern to anyone concerned with the maintenance of the rule of law.

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. 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.

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.

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.

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.

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.

Planning cases

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

5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

In Scotland a petition for judicial review can only be made in the Outer House of the Court of Session. 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, it can (until the end of the Transition Period) be referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The CJEU does not decide the substance of the case but having given its ruling on the validity of a particular piece of EU law, returns the case to the national court for decision.

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.

The rules concerning the judicial review process in Chapter 58 of the Rules of the Court of Session (RCS) are clear, intelligible and well understood by practitioners and the court. The recent changes to the rules have streamlined the process and it appears to be working well in practice.

There have been a few cases recently where the permission stage (i.e. RCS 58.7-58.10) has required to be clarified by the court. Specifically, the court has required to consider whether oral hearings are required when permission to proceed has been denied. There appears to be confusion in this regard by both litigants and the court. It may be useful if the rules on permission were reframed in order to make the process clearer.

Section 3 - Process and Procedure

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

Yes, the current procedures in Scotland strike the correct balance.

An application for judicial review must be made before the end of:

- the period of three months beginning with the date on which the grounds giving rise to the application first arise (Court of Session Act (CSA) 1988, s 27A(1)(a)), or
- such longer period as the court considers equitable having regard to all the circumstances (CSA 1988, s 27A(1)(b)) RCS 58.3(2) provides that the application is made when the petition is lodged with court.

In *Odubajo v Secretary of State for the Home Department* [2020] CSOH 2, it was held that the three month time limit begins to run on the date on which the relevant decision was made. However, if that decision is not conveyed to the Petitioner until a later date, that could be taken into account in considering whether to extend the time limit.

In *Wightman v Advocate General* [2018] CSIH 18, the court held that the three-month time limit could not be circumvented by persuading a person to repeat a decision or other act complained of.

Generally, the three-month time limit for bringing applications for judicial review has been observed strictly by the court. However, there have been some limited exceptions. For instance, in *Energiekontor UK Ltd v Advocate General for Scotland* [2020] CSOH 37, the court held that it was equitable to grant permission to proceed, though the petition was *prima facie* time barred, as the issue raised was an important one, no immediate practical consequences would follow, and no prejudice had been identified.

We take the view that the three month period to raise an application for judicial review is enough. However, some litigants find the three month time period to be very tight and any limitation on that period may affect the number of judicial reviews raised. Empirical evidence from England suggests that the reduction in the three month period reduces the time for negotiation and therefore may lead to judicial reviews which could have been resolved without going to court, being raised unnecessarily.

It is difficult to see how the three month time limit hinders good government.

Looking at this question from the perspective of how long a judicial review takes to run its course, including any appeal, the process takes longer than what was envisaged by the rules. This can be problematic for both petitioners and the bodies which are being challenged.

In terms of the court's rules, following the grant of permission to proceed with the petition, the Keeper of the Rolls must fix:

- a date for the substantive hearing, which can't be more than 12 weeks from the date permission is granted ([RCS Ch 58.11\(1\)\(a\)](#)), and

- a date for a procedural hearing, which can't be more than 6 weeks from the date permission is granted (RCS Ch 58.11(1)(b))

Following the substantive hearing, it is normally some months before a decision is released (though the court has shown that it can act quicker if it needs to). If that is the case, then one could be looking at 6-9 months from the date of the challenged decision before the court adjudicates on the matter. Any changes to the procedures, or the culture of the court, which could speed that process up would be welcome.

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

In general, the rule in Scotland is that expenses follow success. As such, an unsuccessful party will be liable to the successful party in expenses. That position is perfectly clear and is applied by the courts with very limited exceptions. Given that the expenses are awarded judicially in terms of the rules it is difficult to see how "leniency" is a word which applies in this context.

However, one must also consider the issue of Protective Expenses Orders ('PEO') in this regard. A PEO helps litigants to restrict their potential exposure to adverse expenses. It provides certainty and predictability regarding potential exposure to opponent's expenses. In terms of RCS 58A.7, the PEO must limit:

- the petitioner's liability to pay the respondent's expenses to £5,000 (RCS 58A.7(1)(a)), and
- the respondent's liability to pay the petitioner's expenses to £30,000 (RCS 58A.7(1)(b)) (known as the 'cross-cap')

Chapter 58A concerns PEOs in environmental cases. However, they are also available at common law, though are rarely granted.

In general, the procedure for applying for a PEO can lead to delay to the proceedings, where the parties need to engage in litigation (including appeals) concerning whether or not a petitioner should be awarded a PEO, before the substance of the judicial review is even considered. This opposition to a PEO is sometimes to the detriment of the opposing body. For example, in *Wightman and others v Secretary of State for Exiting the European Union* [2018] CSIH 62 a protective expenses order was successfully opposed in the Outer House. The PEO was granted in the Inner House and on success of course the Respondent required to pay the Petitioner's legal expenses for the earlier part of the period unprotected by a PEO.

Changes to the procedure for PEOs could be made to ensure that decisions are reached swiftly to allow the judicial review itself to proceed unhindered, but litigant's attitudes are also a factor in ensuring that the litigation proceeds with pace.

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

We believe the costs of a judicial review claim are proportionate, though they are significant.

Legal aid and PEOs (if the petitioner is acting in the public interest) are available to reduce the potential financial risk. But in terms of access to justice, there is already a very significant portion of society that is not able to litigate due to the expense and the exposure to expenses. Increased efficiency in the process would assist in reducing costs, but that may not be by much.

With regard to unmeritorious claims, the permission stage procedure currently contained in Chapter 58 RCS strikes a reasonable balance between maintaining access to the remedies of judicial review, whilst filtering out unmeritorious applications. Given that applications for judicial review make up less than 10% of the case load in the Court of Session, it does not seem like there is a mischief which limiting the scope of judicial review is required to deal with.

In terms of the RCS (Rules 58.7-58.10), once an application is lodged, the court must consider if the petition should be granted permission to proceed. This procedure is meant to filter out unmeritorious claims, and it appears to function well. In order for a petition to proceed, the petitioner must have sufficient interest and the petition must have real prospects of success.

In 2019, 44% of judicial review applications were granted permission with an oral hearing, 38% were appointed to an oral hearing (1/3 were granted permission), and 20% were refused permission without a hearing. Further, 47% of applications for review at an oral hearing were refused. The statistics bear out that the filtering mechanism in the rules appears to be working well.

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 winning 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).

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

The orders available to the Lord Ordinary under RCS Rule 58.13(3) are reduction, declarator, suspension, interdict, implement, restitution, and payment (whether of damages or otherwise)

These orders cover a wide range of possibilities and can be mixed and matched if the circumstances require it. Alternative remedies are already available in the form of, for instance, internal complaints procedures, statutory rights of appeal, external complaint procedures, alternative dispute resolution, and referrals to an ombudsman.

It is worth noting that the rule introduced in England in 2015 that a remedy must not be granted if it would make no material difference does not apply in Scotland where, as in England, remedies are discretionary.

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

In many instances, there will be very little that can be done as petitioners may simply disagree with a decision, or how it was taken. The need for judicial review petitions to proceed will self-limit to some degree if bodies are transparent about their decision making, assiduously follow their procedures, and provide cogent reasons for the decisions taken. This will not exclude judicial review, but it may make it more difficult for petitioners to challenge decisions if the process is transparent and carried out in accordance with the relevant rules and procedures.

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

Like much litigation, petitions for judicial review tend to settle in large numbers. It is often the case that bodies will simply agree to take the decision again and remedy any failings raised in the petition. Settlement most often occurs because it reduces the parties' exposure to costs and provides certainty as to the outcome of the process.

12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

ADR has some role to play. A petitioner could ask the decision maker to attend mediation, though there is no requirement for the decision maker to agree. ADR generally requires to be a voluntary procedure if it is to work properly. We would not support a change to the Rules of the Court of Session which sought to make ADR a mandatory part of the judicial review process. Such an approach would increase the time a petition took and would increase the costs. Parties should be encouraged to utilise ADR where appropriate but should not be obliged to do so.

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

Historically, a petitioner required to have both title and interest in order to raise an action for judicial review. The old test of title and interest was overtaken by AXA General Insurance v Lord Advocate [2011] UKSC 46, where Lord Hope held that the private law rule that a party had to show title and interest had no place in judicial review proceedings. The court in Axa took the view that 'standing' was a more appropriate word to be adopted, and that the question should be decided on the basis of interests rather than rights i.e. adopting for Scotland the 'sufficient interest' test used in England and Wales. This has been confirmed by the Courts Reform (Scotland) Act 2014.

Accordingly, the issue of standing has been settled for some time and any change would require legislation in Scotland. In each of Wightman and Cherry standing was argued by the Government.

In those two cases if arguments about standing had not been run and the principal arguments had been dealt with by consensus, those litigations could have been concluded relatively quickly.

Lord Hope was the view that the court's function regarding the public interest element of judicial review was to preserve the rule of law, and not just individual rights. He noted that there was a public interest in judicial review applications which goes beyond private law rights (e.g. in petitions which concern environmental protection).

Any move away from the 'sufficient interest' test would appear retrograde and would lead to an erosion of the public's ability to hold Government (and private bodies in Scotland) to account.

Final comments

Judicial review in Scotland 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 an internal complaints procedure or complaining to an ombudsman such as the Scottish Public Services Ombudsman or other external complaints handling body.

Proposals to restrict judicial review have the potential to significantly alter the constitutional balance of separation of powers.

We understand that IRAL is to report in the Autumn. We urge the Government to consult with the Devolved Administrations, the Judiciary in each part of the UK and with relevant stakeholders before committing to a particular course of action especially one involving legislation.



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