

SPICe Briefing

Judicial Review

27 October 2009

09/75

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Judicial review is a type of court action which allows parties to challenge the exercise of power by UK and Scottish ministers, UK and Scottish government departments and agencies, non-departmental bodies, local authorities and other official decision makers. In certain circumstances judicial review can be used to challenge acts of the UK and Scottish parliaments. It can also be used to challenge subordinate legislation.

This briefing provides an introduction to judicial review. 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.



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EXECUTIVE SUMMARY

Judicial review is a type of court action which allows parties to challenge the exercise of power by UK and Scottish ministers, UK and Scottish government departments and agencies, non-departmental bodies, local authorities and other official decision makers.

Whilst there have been significant developments affecting judicial review in recent years, it remains the case that judicial review is primarily concerned with the process or legality of official decision making, rather than the merits 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. This aspect of judicial review does not always accord with the expectations of people considering using judicial review.

The accession of the UK to the European Community, the coming into force of the Human Rights Act 1998, and the creation of a devolved Scottish Parliament and Government (with their powers limited by the Scotland Act 1998) have all had an important impact on the nature of judicial review in Scotland. In particular, they 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.

Aside from the new grounds of review referred to above, the main grounds of judicial review in Scotland are that: the decision maker acted unlawfully; that the decision was made using an unfair procedure; and that the decision was so unreasonable as to be irrational. There are also developing grounds of judicial review based on the concepts of “legitimate expectations” and “proportionality”.

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 new UK [Supreme Court](#). The court action is raised by way of a document known as a “petition”, the person or body raising the action is called a “petitioner” and the person or body defending the action is called “the respondent”.

Between 1999 and 2008, the number of petitions for judicial review raised in the Court of Session ranged from 142 to 261 a year. Petitions associated with immigration formed a substantial proportion of the total during this period, although numbers in any one year varied between 45 and 153. During the years 2004 to 2007, prison-related petitions also formed a significant proportion of all judicial review petitions.

The rules on “standing” determine who may bring an action for judicial review. In Scotland they require that the petitioner has both: (a) title to sue; and (b) interest to sue. A petitioner who has title to sue must be party to some legal relationship which gives them some right which the respondent either infringes or denies. What constitutes sufficient interest to sue depends on the circumstances of the individual case.

The policy justification for the Scottish rules on standing is that they ensure that the Court of Session’s time is not taken up by petitioners who have an insufficient connection with the issues raised, and also to ensure the respondent is not subjected to the trouble and expense of litigation by such petitioners. However, the relatively restrictive rules on standing applied by the Court of Session compared to the Administrative Court in England and Wales have been criticised, and have created particular difficulties for NGOs seeking to represent the views of others. Consequently NGOs have on occasion raised judicial review actions south of the Border (where it is possible to do so) rather than risk being prevented from airing the merits of the matter before the courts in Scotland.

In England and Wales the actions and decisions of private (as opposed to public) bodies are not usually open to judicial review. However, in Scotland the scope of judicial review is not restricted to the actions and decisions of public bodies and can extend to private bodies where certain conditions are satisfied. Conversely, just because a body is a public body does not mean that all of its acts and decisions can be subject to judicial review (eg private contractual disputes between a public body employer and employee cannot form the basis for an action for judicial review).

If an action for judicial review is successful the Court of Session can award a variety of remedies. "Reduction" is probably the most common of the remedies sought under judicial review. It allows the court to quash the original decision and remit the matter to the decision maker to consider it anew, although in keeping with the nature of judicial review, the court will not express a view on what it thinks the ultimate decision should be. A "declarator" is another frequently granted remedy and is a pronouncement that an individual or body has a specific right or duty, useful where this has been doubted or denied.

Recent UK legislation (the Tribunals, Courts and Enforcement Act 2007 and the Borders, Citizenship and Immigration Act 2009) empowers (and in some circumstances compels) the Court of Session to transfer Scottish judicial review cases relating to matters reserved to the UK Parliament to the Upper Tribunal of the new unified tribunal structure created at a UK level. This change has been controversial, particularly in relation to immigration cases which form a significant proportion of the Court of Session's current judicial review case load.

There have been two recent policy reviews affecting Scottish judicial review actions – the review of administrative justice carried out by the Administrative Justice Steering Group and the Scottish Civil Courts Review led by Lord Gill. The final report of Administrative Justice Steering Group was published in June 2009 (Consumer Focus Scotland 2009a; Consumer Focus Scotland 2009b) and the final report of the [Scottish Civil Courts Review](#) (2009a, 2009b and 2009c) was published on 30 September 2009. Chapter 12 of the final report of the Scottish Civil Courts Review makes a range of recommendations relating to judicial review, including a recommendation to reform the current law on standing.

Judicial review is usually a remedy of "last resort" in the sense that it may be used only when other available options have been exhausted. Other options open to individuals who wish to challenge administrative decisions include using a body's internal complaints procedures, exercising a statutory right of appeal or complaining to an ombudsman or other external complaints handling body. The Scottish Public Services Ombudsman is the main complaints handling body operating in Scotland.

INTRODUCTION AND OVERVIEW

Judicial review is a type of court action which allows parties to challenge the exercise of power by UK and Scottish Ministers, UK and Scottish government departments and agencies, local authorities and other official decision makers.

Whilst there have been important developments affecting judicial review in recent years, it remains the case that, to a large extent, judicial review is concerned with the process or legality of official decision making, rather than the merits of the decisions themselves. Consequently, an action for judicial review is not equivalent to a statutory right of appeal where the court can substitute its decision for that of the original decision maker.¹ This aspect of judicial review does not always accord with the expectations of people seeking to challenge decisions by way of judicial review.

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 new UK Supreme Court. The court action is raised by way of a document known as a “petition”, the individual or body raising the action is known as “the petitioner” and the individual or body defending the action is known as “the respondent”.

This briefing provides an overview of judicial review in Scotland, including recent policy developments affecting this area of law. In relation to recent developments, the final report of the [Scottish Civil Courts Review](#) (2009a, 2009b and 2009c) published in September 2009 is particularly significant.

The system of judicial review in England and Wales has similarities with that in Scotland but also differs from it in a number of respects. Where it is thought that a comparison of the systems will improve understanding of the Scottish system, the system in England and Wales is referred to in this briefing. However, a comprehensive treatment of judicial review in England and Wales is outwith its scope and for this see [The Judge over your Shoulder](#) (Treasury Solicitor’s Department 2006) and [Judicial Review: a Short Guide to Claims in the Administrative Court](#) (Horne and Berman 2006).

STATISTICS ON JUDICIAL REVIEW ACTIONS

Judicial review petitions are currently raised in the Court of Session in respect of a wide variety of matters devolved to the Scottish Parliament (including housing, planning and licensing) as well as matters reserved to the UK Parliament (such as immigration control and social security benefits).

The following table provides a break down of Court of Session actions initiated by petition for judicial review.

¹ Sometimes a statutory right of appeal is also restricted to points of law only, as opposed to extending to consideration of the facts of the case and the correctness of the decision taken. Statutory appeals restricted to points of law more closely mirror the nature of judicial review actions than other types of statutory appeals. For further discussion of this issue see Consumer Focus Scotland 2007a, para 6.52.

Table: Court actions initiated by petition for judicial review, 1999 to 2008²

Subject Matter	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Immigrants	73	45	68	68	99	95	74	101	130	153
Housing (homeless)	14	19	15	11	4	5	2	9	6	3
Prison authorities	3	4	7	5	9	90	82	54	59	7
Licensing board	3	3	22	2	8	7	3	0	2	1
Planning permission	10	14	16	10	5	17	10	8	9	5
Social security benefits	1	2	4	3	5	8	1	0	1	0
Other	48	55	76	61	45	39	57	59	32	25
Total	152	142	208	160	175	261	229	231	239	194

Sources: Scottish Government 2009; Scottish Civil Courts Review 2007; Scottish Executive 2004

Between 1999 and 2008, the number of petitions for judicial review raised in the Court of Session ranged from 142 to 261 a year. Petitions associated with immigration formed a substantial proportion of the total during this period, although numbers in any one year varied between 45 (in 2000) and 153 (in 2008).

During the years 2004 to 2007, prison-related petitions also formed a significant proportion of all judicial review petitions. The large increase in such petitions in 2004 may be linked to a judicial review ruling in April of that year that the conditions in which the petitioner had been confined, which included being held in a shared cell with slopping out, contravened rights protected under the European Convention on Human Rights and gave rise to a right to damages.³ The decrease in petitions may be linked to improvements in the prison estate and an increase in the use of sheriff court processes to raise actions connected with the use of slopping out.

THE CHANGING FACE OF JUDICIAL REVIEW

IMPACT OF EUROPEAN COMMUNITY LAW

Prior to the accession of the UK to the European Community in 1972, the UK Parliament was recognised by the UK courts as sovereign, meaning that acts of Parliament were treated as the supreme law of the land and were immune from judicial review. However, since accession (as a result of the European Communities Act 1972) the UK courts have been required to apply European Community (“EC”) law as interpreted by the European Court of Justice and, in any area in which EC law is applicable, to secure the full and effective protection of EC law rights over and against national law.

An important consequence of this is that acts of the UK Parliament (and other forms of UK law and administrative decision-making) can now be the subject of a judicial review action in the national courts on the ground of incompatibility with EC law. Furthermore, unless the UK Parliament has expressly stated an intention to legislate inconsistently with EC law, where an inconsistency is found between a “directly effective” rule of EC law⁴ and a provision of an act of the UK Parliament, the national courts are obliged to set aside the provision of the act of Parliament.

² This information is usually contained within the Scottish Government’s Civil Judicial Statistics publication but the publication has been suspended due to significant concerns surrounding the accuracy of some of the data it contains. Therefore, the data in this table and the associated narrative should be used with caution and it should be appreciated that firm conclusions cannot be drawn from the data provided.

³ See the decision of the Outer House of the Court of Session in *Napier v Scottish Ministers* 2005 1 SC 229 – subsequently confirmed by the Inner House (2005 1 SC 307).

⁴ A “directly effective” rule of EC law is one that can be relied upon directly by individuals without any form of domestic implementing legislation.

IMPACT OF THE HUMAN RIGHTS ACT

The Human Rights Act 1998 (“the Human Rights Act”), which came fully into force in October 2000, provides for certain rights protected by the European Convention on Human Rights in UK law (“Convention rights”).

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). Consequently, following the entry into force of the Human Rights Act, victims of such acts by public bodies have been able to challenge them before the national courts, including by way of judicial review, without having to resort to the European Court of Human Rights. Section 6 allows persons whose rights have been infringed to challenge both specific administrative decisions and the validity of subordinate legislation under which decisions are made.

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. Therefore, some cases of potential inconsistency between provisions of acts of Parliament and Convention rights can be resolved by interpretation. 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 (in Scotland the Court of Session or the High Court of Justiciary) can issue a “declaration of incompatibility” in relation to that act (sections 3 and 4 of the Human Rights Act). However, the declaration does no more than establish that there is an incompatibility between the act and a Convention right. In contrast to the position with EC law, it does not make the act of Parliament invalid and a declaration of incompatibility is not binding on the parties against which it is issued and 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 order the repeal or amendment of the legislation in question, as they think appropriate to remove the incompatibility (section 10).⁵ The petitioner may ask the court to make a declaration of incompatibility in judicial review proceedings.

JUDICIAL REVIEW: SCOTTISH PARLIAMENT AND GOVERNMENT

Although the Human Rights Act also applies to the Scottish Parliament and Government, the powers of both bodies are further limited by the terms of the Scotland Act 1998 (“the Scotland Act”). Significantly, section 29 of the Scotland Act provides that an act of the Scottish Parliament is not law in so far as any of its provisions are outwith the legislative competence of the Scottish Parliament. Provisions outwith legislative competence include those addressing matters reserved to the UK Parliament and those which are incompatible with Convention rights or EC law. Section 57 of the Scotland Act imposes similar limitations on subordinate legislation and acts of (or failures to act by) the Scottish Ministers.

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

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. The requirement that an act of the Scottish Parliament must be within the Parliament’s legislative competence under the Scotland Act opens up the possibility of review on a variety of new

⁵ In deciding how to proceed 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.

grounds, compared to the more limited opportunities available in relation to acts of the UK Parliament (where the review must relate to EC law or Convention rights).⁶ Furthermore, an act of the Scottish Parliament which is found to be incompatible with a Convention right is invalid, whereas, as noted above, an act of the UK Parliament which is incompatible with a Convention right remains valid but can be the subject of a declaration of incompatibility (Human Rights Act sections 3 and 4; Scotland Act section 29).

WHO CAN RAISE AN ACTION FOR JUDICIAL REVIEW?

An important preliminary issue which has to be decided in judicial review cases is whether the petitioner has “standing” (or “locus standi”) to raise the action. In Scotland, the principle of standing requires that the petitioner has both: (a) title to sue; and (b) interest to sue.

TITLE TO SUE

To have title to sue, a petitioner must be party to some legal relationship which gives them a right which the respondent either infringes or denies. In practice, although the legal relationship can arise from other sources (eg a contract or the common law), title to sue is most often derived from the legal relationship created between parties by a statute.

Statutory duty owed to the public

Where a statutory function is owed to the public as a whole, all members of the public have title to sue (*Wilson v Independent Broadcasting Authority* 1979 SC 351; *Scottish Old People’s Welfare Council, Petrs* 1987 SLT 179 hereafter “the SOPWC case”).

In the SOPWC case the petitioner sought to challenge, by way of judicial review, the legality of a circular purporting to give guidance on a state benefit relating to severe weather conditions. The benefit was available to any member of the public that qualified for it. In this situation the judge expressed the view that any member of the public had title to sue. The judge described the petitioner as a voluntary association comprised of members of the public and stated that, in his opinion, if a statute creates a duty to the public as a whole then an association comprised of such members of the public also has title to sue. (However, see below for the problems that subsequently arose for this petitioner as a body in relation to “interest to sue”.)

Statutory functions affecting more limited categories of people

If a statutory function affects a limited category of people, individuals falling outwith that category will be denied title to sue, even in the presence of a demonstrable interest to do so. This issue arose in the case of *Glasgow Rape Crisis Centre v Secretary of State for the Home Department* (2000 SC 527; 2001 SLT 389). In this case a petition for judicial review was brought by a pressure group against the decision of the Home Secretary to let a convicted rapist enter the United Kingdom to take part in a boxing match in Glasgow. The judge decided that the legislation under which the Immigration Rules were made did not create general duties owed to

⁶ As well as the grounds of challenge based on devolution issues under the Scotland Act, some commentators think that Acts of the Scottish Parliament might be subject to challenge on the basis of grounds of judicial review not stated in the Scotland Act, such as irrationality or procedural unfairness, although they suggest that this will be rare in practice (Clyde and Edwards 2000, para 7.23). The views expressed by judges in recent case law on this point have been mixed and future case law will be important.

the public as a whole and accordingly the petitioners, falling outwith the group of individuals to which the statutory provisions related (ie individuals seeking entry to the UK), had no title to sue.

INTEREST TO SUE

As well as having title to sue, the petitioner must have sufficient interest to do so. What constitutes sufficient interest depends on the circumstances of the individual case (Swanson v Mason 1907 SC 426 at 429; Scottish Old People's Welfare Council, Petrs 1987 SLT 179 at 186).

In the SOPWC case discussed above, some but not all members of the petitioning body were potential claimants of a particular state benefit. However, the body sought to represent the interests of the elderly in general in relation to the state benefit. The petitioner argued that it had sufficient interest because a successful action would relieve it of some of the burden in its own work of seeking to help the elderly. The judge decided this was too remote an interest and thus the petitioner did not have sufficient interest to sue (although it did have title to sue). In contrast, said the judge, an individual benefit claimant would have satisfied the requirements of both title and interest to sue.

The SOPWC case highlights the type of case in respect of which the Scottish courts have been reluctant to find interest to sue – cases where a petitioner will not derive personal benefit from a successful challenge but instead seeks to challenge something which is of direct personal benefit to other people. In other words, cases where the petitioner (eg an NGO) doesn't seek to represent individuals directly but does seek to present the case which they could have put forward in person.

SCOTLAND COMPARED TO ENGLAND AND WALES

Arguments used to justify the Scottish rules on standing include that they ensure that the Court of Session's time is not taken up by petitioners who have an insufficient connection with the issues raised, and also ensure that potential respondents are not subjected to the trouble and expense of litigation by such petitioners (Scottish Civil Courts Review 2009b, para 21; Clyde and Edwards 2000, para 10.10). However, the approach in Scotland to standing has been criticised for being unduly restrictive (eg Mullen 2006; Lord Hope of Craighead 2001 and Scottish Civil Courts Review 2009b, paras 19–20) and can be contrasted with the approach in England and Wales.

In England and Wales there is no requirement of title to sue – the applicant must only have “sufficient interest” in the matter to which the application relates. In recommending a broad inclusive approach to this test of sufficient interest in England and Wales, Lord Diplock observed:

“[There would be a] grave lacuna in (...) public law if a pressure group (...) or even a single public-spirited tax-payer were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and the unlawful action stopped”. (Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited 1982 AC 617 at 645)

One consequence of the relatively restrictive rules on standing in judicial review applied by the Scottish courts is that NGOs (notably environmental and welfare bodies) and other parties interested in challenging the general law or executive decision making have taken their judicial review actions south of the Border (where it is possible to do so) rather than risk being

prevented from airing the merits of the matter before the courts in Scotland (O'Neill 1999, para 6.09; Blair and Martin 2005, page 173; Scottish Civil Courts Review 2009b, para 16).

The final report of the [Scottish Civil Courts Review](#), published on 30 September 2009, recommends that the current law on title and interest should be replaced by a single test, namely whether the petitioner has demonstrated a sufficient interest in the subject matter of the proceedings (Scottish Civil Courts Review 2009b, para 25). This may allow more scope for NGOs to engage in public interest litigation. (The review is considered below under the heading of recent policy developments.)

PUBLIC INTEREST INTERVENTIONS AND NON-GOVERNMENT ORGANISATIONS

In 2000 the [Rules of the Court of Session](#) relating to judicial review were amended to introduce a procedure enabling “public interest interventions” (rule 58.8A). This procedure allows an individual or body not party to the judicial review action in question (and who cannot seek permission of the court to become so by virtue of being “directly affected”) to apply for permission to intervene in the case in a more limited way where the case raises an issue of public interest which the applicant wishes to address. The court may grant permission if it considers that certain requirements are satisfied. Intervention is generally in written form and is subject to rules as to length. Unlike the rules applicable to the actual parties to the case, oral intervention is only permitted in exceptional circumstances.

It was originally thought that the public interest intervention procedure might be used extensively by NGOs to get involved in cases where they did not otherwise satisfy the rules on standing, although this has not yet happened in practice (Blair and Martin 2005).

SCOPE OF JUDICIAL REVIEW ACTIONS

An important issue relating to the scope of judicial review actions is whether there are any types of decision-making bodies whose activities are exempted from the possibility of challenge by way of a judicial review.

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 the public/private distinction in judicial review cases south of the Border is that the decisions of private bodies are not usually open to judicial review. For example, judicial review has been refused to challenge decisions of the Jockey Club and the English Football Association (O'Neill 1999, para 1.39).

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 SC 385) 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 persons to whom that decision making power has been delegated and the person or person affected by that decision making power.⁷ In practice a great many Scottish judicial review cases do concern public bodies but there have also been

⁷ A number of commentators have suggested that the tripartite relationship test set out in the case of *West* may be difficult to apply in practice (eg Munro 2007, para 14.09) and later cases have doubted whether the existence of the tripartite relationship is an essential requirement for the availability of judicial review (eg *McIntosh v Aberdeenshire Council* 1999 SLT 93 at 97). Future case law in this area will be important.

cases concerning bodies which are not obviously “public”, such as arbiters (authorised to act by a contract) and sporting and religious bodies.

Conversely, it should be noted that, just because a body is a public body does not mean that all its acts and decisions will be subject to judicial review. In the *West* case referred to above, judicial review was incompetent because the dispute between *West* and the Secretary of State was essentially a private contractual matter between employer and employee relating to the terms and conditions of *West*’s employment as a prison officer. In general, disputes to which a body is party which relate to “ordinary” questions of private law (contractual and property disputes and claims for reparation) are not within the scope of judicial review.

Whilst the above describes the general position regarding the scope of judicial review in Scotland, note must be made of the 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).

GROUNDINGS OF JUDICIAL REVIEW

This section of the briefing outlines the various grounds of judicial review in Scotland. The main grounds of review are illegality, procedural unfairness and irrationality. As discussed earlier in this briefing, there are also new grounds of review based on non-compliance with EC law, Convention rights and, in relation to the Scottish Parliament and Scottish Government, certain provisions of the Scotland Act. Finally, there are developing grounds of review based on the concepts of “legitimate expectations” and “proportionality”.

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

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.

In general, all decisions or actions taken should be within the scope of the relevant statutory (or occasionally non-statutory) legal powers. Many administrative decisions require decision makers to consider the scope of their legal powers, as well as assessing the facts of cases. Many decisions also require the exercise of discretion. Decision makers may be led to exceed their powers by making errors of law or fact, or by misusing their discretion.

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 (typically referred to as an “error of law”), or an error relating to the facts of a dispute (typically referred to as an “error of fact”), constitutes a ground for judicial review.

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

those decisions. Consequently, in relation to errors of law, the courts would traditionally only intervene in relation to errors 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 relations to decisions which were within the scope of the decision maker's powers. In England and Wales this distinction has been significantly eroded by case law (notably *Anisminic (Anisminic Ltd v Foreign Compensation Commission)* [1969] 2 AC 147 and *Page v Hull University Visitor* [1993] AC 682) and now any error of law on which the decision depends is subject to judicial review. In Scotland, however, the Court of Session has maintained the distinction between jurisdictional and non-jurisdictional error, although this has had little impact in practice. (For discussion, see Munro 2007, paras 14.12–14.13, and Clyde and Edwards 2000, chapter 22.)

In relation to errors of fact, the court in a judicial review action will intervene when material findings of fact are reached on the basis of no evidence, and perhaps also when findings of fact are manifestly contrary to the weight of the evidence, but otherwise consider that addressing errors of fact is the appropriate function of an appeal court rather than a court in a judicial review action (Munro 2007, para 14.13).

It is easy to understand that a decision that is inconsistent with the terms of a statute is subject to judicial review. However, many statutory powers confer discretion so that 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.

Improper purpose

When an authority exercises its lawful powers for a purpose other than that for which they were specifically intended or conferred, the resulting decision may be struck down by the courts as being in breach of the principle of legality. So, for example, when 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 held to have acted illegally (*Gerry Cottle's Circus Ltd v City of Edinburgh District Council* 1990 SLT 235).

Abuse of discretion

The discretion conferred by law should not be exercised partially or arbitrarily. It is for this reason that 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 so that they exclude any regard for the special circumstances of the case under consideration.

Thus, 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 authorities had unlawfully fettered their discretion by rigidly applying a policy in marriage cases of excluding from consideration for such leave all such marriages of less than two years standing (*Salah Abdadou v Secretary of State for the Home Department* 1998 SC 504).

Exercise of power by the wrong person

Even where the power may have been otherwise validly exercised, 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] AC 488) 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.

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.

Failure to take into 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. Thus, 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 but 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 SLT 184).

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 SC 49) an individual who 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, 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

PROCEDURAL UNFAIRNESS

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. 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.

Prescribed rules of procedure

The requirements relating to procedure contained in the statute or other instrument which confers the decision making power 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. (See *London and Clydeside Estates Ltd v Aberdeen District Council* 1980 SC (HL) 1.)

⁸ The matter was ultimately appealed to the House of Lords who did not find in favour of the petitioner. It decided that on close reading of the statutory provisions in question, the sheriff had not in fact taken into account any irrelevant considerations (*Reid v Secretary of State for Scotland* [1999] 2 WLR 28).

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, including 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, but oral hearings will certainly be required in some contexts.

Article 6 of the ECHR, incorporated into UK law by the Human Rights Act, 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 requirement apart, there is no general duty to provide reasoned decisions. However, as Munro observes (2007, para 14.30) 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 EC 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 EC law (Case 222/86 *Union National des Entraîneurs 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 EC law.

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 which 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 the English case of *Coughlan (R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 – “the Coughlan case”) the Court of Appeal determined that:

“To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be consciously taken into account when the ultimate decision is taken.”

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 *Ng Yuen Shiu (Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629). 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

A controversial issue in the developing law of legitimate expectations is the extent to which legitimate expectations attract only procedural protection, or whether the courts may go further and protect the substance of the expectation.

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.

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.

IRRATIONALITY

Decision makers must not exercise their powers in a wholly unreasonable or irrational way. This ground of judicial review is often referred to as “Wednesbury unreasonableness”, a reference to the case where the principle was set out (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 – hereinafter “the Wednesbury case”).

It is important to note that this ground of review does not give judges much opportunity to review the merits of administrative decisions as the ground has a high threshold for judicial intervention which is rarely satisfied. The ground is directed at extremes of administrative behaviour. Lord Greene in the *Wednesbury* case stated that for review to be successful on this ground the administrative decision taken must be “something so absurd that no sensible person could ever dream that it lay within the powers of the authority” ([1948] 1 KB 223 at 229). In *Short v Poole Corporation* ([1926] Ch 66 at 90–91) the judge gave the example of a teacher being dismissed from her post because she had red hair.

PROPORTIONALITY

The principle of proportionality provides that the means for achieving some object ought to be sufficient but not excessive for the purpose of achieving that object. Like *Wednesbury* unreasonableness it involves some judicial consideration of the merits of the decision taken, although compared to *Wednesbury* unreasonableness, proportionality allows much closer judicial scrutiny of the substance of the decision in question.

Proportionality is a well established principle of both EC law and ECHR law. Consequently, a case of judicial review brought on the ground of a breach of a “directly effective” rule of EC law or of Convention rights may involve consideration of this principle.

Furthermore, O’Neill (1999, para 2.98) has argued that a form of the doctrine has, due to the terms of the Scotland Act, been introduced into judicial consideration of the validity of Scottish Parliament legislation. The Scotland Act provides that an act of the Scottish Parliament may affect matters reserved to the UK Parliament where certain conditions are satisfied, including that the act of the Scottish Parliament in question does not have a “greater effect on reserved matters than is necessary” (Scotland Act schedule 4, para 3).

An important issue relating to the nature of judicial review actions today is the extent to which proportionality exists as an independent ground of review in cases not involving EC law, Convention rights or the aspect of the Scotland Act referred to above. The Court of Session has recently confirmed that proportionality is not a free-standing ground of review and that its applicability is limited to cases raising human rights issues and questions of EC law (*Somerville v Scottish Ministers* 2007 SC 140; see also *Somerville v Scottish Ministers* 2008 SC (HL) 45). However, it is possible that the courts will revise their position in future and treat it as a generally available ground of review. (For further discussion of this issue see Munro 2007, para 14.32.)

COMMUNITY LAW, CONVENTION RIGHTS AND THE SCOTLAND ACT

Detailed consideration of the large and complex topics of European Community law, Convention rights, and the requirements imposed on the Scottish Parliament and Government under the Scotland Act, are outwith the scope of this briefing. For further information on the requirements which must be met in these areas, to avoid a successful challenge by way of judicial review, see:

EC law

- The Foundations of European Community Law: an Introduction to the Constitutional and Administrative Law of the European Community (Hartley 2007)
- EU Law (Steiner and Woods 2009)
- the European Commission's webpage on [Application of Community Law](#)

Convention rights

- Scotland's Constitution: Law and Practice, chapter 12 (Himsworth and O'Neill 2009)
- Scotland Act 1998 (Himsworth and Munro 2000)
- Public Law, chapter 10 (Munro 2007)
- A Guide to Human Rights Law in Scotland (Reed and Murdoch 2008)
- the Scottish Government's webpage on [Human Rights](#)
- the website of the [Scottish Human Rights Commission](#)

The Scotland Act 1998

- Scotland's Constitution: Law and Practice, chapter 5 (Himsworth and O'Neill 2009)
- Scotland Act 1998 (Himsworth and Munro 2000)
- Public Law, pages 94–103 (Munro 2007)

REMEDIES AVAILABLE IN JUDICIAL REVIEW ACTIONS

Where an action for judicial review is successful, the Court of Session may award various civil remedies against the decision maker. Relevant remedies are outlined below.

REDUCTION

Reduction is probably the most common of the remedies sought under judicial review. On reduction of a particular decision, the court quashes the original decision and remits the matter to the decision maker to consider the whole matter anew. However, in keeping with the nature of judicial review, the court will not express a view on what the ultimate decision should be.

DECLARATOR

A declarator is another popular remedy in the context of judicial review. It is a pronouncement that an individual or body has a specific right or duty. Although this remedy does not create a new right, 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. For example, an applicant under the Housing (Scotland) Act 1987 may seek a declarator that they are "homeless" in terms of the Act, where a local authority has decided such a matter against them or has failed to make any decision on the matter.

SUSPENSION AND INTERDICT

An order for suspension stops something currently being done but does not prevent a repetition of the actions. On the other hand an interdict looks to the future as it is designed to prevent the commission of a threatened wrong or the continuance of current wrongdoing. These remedies can be applied for separately, but in the context of judicial review it is more common for them to be applied for together and/or 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 perform some act which they are under a legal duty to perform. The remedy exists at common law, and section 45 of the Court of Session Act 1988 also provides that the court may order the specific performance of any statutory duty.

LIBERATION

This type of remedy gives the petitioner their liberty and is appropriate in the case of wrongful or illegal imprisonment. The context in which liberation at present most frequently arises in judicial review is that of immigration and asylum.

INTERIM ORDERS

At the start of a case it is possible to apply for an interim court order, pending a final decision in relation to the case. Such a remedy will be awarded where the court considers, on a preliminary assessment, that the petitioner has a convincing case and that the balance of convenience (assessed by the court by reference to a variety of factors) supports the making of such an order. Interim interdicts and interim liberation are types of interim orders with the latter being frequently asked for in the context of immigration and asylum cases.

DAMAGES

The remedy of damages (ie financial compensation loss) is listed in the [Rules of the Court of Session](#) as a possible remedy in the context of judicial review. However, a successful challenge by way of judicial review does not necessarily lead to any entitlement to damages. Damages can only be claimed or awarded if there can be shown to be a ground entitling the applicant to such an award under the ordinary law, for example under the ordinary law of negligence, under EC law or under the law relating to Convention rights. In most cases, a successful challenge to the validity of an administrative decision does not entitle the petitioner to damages.

REMEDIES AGAINST THE SCOTTISH PARLIAMENT AND GOVERNMENT

An order for reduction, suspension, interdict or specific performance is not competent where the respondent is the Scottish Parliament and instead a declarator is the competent remedy in such circumstances (Scotland Act section 40(3)).⁹

⁹ These orders are also not available in proceedings against any MSP, the Presiding Officer or a deputy, any member of the Parliamentary staff or the Parliamentary corporation (ie the SPCB) where the effect of granting the

Because of the wording of section 21 of the Crown Proceedings Act 1947, it used to be in doubt as to whether interdict and the common law remedy of specific performance were available against “the Crown” in matters concerning purely UK domestic law (as opposed to European Community law). This is significant as “the Crown” in this context includes UK and Scottish Government ministers, departments and executive agencies. However, recent case law has established that section 21 does not apply to judicial review actions and thus interdict or order for specific performance are competent against the Crown (Munro 2007, para 14.33).

RECENT POLICY DEVELOPMENTS RELATING TO JUDICIAL REVIEW

THE EFFECT OF RECENT UK LEGISLATION

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

The Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”), an act of the UK Parliament, created a new unified structure for tribunals reserved to the UK Parliament, including many tribunals operating in Scotland. The 2007 Act provides for judicial review cases relating to certain matters reserved to the UK Parliament to be transferred from the Court of Session to the new Upper Tribunal of the Tribunals Service. The Court of Session may in some cases, and must in others, transfer judicial review petitions to the Upper Tribunal (2007 Act section 20).¹⁰

The UK Government stated that the possibility of transfer is to allow flexibility where the expertise of the members of the Upper Tribunal would be beneficial (Hansard 2006a). However, these changes to the scope of the Court of Session’s jurisdiction in judicial review cases have been criticised on various grounds, including that the differences between Scottish and English judicial review procedure have not been respected. It has also been questioned whether the structural links between the Court of Session and the Upper Tribunal are sufficiently strong for the new system to work well in practice (Lord Clyde 2008).

Immigration and asylum cases

As noted earlier in this briefing, immigration cases make up a significant proportion of the Court of Session’s current judicial review caseload. The 2007 Act, as originally enacted, did not contain provision for the transfer of judicial review cases relating to immigration and asylum from the Court of Session to the Upper Tribunal. Reducing the jurisdiction of the courts in this area was viewed as particularly controversial during the passage of the 2007 Act, given that such cases often relate to rights to liberty and freedom from torture or inhuman or degrading treatment or punishment, and therefore are “at the most sensitive end of judicial review” (Hansard 2006b). However, section 53 of the Borders, Citizenship and Immigration Act 2009 (“the 2009 Act”) does allow for such transfer in relation to certain types of immigration and asylum case.

order would be to give a form of relief which is not available against the Scottish Parliament itself (Scotland Act section 40(4)).

¹⁰ So far an Act of Sederunt (Transfer of Judicial Review Applications from the Court of Session) 2008 (SSI 2008/357) has introduced one such class of cases – those which seek to challenge a procedural decision of a first-tier tribunal under the new structure. In such circumstances, a judicial review application will be automatically transferred to the Upper Tier Tribunal for consideration.

The UK Government's justification for the change made by the 2009 Act was a need to reduce the volume of immigration and asylum judicial review cases coming before the higher courts of the UK and speed up consideration of these types of case (see Thorpe and Garton Grimwood 2009, pages 66–67 for discussion of the policy background). During the parliamentary passage of the 2009 Act, the [Immigration Law Practitioners' Association](#) argued (2009) that a decision on this issue in relation to immigration and asylum cases brought before the Court of Session should be postponed pending the final reports of two policy reviews affecting Scottish judicial review, namely the [Scottish Civil Courts Review](#) led by Lord Gill and the review of administrative justice carried out by the Administrative Justice Steering Group (in respect of which see further below). However, this postponement did not occur.

REVIEW OF ADMINISTRATIVE JUSTICE IN SCOTLAND

The Administrative Justice Steering Group (“AJSG”) was established in 2006 under the chairmanship of Lord Philip to look at the administration of tribunals in Scotland, as well as the wider administrative justice system. The term “administrative justice” includes initial decision making by public bodies, as well as the systems for resolving disputes relating to such decisions (including judicial review).

The AJSG's final report was published on 25 June 2009 and concluded that the current system was not yet adequate to meet the needs of users (AJSG 2009a and 2009b). In relation to judicial review, the report referred to the recent changes introduced by the Tribunals, Courts and Enforcement Act 2007. Against the background of controversy associated with these changes, particularly as they affect immigration cases, the AJSG report recommended that the changes be the subject of further inquiry (AJSG 2009a, para 8.32).

REPORT OF THE SCOTTISH CIVIL COURTS REVIEW

In February 2007, the former Scottish Executive (2007a) announced a wide-ranging review of Scotland's civil courts and the way they work, headed by the Lord Justice Clerk, Lord Gill. The remit of the Review included consideration of current judicial review procedures. The final report of the [Scottish Civil Courts Review](#) (2009a, 2009b and 2009c) was published on 30 September 2009. Chapter 12 of the report sets out a number of important recommendations relating to judicial review actions:

- the current law on title and interest to sue is overly restrictive and should be replaced by a single test, namely, whether the petitioner has demonstrated a “sufficient interest” in the subject matter of the proceedings
- petitions for judicial review should be brought promptly and, in any event, within a period of three months. At present, unlike the position in England and Wales, there is no general statutory time limit applicable to judicial review proceedings, although the Court of Session may decide to reject a petition in accordance with common law principles relating to delay¹¹

¹¹ An exception to the general rule on statutory time limits applies where the proceedings in question are against a public authority on the ground that it has acted in breach of Convention rights under the Human Rights Act. They must be brought before the end of one year from the date on which the act complained of took place, although the courts also have discretion to extend this period if they consider this reasonable in the circumstances (Human Rights Act section 7). Proceedings against a Scottish Minister or the Scottish Government brought on or after 1 November 2009 on the ground of breach of Convention rights are stated in the Scotland Act to be subject to a one year time limit, subject to the possibility of an extension if the court considers it equitable in the circumstances (Scotland Act section 100 as amended by the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 section 1).

- a requirement to obtain leave (ie permission) from the Court of Session to proceed with an application for judicial review should be introduced. The test should be whether the petition has a real prospect of success. A requirement to obtain leave to proceed currently exists in England and Wales and is regularly used to filter out applications which are entirely without merit
- the Court of Session should have power to make special orders in relation to expenses in cases raising significant issues of public interest. This could include an order made at the outset or during the course of proceedings to the effect that the petitioner will not be liable for the expenses of the action, even if unsuccessful, or that the expenses of the successful party will be capped at a particular amount. At present, the general rule is that “expenses follow success”, meaning that the losing party is usually held liable for the other side’s legal costs (which may be very substantial).

Further information on the review can be found on the Scottish Courts Service’s [webpage](#) on the topic.

On 8 October 2009, in a Scottish Parliament [debate on civil justice](#), the Cabinet Secretary for Justice stated, in relation to the recommendations set out in the review report, that

“We will carefully examine the detail of the specific proposals. Some could be implemented soon; others will require careful costing and a different public finance climate. Some solutions are at the disposal of the court, others are for the Government and others still are shared, but that does not diminish the urgency of our moving forward in this general direction. I therefore invite the opposition spokespeople to reach early agreement with me on which recommended changes can be rapidly progressed.” (col 20459)

THE AARHUS CONVENTION: ENVIRONMENTAL JUSTICE

In 1998 the UK Government signed the international [Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters](#). Article 9 of the Convention gives members of the public, including environmental organisations, rights of access to the courts (or to administrative procedures) to challenge the legality of decisions by public authorities to grant consent for a wide range of activities affecting the environment, as well as other acts or omissions which are contrary to national environmental laws. Article 9(4) provides that these rights of access should meet a number of requirements, including that they “provide adequate and effective remedies” and “are fair, equitable, timely and not prohibitively expensive”.

The UK Government is largely relying on judicial review procedures to ensure its compliance with article 9 of the Convention and the role of judicial review in this context has been the subject of two recent policy documents. In relation to England and Wales the [Report of the Working Group on Access to Environmental Justice](#) was published in 2008 and at an EU level [Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention](#) was published in June 2009 (Pallemaerts 2009).

Issues considered by the above documents include the cost of bringing a judicial review action and the law of standing (ie who can bring an action for judicial review). The costs of bringing a judicial review action can be considerable, given the relatively limited availability of legal aid, and because of the rule of court procedure that the losing party is usually held liable for the other side’s legal costs. The issue of standing may be particularly significant for Scotland given the comparatively restrictive rules in Scotland, compared to England and Wales and the impact this has on NGOs attempting to bring judicial review actions.

OPTIONS FOR REDRESS OTHER THAN JUDICIAL REVIEW

THE RANGE OF OPTIONS

Internal procedures

It may be possible for an aggrieved individual 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 a limited number of 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 matters – including delay, failure to provide a service or the provision of a poor service. Where a statutory right of appeal or review exists, a person will normally be expected to use it before seeking judicial review (Rules of the Court of Session, rule 58.3(2); *Tehrani v Argyll and Clyde Health Board (No 2)* 1990 SLT 118 at 124). However, voluntary internal complaints procedures do not need to be exhausted before seeking judicial review.

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 available to aggrieved individuals is to complain to an ombudsman or other external complaints handling body. To exercise this option, it is usually the case that the complainer must have gone through a body's internal complaints procedure first. In contrast to judicial review, which focuses on the legality of an administrative decision, an ombudsman (or other external complaints handler) tends to consider a wider range of issues associated with administrative decision making (eg the provision of a poor service or delays in reaching a decision).

Statutory right of appeal

In some instances it will be possible to exercise a right of appeal provided for by statute. In contrast 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. Sheriffs consider appeals in relation to a wide range of matters, and tribunals also play an important role in this area.¹² The existence of a statutory right of appeal usually precludes the possibility of bringing an action for judicial review, unless exceptional circumstances apply

¹² It should be noted that as well as acting as appellate bodies in relation to administrative decision making, sheriff courts and specialist tribunals also act as the original decision maker in relation to a wide range of matters.

(Rules of the Court of Session, rule 58.3(2); *Tehrani v Argyll and Clyde Health Board (No 2)* 1990 SLT 118 at 124).

OMBUDSMEN IN SCOTLAND

The main ombudsman in Scotland is the [Scottish Public Services Ombudsman](#). It has jurisdiction to consider complaints relating to local councils, the National Health Service, housing associations, the Scottish Government and its agencies and departments, colleges and universities and most other devolved Scottish public bodies. The two most notable exceptions to its wide jurisdiction are complaints relating to the police, which are considered by the [Police Complaints Commissioner for Scotland](#), and complaints relating to the prison service, which are considered by the [Scottish Prison Complaints Commission](#).

The [Parliamentary and Health Service Ombudsman](#) 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).

SOURCES

Administrative Justice Steering Group. (2009a) *Administrative Justice in Scotland – The Way Forward. The Final Report of the Administrative Justice Steering Group*. Glasgow: Consumer Focus Scotland. Available at:

http://www.consumerfocus.org.uk/media/viewfile.aspx?filepath=467_20090626092210_e_@@_AdministrativeJusticeinScotland.pdf&filetype=4

Administrative Justice Steering Group. (2009b) *Administrative Justice in Scotland – The Way Forward. The Final Report of the Administrative Justice Steering Group. Summary Report*. Glasgow: Consumer Focus Scotland. Available at:

http://www.consumerfocus.org.uk/media/viewfile.aspx?filepath=467_20090626093708_e_@@_AdministrativeJusticeinScotlandssummary.pdf&filetype=4

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629

Blair and Martin. (2005) *Judicial Review 20 Years on – Where are we now?* 2005 SLT 173

Bradley, A and Himsworth, C. (2002) *Administrative Law. The Laws of Scotland: Stair Memorial Encyclopaedia Reissue 1*. Edinburgh: Lexis Nexis

Case 222/86 Union National des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v Heylens [1987] ECR 4097

City Cabs (Edinburgh) Ltd v City of Edinburgh District Council 1988 SLT 184

Consumer Focus Scotland. (2009a) *Administrative Justice in Scotland – The Way Forward. The Final Report of the Administrative Justice Steering Group*. Glasgow: Consumer Focus Scotland. Available at:

http://www.consumerfocus.org.uk/media/viewfile.aspx?filepath=1_20090821151011_e_@@_AdministrativeJusticeinScotlandTheWayForwardFullReport.pdf&filetype=4

Consumer Focus Scotland. (2009b) *Administrative Justice in Scotland – The Way Forward. A Summary of the Final Report of the Administrative Justice Steering Group*. Glasgow: Consumer Focus Scotland. Available at:

http://www.consumerfocus.org.uk/media/viewfile.aspx?filepath=1_20090813134450_e_@@_AdministrativeJusticeinScotlandSummary.pdf&filetype=4

Department for Environment Food and Rural Affairs. *Aarhus Convention – Environmental Democracy* [Online]. Available at:

<http://www.defra.gov.uk/environment/policy/international/aarhus/index.htm#justice> [Accessed 27 October 2009]

European Commission. *Application of Community Law* [Online]. Available at:

http://ec.europa.eu/community_law/index_en.htm [Accessed 27 October 2009]

Garton Grimwood, G. (2009) *Borders, Citizenship and Immigration Bill [HL]: Committee Stage Report*. Research Paper 09/65 [Online]. Available at:

<http://www.parliament.uk/commons/lib/research/rp2009/rp09-065.pdf> [Accessed 27 October 2009]

Gerry Cottle’s Circus Ltd v City of Edinburgh District Council 1990 SLT 235

Glasgow Rape Crisis Centre v Secretary of State for the Home Department 2000 SC 527; 2001 SLT 389

Hartley, T. (2007) *The Foundations of European Community Law: an Introduction to the Constitutional and Administrative Law of the European Community*. Oxford: Oxford University Press

Hansard. (2006a) *HL Deb 31 January 2006*. Cols 243–248. London: Stationery Office. Available at: <http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70131-0003.htm>

Hansard. (2006b) *HL Deb 13 December 2006*. Col GC68. London: Stationery Office. Available at: <http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61213-gc0001.htm#06121365000002>

Hartley, T. (2007) *The Foundations of European Community Law: an Introduction to the Constitution and Administrative Law of the European Community*. 6th ed. Oxford: Oxford University Press

Himsworth, C. (2005) *Judicial Review in Scotland*. In James Goudie, Paul Walker and Michael Supperstone (eds) *Judicial Review*. 3rd ed. London: Butterworths Law

Himsworth, C and Munro, C. (2000) *The Scotland Act*. 2nd ed. Edinburgh: W Green

Himsworth, C and O’Neill, C. (2009) *Scotland’s Constitution: Law and Practice*. Edinburgh: Lexis Nexis UK

Horne, A and Berman, G. (2006) *Judicial Review: a Short Guide to Claims in the Administrative Court* [Online]. Research Paper 06/44. Available at:

<http://www.parliament.uk/commons/lib/research/rp2006/rp06-044.pdf> [Accessed 27 October 2009]

Horne, A and Ward, P. (2007) *The Tribunals, Courts and Enforcement Bill [HL]* [Online]. Research Paper 07/22. Available at: <http://www.parliament.uk/commons/lib/research/rp2007/rp07-022.pdf> [Accessed 27 October 2009]

Immigration Law Practitioners' Association [Online]. Available at: <http://www.ilpa.org.uk/>

Immigration Law Practitioners' Association. (2009) *Transfer of Judicial Reviews*. London: Immigration Law Practitioners' Association. Available at: <http://www.ilpa.org.uk/infoservice/18%20Info%20Sheet%20Transfer%20of%20judicial%20reviews1.pdf>

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Limited 1982 AC 617

London and Clydeside Estates Ltd v Aberdeen District Council 1980 SC (HL) 1

Lord Clyde and Edwards, D. (2000) *Judicial Review*. Edinburgh: W Green

Lord Clyde. (2008) *Public Service*. Journal of the Law Society of Scotland 53, No 12 2008, p 18. Available at: <http://www.journalonline.co.uk/Magazine/53-12/1005983.aspx>

Lord Hope of Craighead. (2001) *Mike Tyson comes to Glasgow – a Question of Standing*. 2001 PL 294

McIntosh v Aberdeenshire Council 1999 SLT 93

Mullen, T et al. (1996) *Judicial Review in Scotland*. Chichester: Chancery Law Publishing

Mullen, T. (2006) *Standing to Seek Judicial Review*. In A McHarg and T Mullen (eds), *Public Law in Scotland*. Edinburgh: Avizandum

Munro, J. (2007) *Public Law*. Edinburgh: Thomson/W Green

Napier v Scottish Ministers 2005 1 SC 229; 2005 1 SC 307

O'Neill, A. (1999) *Judicial Review in Scotland: A Practitioner's Guide*. Edinburgh: Butterworths

Page, A (1987) *Judicial Review in the Court of Session* in Scottish Office Central Research Unit *Socio-Legal Research in the Scottish Courts, Volume 2*. Edinburgh: Scottish Office

Pallemaerts, M. (2009) *Compliance by the European Community with its Obligations on access to Justice as a Party to the Aarhus Convention*. Brussels: Institute for European Environmental Policy. Available at: http://www.ieep.eu/publications/pdfs/2009/aarhus_report.pdf

Parliamentary and Health Service Ombudsman [Online]. Available at: <http://www.ombudsman.org.uk/>

Police Complaints Commissioner for Scotland [Online]. Available at: <http://www.pcc-scotland.org/>

The Public Law Project [Online]. Available at: <http://www.publiclawproject.org.uk/index.html>

R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry 2007 EWHC 311 (Admin)

R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213

Reed, R and Murdoch, J. (2008) *A Guide to Human Rights Law in Scotland*. Second Edition. Edinburgh: Tottel Publishing

Reid v Secretary of State for Scotland 1998 SC 49 and [1999] 2 WLR 28

Salah Abdadou v Secretary of State for the Home Department 1998 SC 504

Scottish Civil Courts Review. (2007) *Scottish Civil Courts Review – a Consultation Paper*. Edinburgh: Scottish Civil Courts Review. Available at:
<http://www.scotcourts.gov.uk/civilcourtsreview/SCCCompleteR.pdf>

Scottish Civil Courts Review. (2009a) *Report of the Scottish Civil Courts Review – Volume 1 Chapters 1–9*. Edinburgh: Scottish Civil Courts Review. Available at:
http://www.scotcourts.gov.uk/civilcourtsreview/theReport/Vol1Chap1_9.pdf

Scottish Civil Courts Review. (2009b) *Report of the Scottish Civil Courts Review – Volume 2 Chapters 10–15*. Edinburgh: Scottish Civil Courts Review. Available at:
http://www.scotcourts.gov.uk/civilcourtsreview/theReport/Vol2Chap10_15.pdf

Scottish Civil Courts Review. (2009c) *Report of the Scottish Civil Courts Review – The Review and the Report*. Edinburgh: Scottish Civil Courts Review. Available at:
<http://www.scotcourts.gov.uk/civilcourtsreview/theReport/Synopsis280909.pdf>

Scottish Courts Service. *Civil Courts Review* [Online]. Available at:
<http://www.scotcourts.gov.uk/civilcourtsreview/> [Accessed 27 October 2009]

Scottish Courts Service. *Rules of the Court of Session* [Online]. Available at:
<http://www.scotcourts.gov.uk/session/rules/print/index.asp> [Accessed 27 October 2009]

Scottish Executive. (2001) *Civil Judicial Statistics Scotland 1999*. Edinburgh: Scottish Executive. Available at: <http://www.scotland.gov.uk/Publications/2001/04/8927/File-1>

Scottish Executive. (2004) *Civil Judicial Statistics Scotland 2002*. Edinburgh: Scottish Executive. Available at: <http://www.scotland.gov.uk/Publications/2001/04/8927/File-1>

Scottish Executive. (2007a) *Major Review of Scotland's Civil Courts*. Press release 12 February 2007. Edinburgh: Scottish Executive. Available at:
<http://www.scotland.gov.uk/News/Releases/2007/02/12132032>

Scottish Executive. (2007b) *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland*. Edinburgh: Scottish Executive. Available at:
<http://www.scotland.gov.uk/Publications/2007/02/09110006/8>

Scottish Government. *Human Rights* [Online]. Available at:
<http://www.scotland.gov.uk/Topics/Justice/law/17838> [Accessed 27 October 2009]

Scottish Government. *Scottish Prisons Complaints Commission* [Online]. Available at:
<http://www.scotland.gov.uk/Topics/Justice/public-safety/offender-management/Prisons/18780>
[Accessed 27 October 2009]

Scottish Human Rights Commission [Online]. Available at: <http://www.scottishhumanrights.com/>

Scottish Mediation Network [Online]. Available at: <http://www.scottishmediation.org.uk/>

Scottish Old People's Welfare Council, Petrs 1987 SLT 179

Scottish Parliament. (2009) *Civil Justice*. Official Report 8 October 2009. Col 20458. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-09/sor1008-02.htm#Col20458>

Scottish Public Law Group [Online]. Available at: <http://splg.co.uk/>

Scottish Public Services Ombudsman [Online]. Available at: <http://www.spsso.org.uk/>

Short v Poole Corporation [1926] Ch 66

Steiner, J and Woods, L. (2009) *EU Law*. 10th ed. Oxford: Oxford University Press

Somerville v Scottish Ministers 2007 SC 140 and 2008 SC (HL) 45

Supreme Court [Online]. Available at: <http://www.supremecourt.gov.uk/>

Sutherland, R. (2003) *Introduction to Judicial Review in Scotland* [Online]. Available at: <http://www.jonathanmitchell.info/uploads/Judicialreview.pdf> [Accessed 27 October 2009]

Swanson v Mason 1907 SC 426

Tehrani v Argyll and Clyde Health Board (No 2) 1990 SLT 118

Thornton, J. (2007) *Greenpeace and the Law of Consultations*. 2007 Journal of Planning and Environmental Law 2007 2

Thorp, A and Garton Grimwood, G. (2009) *Borders, Citizenship and Immigration Bill [HL]*. Research Paper 09/47 [Online]. Available at: <http://www.parliament.uk/commons/lib/research/rp2009/rp09-047.pdf> [Accessed 27 October 2009]

Treasury Solicitor's Department. (2006) *The Judge over your Shoulder*. Fourth Edition. London: Treasury Solicitor's Department. Available at: <http://www.tsol.gov.uk/Publications/judge.pdf>

Tribunals Service [Online]. Available at: <http://www.tribunals.gov.uk/>

United Nations Economic Commission for Europe. *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* [Online]. Available at: <http://www.unece.org/env/pp/welcome.html> [Accessed 27 October 2009]

Vine v National Dock Labour Board [1957] AC 488

West v Secretary of State for Scotland 1992 SC 385

Wilson v Independent Broadcasting Authority 1979 SC 351

Working Group on Access to Environmental Justice. (2008) *Ensuring Access to Environmental Justice in England and Wales: Report of the Working Group on Access to Environmental Justice*. London: Working Group on Access to Environmental Justice. Available at: http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf



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