

INTRODUCTION TO JUDICIAL REVIEW IN SCOTLAND

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INTRODUCTION

Take advice

[1]

The purpose of this article is to look at how the Court of Session in Scotland supervises the administrative decision making process through applications for judicial review, and how this remedy can be used to challenge the acts and decisions made. It was prepared in July 2003 but it is intended to be illustrative only. It is not intended to be an exhaustive up to date examination of the law, and it should not be relied upon to provide an answer to any particular problem. Many of the subject areas referred to are subject to frequent statutory changes of law and procedure – notoriously so in the case of immigration and asylum law. Up to date advice on the applicable law and procedures will therefore be necessary when dealing with individual cases. Case references are also not kept up to date.

What is judicial review?

[2]

Judicial review is the procedure whereby the exercise of a delegated discretionary decision making power is examined by a court so as to ensure that the power has been properly exercised for its lawful purpose¹. In general terms the court will intervene where the person or body which has been given the power fails to act when it is required to or when it makes a decision it ought not to have made when acting properly within the terms of the mandate given to them. The remedy is only available in the Court of Session².

1. *West v Secretary of State for Scotland*, 1992 SC 385, 1992 SLT 636, (reported as *West v Scottish Prison Service*, 1992 SCLR 504).
2. *Brown v Hamilton District Council*, 1983 SC (HL) 1.

The scope of judicial review

[3]

To a large extent the court is more interested in the process of decision making rather than the actual result. The scope of judicial review and its relationship with the evidential merits of any particular decision was summarised in *R v Secretary of State for Scotland* in the following terms:

“Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from ordinary appeal, the court may not set about forming its own preferred view of the evidence.”¹

Further aspects of this summary are dealt with in more detail below. There must however be a reviewable act, failing or decision in the first place. That requires there to be an act which has taken place, or a failure to act, or a decision which has actually been made and which has the effect of altering the rights and obligations of the prospective

petitioner, or deprives them of a benefit or advantage they have had or would otherwise be entitled to². It has been held that an expression of a legitimate opinion on the part of a public body is not amenable to judicial review³. Similarly, the function of an immigration adjudicator is to make a decision on the issues of fact and law concerning the applicants legal rights to enter and remain in the United Kingdom under any of the statutory provisions and in accordance with the relevant immigration rules which permit this. There may be instances where the applicant is not entitled to such leave and the applicant may ask the adjudicator to make a recommendation to the Secretary of State that the Secretary of State exercise a discretion to allow the applicant to enter or stay in the country because of some exceptional or compassionate circumstance which does not fall within the scope of the existing provisions. Any such recommendation is not part of the statutory functions of the adjudicator but having heard the evidence in the case the adjudicator may or may not choose to express an opinion on the possible exercise of the Secretary of State's discretion. Any decision or failure of the adjudicator to make a recommendation when asked to do so is not capable of being reviewed⁴. The judicial review power of the courts has been developed by them at common law on the basis that they have an inherent jurisdiction to supervise inferior courts, tribunals and other decision making bodies⁵. The Court of Session will not however interfere with the decisions of other courts of equivalent stature, such as the High Court of Justiciary or the Valuation Appeal Court⁶. Nor will it interfere with the decision of a sheriff court where the action is one that could be readily brought under an existing remedy and it is not said that the court is exceeding its jurisdiction⁷. Nor is it appropriate to ask the Court of Session to exercise its supervisory jurisdiction where the subject matter of the proposed action is criminal business which falls under the supervisory jurisdiction of the High Court of Justiciary⁸.

1. *R v Secretary of State for Scotland*, 1999 SC (HL) 17 at 41 - 42 per Lord Clyde (reported as *Reid v Secretary of State for Scotland*, 1999 SCLR 74; [1999] 2 WLR 28, [1999] 1 All ER 481).

2. *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374, [1984] 3 WLR 1174, [1984] 3 All ER 935; *Monklands District Independent Taxi Owners Association v Monklands District Council (No 2)*, 1997 SLT 7.
3. *R v The Housing Corporation ex p. Rodgers*, QBD, Dyson J, (10 May 1999 unreported).
4. *R v Secretary of State for Home Department ex p. A*, Court of Appeal, (July 2000 unreported).
5. *West v Secretary of State for Scotland*, 1992 SC 385, 1992 SLT 636, (reported as *West v Scottish Prison Service*, 1992 SCLR 504).
6. *Moss' Empires v Assessor for Glasgow*, 1917 SC (HL) 1.
7. *Bell v Fiddes*, 1996 SLT 51.
8. *Reynolds v Christie*, 1988 SLT 68.

Judicial review or appeal

[4]

In some instances the legislation will provide for a right of appeal from the original decision maker to an appellate body, tribunal or court. Because the origin of judicial review lies in the courts declaring their power to supervise how a delegated decision making function is to be exercised they have had to make it clear that there are limits in their willingness to intervene in the decision making process, and that the role of the court in such applications is not the same as that of a court of appeal¹. As a consequence judicial review is not generally available where a statutory right of appeal or review exists, or where such a right did exist but was not used². If a statutory right of appeal does exist then it must be used, unless there are exceptional reasons for not doing so³. This general rule of common law is also reflected in the procedural rules of the Court of Session. RCS 1994 r 58.3(2) provides that an application to the supervisory jurisdiction of the Court may not be made if that application is made, or could be made, by appeal or review under or by virtue of any enactment. In some instances there may be a non statutory appeal procedure provided by the decision maker, e.g., a number of local authorities have an internal appeal process for reviewing decisions made about homelessness applications.

Where a non statutory appeal process does exist there is no requirement that it is used before seeking judicial review⁴. However it could be more appropriate to allow the responsible decision making body to have the opportunity to correct any mistakes it has made before an application is made to the court for a remedy. One reason for this is that it is quite possible that the issue might be resolved more quickly through an informal internal appeal than through the courts. The informal appeal is also the last opportunity to make sure that all the relevant information which might support the application being made is put before the decision maker. In practice this can turn out to be very important. It is not uncommon for crucial facts to be disclosed only at an appeal as the client had not fully appreciated until after the original decision was made what information would be required to properly support the application being made. There may be circumstances where notwithstanding the existence of a statutory remedy judicial review is still possible³. Further examples of this situation arise where the right of appeal does not cover the complaint made or is not available to the person making the complaint⁵, or where the statutory provisions for review leave open the possibility of other remedies⁶. Another possible situation where judicial review might be available is if the appeal procedure could not remedy the problem complained of, *e.g.*, a complaint that an issue is to be determined by a person or body that is not an independent and impartial tribunal might not be capable of being remedied by an appeal to a court and therefor the only suitable remedy could be to judicially review the decision to appoint that person or body in the first place⁷.

1. *Stewart v Monklands District Council*, 1987 SLT 630.
2. *West v Secretary of State for Scotland*, 1992 SC 385, 1992 SLT 636, (reported as *West v Scottish Prison Service*, 1992 SCLR 504); *R v Preston Supplementary Benefits Appeal Tribunal ex p. Moore and Shine*, [1975] 1 WLR 624; *R v Secretary of State for Home Department ex p. Swati*, [1986] 1 WLR 477.
3. *British Railways Board v Glasgow Corporation*, 1974 SC 261, (OH); 1976 SC 224, (IH); *Tarmac Econowaste Ltd v Assessor for Lothian Region*, 1991 SLT 77p; *Choi v*

Secretary of State for the Home Department, 1996 SLT 590. The use of judicial review has been permitted where the alternative statutory remedy is not adequate to deal with the issue raised (*Leech v Deputy Governor of Parkhurst Prison*, [1998] AC 533), where the real issue could only be dealt with by means of judicial review rather than an appeal (*R v Leeds City Council ex p. Hendry*, (1994) 6 Admin LR 439), where the legality of a policy is being tested (*R v Kensington and Chelsea Royal London Borough Council ex p. Byfield*, (1999) 31 HLR 913), and where judicial review would provide a convenient, expeditious and effective procedure compared to the statutory remedy (*R v Devon County Council ex p. Baker*, [1995] 1 All ER 73). In Clyde & Edwards, *Judicial Review*, para 12-13 it is said that exceptional in this sense means a departure from the generality and does not mean rare. See also paragraph [6].

4. *Edwards, Petitioner*, (9 November 1993 unreported), Lord Clyde (option of arbitration in respect of a decision of a disciplinary committee not a bar to judicial review; *R v Lambeth London Borough Council ex p. Ogunmuyiwa*, 1997 TLR 198 (where the local authority had written to an applicant in terms giving rise to an expectation that it would carry out a review of its decision but failed to do so).
5. *Purves v Edinburgh District Council*, 1987 SCLR 164.
6. *Short's Trustee v Keeper of the Registers of Scotland*, 1993 SLT 1291 at 1298 A-B (the respondent's plea to the competency of the petition was not argued however).
7. *County Properties Ltd v The Scottish Ministers*, 2000 SLT 965 (this decision was overturned by the Inner House, 2001 SLT 1125, following the decision of the House of Lords in *R v Secretary of State for the Environment, Transport and the Regions, ex p. Alconbury Developments Ltd*, [2001] 2 WLR 1389 which decided that procedurally there was no breach of the right to an independent and impartial tribunal under Article 6, ECHR where a planning reporter was appointed by a government minister).

Matters outside the scope for judicial review

[5]

Apart from cases where there is a statutory right of appeal or review there are a number of other instances where the courts will not exercise their supervisory jurisdiction. The principal of these is where the subject matter of the dispute does not concern a delegated discretion, such as one party's rights under a contract of employment¹. If what is at issue is the termination of the contract then it does not matter that one of the parties to the contract is a public body which exists to exercise administrative powers delegated to it by Parliament². A decision of a local authority to enter into a particular contract may be competently reviewed if that decision has been reached in the exercise of a discretion under a statutory power³. It had previously been considered that decisions made in the exercise of a prerogative power could not be challenged by judicial review, but that view has since changed and there now seems to be no reason why most decisions made under a prerogative should not be subject to the same supervision from the courts as occurs with the exercise of any other discretionary power⁴. For example a judicial review petition has been brought in Scotland against the United Kingdom Passport Agency for failing to issue a new passport to the petitioner on the expiry of his existing passport⁵. Another circumstance where judicial review may not be available is where the courts jurisdiction is specifically excluded or limited by statute. These provisions are known as 'ouster clauses'. For example, a provision in a statute may state that a matter can be challenged only by use of a specific statutory procedure, or within a specific time limit, but cannot otherwise be questioned in any legal proceedings whatsoever (time limited ouster clauses). On the other hand the provision may state that a particular matter shall not be called into question in any court of law whatever (absolute ouster clauses). Broadly speaking the distinction between them is that the former are not considered to oust the jurisdiction of the court altogether, but rather to confine the time within which the court can intervene in order that there can be certainty about the subject matter of the decision⁶. Such a clause can result in the court concluding that the remedy of judicial review is excluded both before and after the expiry of the time limit⁷. Whether this is so will depend very much on the language used. It might be that there are appeal rights only

over certain matters, in which case there seems no reason that judicial review could not be used to bring challenges under different grounds where no right of appeal existed. By contrast an absolute ouster clause is generally not considered as excluding judicial review by the court where the decision maker has acted outwith the powers given⁸. The thinking there is that Parliament could not have intended that the body concerned would be allowed to go outside the powers given to them. The matter was put by Lord Reid in *Anisminic Ltd v Foreign Compensation Commission* in the following terms:

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal has jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."⁹

This has been quoted approvingly by Lord President Emslie in *Watt v Lord Advocate*¹⁰.

1. *Blair v Lochaber District Council*, 1994 SCLR 1070, 1995 SLT 407.
2. *Millar & Bryce Ltd v Keeper of the Registers of Scotland*, 1997 SLT 1000.
3. *Tay Premium Unit Consortium, Petitioners*, Lord Cameron of Lochbroom, (20 October 1995 unreported), [challenge to the criteria adopted to award a contract under

the Public Works Contract Regulations 1991, unsuccessful on the merits]; *JDP Investments Ltd v Strathclyde Regional Council*, 1996 SCLR 243 [local authority's exercise of a statutory power to sell land].

4. *R v Criminal Injuries Compensation Board ex p. Lain*, [1967] 2 QB 864, [1967] 3 WLR 348, [1967] 2 All ER 770; *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374, [1984] 3 WLR 1174, [1984] 3 All ER 935; *R v Home Secretary ex p. Fire Brigades Union*, [1995] 2 AC 513, [1995] 2 WLR 464, [1995] 2 All ER 244.
5. See also *R v Secretary of State for Foreign and Commonwealth Affairs, ex p. Everett*, [1989] QB 811, [1989] 2 WLR 224, [1989] 1 All ER 655.
6. *Martin v Bearsden and Milngavie District Council*, 1987 SC 80, 1987 SLT 300.
6. *Pollock v Secretary of State for Scotland*, 1993 SLT 1173.
7. *Pollock v Secretary of State for Scotland*, 1993 1173.
8. *Ashley v Magistrates of Rothesay*, (1873) 11 M 708, affd (1874) 1 R (HL) 14; *Anisminic Ltd v Foreign Compensation Commission*, [1969] 2 AC 147, [1969] 2 WLR 163, [1969] 1 All ER 208.
9. *Anisminic Ltd v Foreign Compensation Commission*, [1969] 2 AC 147, at p. 171 B-D.
10. 1979 SLT 137 at p. 142.

Availability of judicial review in special circumstances

[6]

There have been instances where judicial review has been permitted by the courts notwithstanding the existence of an alternative remedy¹. In *British Railways Board v Glasgow Corporation* it was said that recourse to a common law remedy where there was a statutory remedy may be had in exceptional or special circumstances. Examples of such special circumstances might exist where there were averments of *ultra vires* or fraud, or possibly where both parties have agreed that the statutory form of appeal should not be used². In recent years judicial review proceedings have been allowed to proceed, notwithstanding the existence of a statutory remedy, where there was a demonstrable miscarriage of justice and an accumulation of circumstances which taken together could be

considered exceptional³, allegations of procedural impropriety and irrationality⁴, and where the decision under attack was fundamentally invalid and this ground for review had not been excluded by statute⁵. It has been held that allegedly unsound advice from an unqualified representative practising before a tribunal does not of itself amount to special circumstances⁶. That decision might now be open to re-consideration as amounting to a breach of Article 6 of the European Convention on Human Rights following the Human Rights Act 1998.

1. E.g., *Alagon v Secretary of State for the Home Department*, 1995 SLT 381.
2. *British Railways Board v Glasgow Corporation*, 1976 SC 224 at 239.
3. *Alagon v Secretary of State for the Home Department*, 1995 SLT 381.
4. *Choi v Secretary of State for the Home Department*, 1996 SLT 590.
5. *Mensah v Secretary of State for Home Department*, 1992 SLT 177.
6. *Sangha v Secretary of State for Home Department*, 1997 SLT 545, [1996] Imm AR 493 in which Lord Marnoch declined to follow the decisions in either *Alagon* or *Choi*.

Non-availability of judicial review

[7]

As has already been noted, judicial review will not normally be available where there is a statutory right of appeal. An exception to this may exist where there are averments of ultra vires or fraud¹. Judicial review however is an equitable remedy and as a result not every excess of jurisdiction will lead to the court granting a remedy. The court will only exercise their supervisory jurisdiction if it considers it fair and equitable to do so and the same result could not be achieved by pursuing the statutory appeal provided². As a consequence of this equitable consideration the court will not grant a remedy where there would be no material change or benefit for the applicant³. A delay in challenging a decision may have the consequence that the decision has actually been implemented by the time any challenge is brought. In these circumstances the decision is spent and the remedy may be considered academic, causing the court to dismiss the challenge⁴. Judicial

review may also be refused where there has been inordinate delay in bringing proceedings⁵. The other circumstance where the availability of judicial review is limited is where there is a statutory exclusion or limitation of the courts jurisdiction. The courts have been reluctant to allow their jurisdiction to be removed completely, even in the face of legislative wording stating that the decision is to be final or conclusive of a matter. It has been said that there is a presumption that any error of law by a tribunal is reviewable, but that this presumption has reduced force where the statute seeks to preclude judicial review of the decision, or where a reasonable time for challenging the decision is allowed, after which the decision is final⁶.

1. *Lord Advocate v Police Commissioners of Perth*, (1869) 8 M. 244; *British Railways Board v Glasgow Corporation*, 1976 S.C. 224; *Mensah v Secretary of State for the Home Department*, 1992 SLT 177.
2. *Ingle v Ingle's Tr.*, 1999 SLT 650.
3. *Andrew v City of Glasgow District Council*, 1996 SLT 814 (a housing benefit review board had reached the correct result but for the wrong reasons), following *City of Glasgow District Council v Secretary of State for Scotland*, 1982 SLT 28.
4. *McNaughton v McNaughton's Trs*, 1953 SC 387, 1953 SLT 240; *Aldridge v Simpson-Bell & Ors*, 1971 SLT 188; *Shetland Line (1984) Ltd v Secretary of State for Scotland*, 1996 SLT 653.
5. *Glancy v City of Edinburgh District Council*, Lord Osborne, (27 May 1994 unreported), [petition lodged in 1994 for judicial review of a decision in 1990, respondents records destroyed in fire in 1991]. See also paragraph [36] on mora, delay and acquiescence.
6. See de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, (5th ed), paras 5-041 to 5-043 and also paragraph [4].
- 7.

GROUNDS FOR REVIEW

Introductory comment

[8]

The grounds for judicial review have been characterised by Lord Diplock in the *CCSU* case as 'illegality', 'irrationality' and 'procedural impropriety'¹. By 'illegality' Lord Diplock meant that the decision maker must have correctly understood the relevant law and correctly applied it. 'Irrationality' was described as a decision which was so outrageous in its defiance of logic or accepted moral standards that no sensible person applying their mind to the question to be decided could have arrived at that decision. 'Procedural impropriety' covers those situations where there has been a breach of procedural rules laid down by the relevant legislation or a breach of the common law rules of natural justice or there has been procedural unfairness. These grounds for review are dealt with in this chapter under the general conceptual headings of 'ultra vires', 'reasonableness' and 'fairness' (although not in that order). In addition to these general grounds of review there can also be added 'disproportionality'. An analysis of these and other formulations of the ground for review is to be found in *Judicial Review Handbook*, (2nd ed) by Michael Fordham. There can be a degree of overlap in the various categories, e.g., if a decision maker fetters his discretion then that can be said to be an illegal or ultra vires act and it can also be said to be an unreasonable act or to have given rise to an unreasonable decision.

1. *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374 at pp 410D-411B. For an acceptance of these three grounds by a court in Scotland see *City of Edinburgh District Council v Secretary of State for Scotland*, 1985 SLT 551.

The concept of reasonableness

[9]

At the heart of the issue of reasonableness is a recognition that the decision maker has a discretion when it comes to making a particular decision, and that the decision which is made may be allowed to stand even though it is not the decision which the court would make under the same circumstances. The classic formulation of the concept of

reasonableness was given by Lord Greene in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*¹. For a decision to be *Wednesbury* unreasonable it must be one that is 'so unreasonable no reasonable authority could have come to it'². Another formulation of the test is that the decision is 'perverse' or 'absurd'³. The test is therefore a very high one⁴. What the court will not do is substitute its own decision for that of the decision maker simply because it might have reached a different conclusion⁵. The courts have repeatedly stated that they are not exercising an appellate function in judicial review, and that they have to be careful not to substitute their own view of what should happen for that of the decision maker. This has a consequence for the remedies which can be sought, and may restrict the remedies which a court will be willing to grant⁶. Decision makers who are faced with having to make repeated decisions on an issue are entitled to adopt a policy to assist them. The existence of a policy can be beneficial as giving an indication of a general approach. However any policy which has been adopted by a decision making body must not be formulated or applied so rigidly that it prevents the genuine exercise of the discretion entrusted to the decision maker⁷. For example a local authority's housing policy was found to be irrational and unlawful because it only awarded one set of medical points per household even if there was more than one person in it with health problems. This appeared to give households with one or several members the same amount of credit and was therefore inflexible in dealing with households with a number of people having health problems, thereby fettering the authority's discretion in such cases⁸. Nor can the decision maker refuse to apply its mind to a discretionary matter because of an apparent conflict with the policy⁹.

1. [1948] 1 KB 223, [1947] 2 All ER 680.
2. *Associated Provincial Picture Houses v Wednesbury Corporation*, [1948] 1 KB 223 at p 230.
3. *Associated Provincial Picture Houses v Wednesbury Corporation*, [1948] 1 KB 223, [1947] 2 All ER 680; *Venter v Scottish Legal Aid Board*, 1993 SCLR 88, 1993 SLT 147; *Atherton v Strathclyde Regional Council*, 1995 SLT 557; *City of Aberdeen*

- Council v Local Government Boundary Commission*, 1998 SLT 613; *R v Hillingdon London Borough Council ex p. Puhlhofer*, 1986 AC 484, [1986] 2 WLR 259, [1986] 1 All ER 467; *R v Secretary of State for Home Department ex p. Brind*, [1991] 1 AC 696, [1991] 2 WLR 588, [1991] 1 All ER 720.
4. *K v Scottish Legal Aid Board*, 1989 SCLR 144; 1989 SLT 617; *B v Scottish Legal Aid Board*, 1991 SCLR 702; *McRae v Parole Board for Scotland*, 1997 SLT 97.
 5. *Associated Provincial Picture Houses v Wednesbury Corporation*, [1948] 1 KB 223, [1947] 2 All ER 680; *R v Secretary of State for Home Department ex p. Brind*, [1991] 1 AC 696, [1991] 2 WLR 588, [1991] 1 All ER 720.
 6. See paragraphs [22] to [31] on remedies.
 7. *British Oxygen Co. Ltd v Board of Trade*, [1971] AC 610; *Sagnata Investments Ltd v Norwich Corporation*, [1971] 2 QB 14; *Centralbite Ltd v Kincardine and Deeside District Licensing Board*, 1989 SCLR 652, 1990 SLT 231.
 8. *R v London Borough of Tower Hamlets ex p. Uddin*, Keene J, Queens Bench Division, (5 May 1999 unreported).
 9. *Elder v Ross and Cromarty District Licensing Board*, 1990 SCLR 1, 1990 SLT 307.

The concept of ultra vires

[10]

Any decision which has not been taken in a lawfully permitted manner can be considered to be ultra vires. The term literally means 'beyond the powers of', and in a broad sense this covers all the grounds of review referred to at paragraph 7. In a narrower sense, and the way it is used in this chapter, it means that the decision making body is acting in excess of the power granted to it, either by doing something which it has no power to do¹, or by failing to do something which it ought to², or by taking into account an irrelevant consideration³, or failing to take into account a relevant consideration⁴, or by using a lawful power for an improper purpose⁵, or by fettering its discretion⁶ or by misunderstanding the relevant law applicable to the act or decision to be taken⁷.

1. *McCull v Strathclyde Regional Council*, 1983 SLT 616 [duty to provide wholesome water did not include power to add fluoride to water]; *Thomson v City of Glasgow District Council*, 1992 SLT 805 [no power to revoke a taxi license already awarded on the ground of apparent misrepresentation]; *Ferguson v Scottish Football Association*, Lord MacFadyen, (1 February 1996 unreported), [no power to suspend football player as this conditional on receiving a report on incident from match officials and there was no such report].
2. *Padfield v Minister of Agriculture Fisheries and Food*, [1968] AC 997, [1968] 2 WLR 924, [1968] 1 All ER 694 [refusal to refer complaint to a committee of investigation].
3. *Pirie v City of Aberdeen District Council*, 1993 SLT 1155 [rent arrears accrued by the applicants wife under her tenancy, contrary to s 19 of the Housing (Scotland) Act 1987].
4. *Kelly v Monklands District Council*, 1986 SLT 169; *City Cabs (Edinburgh) Ltd v City of Edinburgh District Council*, 1988 SLT 184.
5. *Air 2000 Ltd v Secretary of State for Transport*, 1989 SLT 698 [air traffic rules requiring that transatlantic aircraft from Edinburgh or Glasgow land at Prestwick airport not fulfilling statutory power to distribute traffic between airports]; *Ward v Secretary of State for Social Security*, 1995 SCLR 1134, 1997 SLT 325 [power of social security appeal tribunal to set aside of decision of another tribunal not used for the purpose intended by the legislation]; *Highland Regional Council v British Railways Board*, 1996 SLT 274 [the withdrawal of a sleeper service and the use of substitute services as a means of avoiding a statutory closure procedure].
6. *Gerry Cottle's Circus Ltd v City of Edinburgh District Council*, 1990 SLT 235 [refusal of a temporary public entertainment licence to a circus because of policy of not permitting circuses featuring performing animals].
7. *McMillan v Kyle & Carick District Council*, 1995 SCLR 365; 1996 SLT 149.

The concept of fairness

[11]

This concept covers all aspects of what Lord Diplock described as 'procedural impropriety'. It includes both the duty to act according to common law rules of natural justice and procedural fairness, and failure to follow procedural requirements. Where a dispute requires to be resolved, the body responsible for deciding the matter is expected to act according to the rules of natural justice. Natural justice means acting fairly between the parties, allowing all sides to be heard, and taking a decision impartially. Acting fairly between the parties means allowing both sides the opportunity of presenting their case, and in certain circumstances also to allow an opportunity for cross-examination of witnesses so as to raise relevant issues and to test the evidence¹. This can mean that there is a right to be heard before a decision is taken. It is not possible from the decided cases to formulate a particular test which can be said to apply in all cases. Generally though a right to be heard will depend on the importance of the matter to the individual, and the interest they have to protect. A person who is adversely affected by a decision will usually have a right to make representations, either before the decision is taken or after in order that there is an opportunity to modify the decision, or both. In order to make this right meaningful they should be informed of the gist of the case they have to meet². However, in *Young v Criminal Injuries Compensation Board*³ Lord Gill held that there was a distinction between a right to a hearing and a right to be heard, and that in the context of a non-adversarial scheme for compensating victims of crime it was not a breach of natural justice to be refused a hearing having put forward written material in support of the application. The right to be heard can include the right to a hearing⁴. It has been suggested that this right might not exist where there would be no particular purpose to have a hearing because it could not affect the outcome of the decision to be taken⁵. It is quite common for parties to be allowed to be represented at a hearing. This does not mean that where one party chooses to be represented by someone else instead of moving their case personally that the decision making body has to allow that person the representative of their choice, even where there is a specific right to have a

representative act⁶. The presence of one party during the deliberations of the decision maker while the other party is absent is a ground for quashing any decision which follows. The absent party does not have to show any actual prejudice or influencing of the result because of the presence of the other party, as the test is not whether an unjust result has been reached but whether there was an opportunity for injustice to be done⁷. In order to avoid bias the matter at issue should not be determined by any person who has a potential personal interest in the outcome⁸. Previous comments on an issue which indicate that a particular view has been taken for or against a class of person or a particular person can give rise to a suspicion of bias, and may mean that anybody expressing such views ought to decline to adjudicate on the same or similar issues because of the perception of possible bias⁹.

1. *Errington v Wilson*, 1995 SC 550; 1995 SLT 1193.
2. *Inland Revenue Commissioners v Barrs*, 1961 SC (HL) 22.
3. 1997 SLT 297.
4. *R v Secretary of State for Home Department ex p. Doody*, [1993] 3 All ER 92.
5. *Cinnamond v British Airports Authority*, [1980] 1 WLR 582, [1980] 2 All ER 368; *Young*, (*supra*).
6. In *Templeton v Criminal Injuries Compensation Board*, 1997 SLT 953 the Board were held to have a discretion to exclude an individual as a representative, subject to the test that their discretion was exercised reasonably.
7. *Barrs v British Wool Marketing Board*, 1957 SC 72.
8. E.g., in *Metropolitan Properties Co (FGC) Ltd v Lannon*, [1969] QB 577, [1968] 3 WLR 694, [1968] 3 All ER 304 the chairman of a rent assessment committee was a solicitor who acted for the landlord in relation to another property owned by the same landlord.
9. *Bradford v McLeod*, 1985 SCCR 379, 1986 SLT 244; *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)*, [1999] 2 WLR 272, [1999] 1 All ER 577.

The concept of legitimate expectation

[12]

A person may legitimately expect a certain result if their circumstances can be said to meet those provided for in a policy document or regular practice of the decision maker, or where they received a promise from the decision maker as to the outcome were these circumstances to apply¹. Whilst it has always been accepted that the concept applied to procedural matters, so that it could be said that there was an expectation that a particular procedure would apply², there has been a debate as to whether it also extended so as to create a substantive right to a particular benefit³. It has been held by the Court of Appeal in England that there may be a legitimate expectation of a substantive benefit where the decision to do something else amounts to an unfair change which is an abuse of the decision makers power⁴. A decision in these circumstances may therefor be 'reasonable', but it could still be unfair and unlawful. It has been held that legitimate expectations may exist so that a person who had no right to succeed to a secure tenancy under the housing legislation was entitled to do so in terms of the local authority's housing policy⁵, that a travelling person who had been assured that she would not be evicted without either being given an alternative pitch or an opportunity to make representations could have the decision to evict her quashed⁶, and that a prisoner transferred from an English prison to a Scottish one was entitled to have the more generous English rules on remission applied instead of the Scottish rules⁷. Similarly it has been held that where the Secretary of State has issued procedural guidelines which stated that they were being issued 'in the interests of ensuring that they are applied in each and every case', there was a legitimate expectation that they would be applied in a particular case notwithstanding the absence of any averment that there was a practice or promise on the part of the decision maker⁸. A pre-election promise that a particular policy would be applied after the election does not give rise to a legitimate expectation protected by law where that promise is not kept⁹. There can be no legitimate expectation of expecting to immediately benefit from statutory provisions where there is a clear

statutory intent to postpone the coming into effect of these provisions¹⁰. The existence of a particular practice might need to be determined by allowing a proof if it cannot be agreed¹¹. It has also been held in England that an asylum seeker had a legitimate expectation that the provisions of Article 31 of the UN Convention Relating to the Status of Refugees would be followed notwithstanding the fact that the Convention had not been formally incorporated into domestic law¹².

1. *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374, [1984] 1 WLR 1174, [1984] 3 All ER 935.
2. *Attorney-General for Hong Kong v Ng Yuen Shiu*, [1983] 2 AC 69; *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374, [1984] 1 WLR 1174, [1984] 3 All ER 935; *R v Home Secretary ex p Hargreaves*, [1997] 1 WLR 906.
3. *R v Devon County Council ex p Baker*, [1995] 1 All ER 73; *McPhee v North Lanarkshire Council*, 1998 SLT 1317.
4. *R v North and East Devon Health Authority ex p Coughlan*, Court of Appeal, (16 July 1999 unreported).
5. *Lennon v Hamilton District Council*, 1990 SCLR 514.
6. *R v London Borough of Brent, ex p. McDonagh*, (1989) 21 HLR 494.
7. *Walsh v Secretary of State for Scotland*, 1990 SCLR 350, 1990 SLT 527.
8. *Rooney v Chief Constable, Strathclyde Police*, 1997 SCLR 367, 1997 SLT 1261.
9. *R v Department of Education and Employment ex p Begbie*, Court of Appeal, (20 August 1999, unreported).
10. *R v Director of Public Prosecutions ex p. Kebilene*, [1999] 3 WLR 972, [1999] 4 All ER 801.
11. *Perfect Leisure Ltd v City of Edinburgh District Licensing Board*, 1996 SLT 1267.
12. *R v Uxbridge Magistrates Court and anr ex p Adimi*, 1999 TLR 596.

The concept of proportionality

[13]

This is not one of the well established grounds for review which Lord Diplock summarised in the *CCSU* case, although the possibility that it could become a distinct ground for review was canvassed¹. The concept itself involves challenging the act or decision complained about on the basis that the consequences of the act or decision are out of proportion to any legitimate purpose which that act or decision serves². The approach does not originate in the United Kingdom, but it is found in the jurisprudence of some of the member states of the European Union and has been applied in cases decided by the European Court of Justice and also in decisions and judgements from the European Commission on Human Rights and the European Court of Human Rights. Since the decision in *CCSU* some attempts have been made to develop this basis of review³, but the House of Lords rejected the idea that it might become an integral part of domestic law where there was no European element⁴. Where there are issues of European Union law at stake then it can be a relevant consideration in domestic courts. It is also a concept which will be increasingly relevant where the courts are looking at fundamental rights protected by the European Convention on Human Rights⁵. Prior to the Human Rights Act 1998, where it was considered by the courts to be relevant at all, it was most likely to be as an aid to interpretation of ambiguously worded legislation⁶, an aspect of *Wednesbury* unreasonableness, *i.e.*, that the consequences of an act or decision are so disproportionate that the act or decision must be irrational⁷. Since the Human Rights Act was brought into effect on 2 October 2000 the concept of proportionality will require to be given greater consideration than before. This is particularly the case where the ECHR permits infringements of certain of the protected rights, but only in limited circumstances where there is a wider social or public need being served. Where an infringement of a Convention right is permitted then the Court will be able to consider not only whether the infringement taking place is of the kind which is permitted, but also whether the extent of any infringement is proportionate to its aim⁸.

1. [1985] AC 374 at p 410.

2. See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, (5th ed), paras 13-070 to 13-085 for a fuller discussion on the thinking behind and the application of a test of proportionality.
3. E.g., *R v Secretary of State for Transport ex p Pegasus Holdings (London) Ltd*, [1988] 1 WLR 990, [1989] 2 All ER 481.
4. *R v Secretary of State for the Home Department ex p Brind*, [1991] AC 696, [1991] 2 WLR 588, [1991] 1 All ER 720.
5. Convention on Human Rights and Fundamental Freedoms (1950).
6. *T, Petitioner*, 1996 SCLR 897, 1997 SLT 724.
7. *R v Ministry of Defence ex p Smith*, [1996] QB 517, [1996] 2 WLR 305, [1996] 1 All ER 257; *Abdadou v Secretary of State for Home Department*, 1998 SC 504.
8. As in *A v The Scottish Ministers*, 2000 SLT 873 [a challenge to the legality of section 1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 in which the retrospective effect of the section on those who had already submitted appeals to the sheriff court against their continuing detention was held to be proportionate to the aim of protecting the general public against the danger posed by the release of people with untreatable psychopathic disorders from the State Hospital].

The role of the European Convention on Human Rights

[14]

Until the enactment of the Human Rights Act 1998 there was only a limited scope for referring to the European Convention on Human Rights in UK courts, and it took some time for the Scottish courts to follow the developments which had taken place in England. The Convention could be referred to as an aid in construing the meaning of ambiguously worded legislation¹ and as a test of the reasonableness of an administrative decision where fundamental human rights were in issue². It had also been held in England that the Convention could be used as a reference point in the exercise of judicial discretion by

the courts and to establish the scope of the common law³. Between the passing of the Human Rights Act 1998 and that Act coming into full effect throughout the UK on 2 October 2000 the Convention nevertheless applied to the actions and legislation of the Scottish Parliament and the Scottish Executive⁴. It was also the case that where it was said that a decision maker had misdirected themselves on the Convention and had expressly said that the Convention has been taken into account in the decision making then the Court could examine the substance of the argument so as to give the applicant an effective remedy⁵. There was however no legitimate expectation that pending the main provisions of the Act coming into effect a public authority would not take a particular step which it was argued would lead to a breach of the Convention⁶. Following the passing of the Human Rights Act but prior to its implementation the courts themselves had been prepared to take account of breaches of the Convention when determining cases⁷. Now that the Act has come into full effect it can be expected that a generous construction which gives a full measure of protection to the fundamental rights of the citizen will be applied by the court towards any legislative provision or act of a public authority which raises an issue as to its compatibility with Convention rights⁸.

1. *R v Secretary of State for the Home Department ex p. Brind*, [1991] AC 696, [1991] 2 WLR 588, [1991] 1 All ER 720; *T Petitioner*, 1996 SCLR 897, 1997 SLT 724.
2. *R v Ministry of Defence ex p. Smith*, [1996] QB 517, [1996] 2 WLR 305, [1996] 1 All ER 257; *Abdadou v Secretary of State for Home Department*, 1998 SC 504.
3. *Attorney-General v Guardian Newspapers Ltd*, [1987] 1 WLR 1248, [1987] 3 All ER 316; *Derbyshire County Council v Times Newspapers Ltd*, [1992] QB 770, [1992] 3 WLR 28, [1992] 3 All ER 65 (affirmed in [1993] AC 534, [1993] 1 WLR 449, [1993] 1 All ER 1011). See also *Using Human Rights Law in English Courts*, M. Hunt, (Hart Publishing) (1997).
4. Scotland Act 1998, ss 29(1), (2)(d), 54, 57(2).
5. *R v Secretary of State for Home Department ex p. Launder*, [1997] 1 WLR 839; *R v Director of Public Prosecutions ex p. Kebilene*, [1999] 3 WLR 175 and 972.

6. *R v Director of Public Prosecutions ex p. Kebilene*, [1999] 3 WLR 972, [1999] 4 All ER 801.
7. *Barrett v Enfield London Borough Council*, [1999] 3 WLR 79; *R v North and East Devon Health Authority ex p Coughlan*, Court of Appeal, (16 July 1999 unreported).
8. *Attorney-General of Hong Kong v Lee Kwong-hut*, [1993] AC 951; *R v Director of Public Prosecutions ex p. Kebilene*, [1999] 3 WLR 972, [1999] 4 All ER 801.

Human Rights Act 1998

[15]

The 1998 Act is frequently referred to as incorporating the European Convention on Human Rights into UK law. Strictly speaking this is not an accurate description of the effect of the Act. The distinction between incorporation and the consequences of the Act was explained by the Lord Chancellor in the following terms:

“... the convention can, and is, already applied in a variety of different circumstances and is relied on in a range of ways by our own courts ... the [Human Rights] Bill as such does not incorporate convention rights into domestic law, but .. it gives further effect in the United Kingdom to convention rights I have to make this point absolutely plain. The European Convention on Human Rights under this Bill is not made part of our law. The Bill gives the European Convention on Human Rights a special relationship which will mean that the courts will give effect to the interpretative provisions to which I have already referred, but it does not make the convention directly justiciable as it would be if it were expressly made part of our law The short point is that if the convention rights were incorporated into our law, they would be directly justiciable and would be enforced by our courts. That is not the scheme of this Bill. If the courts find it impossible to construe primary legislation in a way which is compatible with the convention rights, the primary legislation remains in full force and effect. All that the courts may do is to make a declaration of incompatibility.”¹

The essential point being made is that the Bill retains the principle that Parliament is sovereign and its Acts cannot be struck down or disapplied by the courts. This position contrasts with EU law under the Community treaties which are given legal effect in UK law by s 2(1) of the European Communities Act 1972. Under the 1972 Act courts and tribunals do have the power to disapply Acts of Parliament which are incompatible with EU law, and can do so on an interim basis pending final determination of the issue². The Human Rights Act create a multi-layered effect for its provisions. Section 3 of the 1998 Act provides that so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights³. The validity, continuing operation or enforcement of incompatible primary legislation (or of incompatible subordinate legislation where primary legislation prevents removal of the incompatibility) is not affected⁴. Acts of the UK Parliament are primary legislation and cannot be struck down by the courts, whose only power in respect of these is to make a declaration of incompatibility under s 4 of the Act. Thereafter it is for the UK Parliament to determine whether or not the offending legislation should be repealed or amended. If the UK Parliament determines not to act then the only remedy left would be to apply to the European Court of Human Rights in Strasbourg. Similarly, subordinate legislation cannot be struck down by the courts if primary legislation exists which would not remove the incompatibility. Again the only course open to the courts in that situation is to make a declaration of incompatibility and then leave it to the UK Executive and Parliament to determine what remedial action, if any, should be taken. Subordinate legislation is defined in s 21 of the Act. The definition includes statutory instruments made under primary legislation and also Acts of the Scottish Parliament and orders, rules, regulations schemes, warrants, bye-laws or other instruments of the Scottish Executive. By implication, and contrasting with the position as regards primary legislation, subordinate legislation which is incompatible with the 1998 Act is to be treated as repealed, at least to the extent that it is incompatible Convention rights. If the courts cannot interpret such legislation in a way as to be compatible with Convention

rights then they should ignore the effect of such legislation. A person who is, or would be, a 'victim'⁵ of an unlawful act and claims that a public authority has acted or proposes to act in a way which is incompatible with a Convention right may (a) bring proceedings against the authority under the Human Rights Act or (b) rely on the Convention right concerned in any legal proceedings. This would mean that a person seeking to challenge the effect of UK Parliament legislation as giving rise to a breach of one or more of their Convention rights could bring judicial review proceedings seeking a declarator of incompatibility under s 4 of the Act. The final court of appeal in civil proceedings under the Act is the House of Lords. Where the legislation under challenge is UK Parliament secondary legislation which is not covered by s 3(2)(c) of the Act then this would be treated as valid and unenforceable under s 3 of the Act. There is no limitation as to the retrospective effect of such treatment under the Act. Although the Acts of the Scottish Parliament and the secondary legislation issued by the Scottish Executive fall under the definition of subordinate legislation, the Scotland Act 1998 appears to envisage a different process applying to that particular class of subordinate legislation.

1. Lord Irvine of Lairg, Lord Chancellor, speaking at the Report Stage of the Human Rights Bill in the House of Lords on 29 January 1998 (Hansard (HL) 29 January 1998, col. 421-2).
2. *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR 629; *Levez v T H Jennings (Harlow Pools) Ltd*, [1999] IRLR 764; *R v Secretary of State for Transport ex p. Factortame (No. 2)*, [1991] 1 AC 603, [1990] 3 WLR 818, [1991] 1 All ER 70.
3. Defined in s 1 as meaning the rights and fundamental freedoms set out in Articles 2 to 12 and 14 of the Convention, Articles 1 to 3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention.
4. Human Rights Act 1998, s 3.
5. See paragraph [34].

The relationship between the Human Rights Act 1998 and the Scotland Act 1998

[16]

Under s 100 of the Scotland Act 1998 the making of legislation by the Scottish Parliament or any act or failure to act of a member of the Scottish Executive may only be challenged on the grounds of incompatibility with Convention rights by the Lord Advocate, the Advocate General, the Attorney General or the Attorney General for Northern Ireland, or by a person who is a 'victim' for the purposes of Article 34 of the Convention¹. S 29 of the Scotland Act provides that an Act of the Scottish Parliament is not law in so far as any provisions are outwith the legislative competence of the Parliament². The section lists five areas which are outwith the legislative competence of the Parliament, and these include 'reserved matters' and 'incompatibility with any of the Convention rights or with Community [EC] law'³. Similar provisions apply concerning secondary legislation by and the acts of members of the Scottish Executive⁴. Where possible any provision of any Bill or Act of the Scottish Parliament or of any subordinate legislation made by a member of the Scottish Executive which could be read as being outwith the competence of the Parliament or the Executive member is to be read as narrowly as required to allow it to be within their competence⁵. Legislation of the Scottish Parliament which is incompatible with a persons Convention rights falls within the definition of 'devolution issue' under the Scotland Act⁶. Part II of Schedule 6 is stated to apply in relation to devolution issues in proceedings in Scotland⁷. Any challenge to the Acts of the Scottish Parliament or the legislation of the Scottish Executive as being incompatible with a persons Convention rights requires to be brought as a 'devolution issue' under the Scotland Act rather than as a 'human rights issue' under the Human Rights Act. This has the further consequence that any challenge has to be intimated to the Advocate General and the Lord Advocate (unless they are already party to the proceedings)⁸. Where it is decided that an Act or any provisions of an Act of the Scottish Parliament is not within legislative competence or that there was no power on the part of a member of the Scottish Executive to make, confirm or approve subordinate legislation then the court may remove or limit any retrospective effect of its decision, or it may suspend the effect of the decision for any

period and on any conditions so as to allow the defect to be corrected. This could mean that, for example, a statutory instrument promulgated by the UK Executive could be treated by a Scottish or English court as being incompatible with an individual's Convention rights. Intimation of the challenge need not be given to any law officers of the Executive and, if there was no primary legislation which prevented it, a successful challenge could lead to the court ignoring the offending legislation and removing any retrospective effect it might have. By contrast if an identical provision was enacted as an Act of the Scottish Parliament or was contained in a Regulation made by a Scottish Executive Minister then the challenge would have to be intimated to the Lord Advocate and the Advocate General where they were not a party to the action in any event and, although the challenge was successful the court could stop the decision from having any retrospective effect and suspend any current effect so as to allow the Scottish Parliament or Executive a chance to amend the legislation. In addition, unlike the situation under the Human Rights Act 1998, the final court for the determination of a devolution issue is the Judicial Committee of the Privy Council⁹. Questions as to the legislative competence of any particular Bill may be referred to the Judicial Committee by the Advocate General, the Lord Advocate or the Attorney General¹⁰.

1. See paragraph [34] for further discussion of the meaning of 'victim'.
2. 1998 Act, s 29(1).
3. 1998 Act, s 29(2).
4. 1998 Act, s 57(2).
5. 1998 Act, s101.
6. 1998 Act, s 98 and Sched 6, para 1(a).
7. 1998 Act, Sched 6, para 3.
8. 1998 Act, Sched 6, para 5.
9. 1998 Act, ss 98 and 103 and Sched 6, paras 10 - 13 and s 32(4).
10. 1998 Act, s 33.

The Scottish Parliament and MSP's

[17]

The Scottish Parliament is not a sovereign parliamentary body of the Westminster type. It owes its existence to an Act of the Westminster Parliament¹. As already noted that Act specifically defines its legislative consequence and states the consequences of it acting outwith its legislative consequence². The 1998 Act does however contain express limits on the extent which the courts might interfere with the Parliament or be used as a means of disrupting its proceedings by providing that the court may make an order for declarator but cannot make an order for suspension, interdict, reduction or specific performance (or other like order) against the Parliament³. Nor can these orders be made in proceedings against MSP's, the Presiding Officer or a deputy, member of the Parliament's staff or the Parliamentary corporation where this would give a form of relief not available against the Parliament itself⁴. Nor is the validity of an Act of the Parliament affected by any invalidity in the proceedings of the Parliament leading to its enactment⁵. This does not mean that the courts will take the same approach to the Scottish Parliament as they do to Westminster. This was emphasised by the Court of Session early in the Parliament's existence when Lord President Rodger stated:

“The Lord Ordinary gives insufficient weight to the fundamental character of the parliament as a body which - however important its role - has been created by statute and derives its powers from statute. As such, it is a body which, like any other statutory body, must work within the scope of these powers. If it does not do so, then in an appropriate case, the court may be asked to intervene and will require to do so, in a manner permitted by the legislation. In principle therefore, the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law ... Subject to sec 40(3) and (4), however, the court has the same powers over the Parliament as it would have over any other statutory body and might, for instance, in an appropriate case grant a decree against it for the payment of damages.”⁶

Whilst s 40(4) of the 1998 Act prevents the court from granting certain orders against MSP's in certain circumstances and there is further protection granted to MSP's in respect of defamatory statements made in parliamentary proceedings⁷, the same form of control by the courts that exist in relation to the Parliament also apply to Members of the Scottish Parliament⁸. Where it is found that an MSP has committed a legal wrong but that legal wrong is not one which could be committed by the Scottish Parliament it could be competent to grant an interdict against the MSP even though this would have an effect on the workings of the Parliament⁹. Not all legal wrongs need give rise to the public in general or an interested member of the public having a civil right which entitles that person to the remedy sought¹⁰.

1. The Scotland Act 1998.
2. 1998 Act, s 29.
3. 1998 Act, s 40(3).
4. 1998 Act, s 40(4).
5. 1998 Act, s 28(5).
6. *Whaley v Lord Watson*, 2000 SC 340 at 348G-I; 2000 SCLR 279 at 287G - 288A.
7. 1998 Act, s 41.
8. *Whaley v Lord Watson*, 2000 SC 340; 2000 SCLR 279 at 288D-F.
9. *Whaley v Lord Watson*, 2000 SC 340; 2000 SCLR 279.
10. *Whaley v Lord Watson*, 2000 SC 340; 2000 SCLR 279.

THE GIVING OF REASONS

Where reasons are required

[18]

There is no general duty at common law to give reasons¹. This situation is likely to change as a consequence of the Human Rights Act 1988², since there is a general requirement under Article 6 of the ECHR for reasons to be given in both civil and criminal matters³. In most instances if there is a duty to give reasons for a decision then this is prescribed by statute.

A prime example of this is the Tribunals and Inquiries Act 1992, s 10 and Sched 1, which provides that it is the duty of the relevant tribunal or Minister to furnish a statement, either written or oral, of reasons for a decision if requested to do so on or before the giving or notification of the decision. This covers, *inter alia*, child support appeal tribunals, immigration adjudicators, social security appeal tribunals, social security commissioners and childrens hearings. There is a statutory exclusion of the obligation of a Social Security Commissioner to give reasons when refusing leave to appeal from a social security appeal tribunal. Specific statutory provisions which have required written reasons for a decision in social welfare areas include: Housing (Scotland) Act 1987, s 30 (decisions by local authorities on homeless persons applications); Housing Benefit (General) Regulations 1987, reg 83(4) (decisions by housing benefit review boards on appeals); Immigration Appeals (Procedure) Rules 1984, rule 39 (decisions of appellate authorities on immigration appeals); Asylum Appeals (Procedure) Rules 1993, rules 11 and 19 (decisions of a special adjudicator and the Immigration Appeal Tribunal in asylum appeals). Where there is a statutory duty to give reasons the purpose of this requirement is not only to inform the parties of the result and to make clear the basis on which the decision was reached, but also to demonstrate that the result conforms with the statutory provisions and and in accordance with principles of natural justice⁴.

1. *Lawrie v Commission for Local Authority Accounts in Scotland*, 1994 SLT 1185; *R v Civil Service Appeal Board ex p. Cunningham*, [1991] 4 All ER 310; *R v Higher Education Funding Council ex p. Institute of Dental Surgery*, [1994] 1 WLR 242, [1994] 1 All ER 651.
2. *Stefan v General Medical Council*, [1999] 1 WLR 1293.
3. *Van der Hurk v The Netherlands*, (1994) 18 EHRR 481.
4. *Glasgow Heritable Trust Ltd v Donald*, 1973 SC 113; *Albyn Properties Ltd v Knox*, 1977 SC 108, 1977 SLT 41.

Where there is no statutory requirement to give reasons

[19]

If there is no duty to give reasons then the absence of reasons does not of itself mean that the decision is irrational¹. Where no reasons are given it can be very difficult to know whether there is any basis for challenging the decision taken. Even if there is no statutory obligation to give reasons there may still be circumstances where courts are prepared to hold that reasons ought to be given. This may be because as a matter of natural justice an applicant needs to be advised of any aspect of a matter which might go against them². In other instances it has been said that the circumstances may cry out for reasons to be given and that where there is a common law duty to give reasons this arises as part of the duty to act fairly³. The fact that the decision may be liable to challenge by judicial review could be one factor which means that reasons ought to be given⁴. Where a decision making body is exercising a judicial function it should also give reasons for its decisions⁵. It has also been said that if all other facts and circumstances point to a different decision being reached, the decision maker who has given no reasons cannot complain if a court draws an inference that there was no rational reason for the decision⁴.

1. *Bass Taverns Ltd v Clydebank District Licensing Board*, 1995 SLT 1275, following *R v Trade and Industry Secretary ex p. Lonhro plc*, [1989] 1 WLR 525, [1989] 2 All ER 609.
2. *R v Secretary of State for the Home Department ex p. Fayed*, [1998] 1 WLR 763, [1997] 1 All ER 228. .
3. *R v Secretary of State for Education ex p. G*, [1995] ELR 58.
4. *R v Secretary of State for Home Department ex p. Doody*, [1993] 3 All ER 92.
5. *R v Civil Service Appeal Board ex p. Cunningham*, [1991] 4 All ER 310.
6. Lord Keith in *R v Secretary of State for Trade and Industry*, [1989] 1 WLR 525 at p 620.

The standard of reasoning required

[20]

It has been held that where a statutory duty to give reasons exists the reasons given must be proper and adequate, and deal with the substantive issues raised in an intelligible way. The informed reader and the court should be left in no real and substantial doubt as to what the reasons for the decision were and what were the material considerations taken into account in reaching it¹. Scottish courts have applied the same tests². In *Albyn Properties Ltd v Knox*, it was stated that a rent assessment committee must state what facts they found to be admitted or proved, whether and to what extent the parties' submissions were accepted as convincing or not, and by what method or methods of valuation applied to the facts was the determination arrived at. It was not sufficient simply to say that they had arrived at a figure after full consideration of all the circumstances where there was evidence of different approaches which could be taken³. Parties ought to be able to tell from looking at the decision why the decision has been made the way it has, stating what evidence has been accepted and what evidence has been rejected⁴. In giving reasons it is not necessary to deal with every matter of fact, so long as the decision can be seen to deal with the material matters⁵. The amount of detail required to be given in any decision will depend on the circumstances⁶. A decision which failed to take account of a representation on a matter which could affect the outcome of the issue before the decision maker is thus liable to be reduced as being unreasonable for failing to deal with all material matters. Where decisions are made under statute and there is provision for full reasons to be given separately from the decision letter it can be sufficient for the decision letter to do no more than state the statutory ground of decision⁷. It is not however sufficient for the Criminal Injuries Compensation Authority to simply refer to the relevant paragraph of the scheme for criminal injuries compensation when refusing to make an award or a full award of compensation without giving the gist of the evidence upon which they relied in making their decision⁸.

1. *Re Poyser and Mills Arbitration*, [1964] 2 QB 467; *Givaudan & Co. Ltd. v Minister of Housing and Local Government*, [1967] 1 WLR 250.

2. *Wordie Property Co. Ltd. v Secretary of State for Scotland*, 1984 SLT 345; *Mecheti v Secretary of State for Home Department*, 1996 SCLR 998.
3. 1977 SC 108 at p. 112. Note also the warning of the Inner House in *Singh v Secretary of State for the Home Department*, 2000 SLT 243 against requiring an overly formulaic approach to the giving of reasons.
4. *McLeod v Banf and Buchan Housing Benefit Review Board*, 1988 SLT 486; *Malcolm v Tweedale District Council Housing Benefit Review Board*, 1994 SLT 1212; *R v Sefton Metropolitan Borough Council ex p. Cunningham*, (1991) 23 HLR 534; *R v Cardiff City Council Housing Benefit Review Board ex p. Thomas*, (1991) 25 HLR 1; *R v Solihull Metropolitan Borough Council Housing Benefit Review Board ex p. Simpson*, (1993) 26 HLR 370.
5. *R W Cairns Ltd v Busby East Church Kirk Session*, 1985 SLT 493; *R v Criminal Injuries Compensation Board ex p. Cook*, [1996] WLR 1037; *Asif, Petitioner*, 1999 SCLR 427; *Singh v Secretary of State for the Home Department*, 2000 SC 219.
6. *Safeway Stores Ltd v National Appeal Panel*, 1996 SC 37; 1996 SLT 235; *Helle v Finland*, (1997) 26 EHRR 159; *Singh v Secretary of State for the Home Department*, 2000 SLT 243.
7. *Swati v. Secretary of State for the Home Department*, [1986] 1 W.L.R. 477; [1986] Imm Ar 88.
8. *R v Criminal Injuries Compensation Authority ex p. Leatherland*, QBD, Turner J, (21 July 2000 unreported).

JUDICIAL REVIEW OF PARTICULAR DECISIONS

Checklist

[21]

When considering whether it is possible to judicially review a particular decision the answers to the following questions give guidance as to when a decision requires to be appealed or may be reviewed. Six general questions need to be asked when trying to assess the possibility for a judicial review:

- (i) what exactly is it that the decision maker has to determine;
- (ii) what information did the decision maker have in making the determination;
- (iii) has the decision maker taken proper account of the information available;
- (iv) has the decision maker properly applied the relevant law or legal tests to the issue;
- (v) has the decision maker acted within the scope of the decision making remit and in a fair manner; and
- (vi) was the determination one that the decision maker entitled to make in terms of the remit and on the basis of the information available.

Using these questions as a checklist is a first step to determining whether there are possible grounds for judicially reviewing a particular decision.

REMEDIES

Introduction

[22]

The powers of the court are set out in RCS 1994 r 58.4. The rule provides that the court may make such order as the court thinks fit whether or not such order was sought in the petition, being an order that could be made if sought in any petition or action. The rule goes on to list examples of the orders which might be made, including an order for reduction, declarator, suspension, interdict, implement, restitution, payment (whether of damages or otherwise) and any interim order. This is not an exhaustive list of the type of order which the court could make, and further remedies which could be sought from the court would include liberation, delivery, recitification of a deed or document, count, reckoning and payment, division and sale, and removing. This part of the chapter will concentrate on the more common remedies which might be sought in social welfare cases. It is not intended as an authoritative discussion of the various remedies available, for which reference should be made to *Administrative Law*, Stair Encyclopaedia and Clyde and Edwards, *Judicial Review*.

Declarator

[23]

This remedy does not create a new right but 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 Part II of the Housing (Scotland) Act 1987 may want a declarator that they are homeless, or in priority need or that they are not intentionally homeless (or a combination of all or any of them) where a local authority has decided such a matter against them or has failed to make any decision on the matter. Where no decision has been made at all this remedy may be linked with another, such as for specific performance of a statutory duty, which follows on as a consequence of the right or status being declared. There seems to be no reason why a declarator could not be framed in negative terms, that is to say that the respondent has no right or power to act in a particular way. Because of the effect of the Crown Proceedings Act 1947, s 21(1) declarator may be a necessary remedy where interdict, specific performance or delivery would otherwise be sought in an action brought against a Government Minister, Department or Agency. It is an alternative to a remedy of suspension, interdict, reduction or specific performance (or other like order) in proceedings against the Scottish Parliament¹. It is also available as an alternative to these same order in proceedings against any member of the Parliament, the Presiding Officer or a deputy, any member of the Parliamentary staff or the Parliamentary corporation where the effect of granting those orders would be to give a form of relief which was not available against the Parliament itself².

1. The Scotland Act 1998, s 40(3).
2. 1998 Act, s 40(4).

Reduction

[24]

This is the most common remedy sought in a judicial review as the petitioner usually wishes to challenge a decision which has already been taken, and needs to have that decision set aside or quashed as a prelude to exercising or enjoying in the future the particular right, benefit or interest which is sought to be protected. Reduction can be used against either decisions or documents. The remedy is not confined to writings but it is also available to reduce illegal acts¹. If it is a document which is being challenged it may not be necessary to reduce the whole document². Where the document also deals with the interests of a third party it should be made clear that it is only that part of the document which affects the petitioner which is being challenged. It is a remedy which is available against the Crown. The effect of reduction is to make the document or decision so reduced a nullity, and restores the petitioner to the position that existed prior to the issuing of the decision or document which is the subject of proceedings. As a consequence the normal effect of reduction is that the decision making body will require to consider matters anew and issue a fresh determination. Where it is being argued that an act or decision complained of was ultra vires it may be appropriate to also seek a declarator that the respondent had no right or power to make the decision complained of. It is not available in proceedings against the Scottish Parliament but the courts may instead make a declarator³. Nor is it available in proceedings against any member of the Parliament, the Presiding Officer or a deputy, any member of the Parliamentary staff or the Parliamentary corporation where the effect of granting the order would be to give a form of relief which was not available against the Parliament itself⁴.

1. *Lennox v Scottish Branch of the British Show Jumping Association*, 1996 SLT 353.
2. *Brechin Golf and Squash Club v Angus District Licensing Board*, 1993 SLT 547.
3. The Scotland Act 1998, s 40(3).
4. 1998 Act, s 40(4).

Suspension

[25]

Suspension has proven itself to be more useful and more popular in recent years than would be suggested by the law reports. The remedy is available as a means of preventing interference with an established or claimed right and is a means to prevent some step being taken which would otherwise injure the interests of the petitioner. While it stops the proceedings being objected to it cannot of itself prevent a future resumption of those activities and it would be necessary to combine a conclusion of suspension with one for interdict in order to achieve that effect. By its nature it is an interim remedy in that it is possible to come to court and at the stage of seeking first orders ask for suspension of an act or decision. In practice it is usual to specifically seek interim suspension, which makes it clear from the pleadings that an order for suspension is being sought at the outset. The principal use for suspension has been in immigration cases where the applicant has been served with notice that he is to be removed or deported and it is not possible to obtain an interdict by virtue of Section 21 of the Crown Proceedings Act 1947 (see paragraph [26]). In practice it is usually unnecessary to pursue the order for suspension as the practice of the immigration authorities has been that once a judicial review petition has been lodged with the court and intimated to the Office of the Solicitor to the Advocate General (representing the interests of the Home Office) they removal directions which are the subject of the order for suspension are cancelled administratively. Orders for interim suspension have also been sought in housing judicial reviews as a means of preserving the status quo pending the determination of the petition. In these circumstances it is common for local authorities to give an undertaking which has the same effect as the order sought. If there is a subsequent change of circumstances the respondent may seek to have the undertaking recalled. It has been held that it is not appropriate for the court's exercise of its supervisory jurisdiction to grant an interim order for suspension of a decision of a public body to terminate a contract¹. It is not available in proceedings against the Scottish Parliament but the courts may instead make a declarator². Nor is it available in proceedings against any member of the Parliament, the Presiding Officer or a deputy, any member of the Parliamentary staff or the Parliamentary corporation where the effect of

granting it would be to give a form of relief which was not available against the Parliament itself³.

1. *Millar & Bryce Ltd v Keeper of the Registers of Scotland*, 1997 SLT 1000.
2. The Scotland Act 1998, s 40(3).
3. 1998 Act, s 40(4).

Interdict

[26]

Interdict is the appropriate remedy where the petitioner is claiming some right or interest which requires to be protected against an infringement or a threatened infringement. As a preventative remedy it must be sought before its purpose becomes otiose. An interim order for interdict can be obtained at the time that first orders are sought. It is possible to seek interdict as the sole remedy, although in practice it is often just one of a number of conclusions. Where there is some doubt about the right being founded upon it would be appropriate to seek declarator along with interdict. Where the act or threatened act complained of results from a decision of the respondent then it may be advisable to also seek an order for reduction of that decision. The extent of the interdict being sought should be clear, precise and no more than what is required. Because it is not competent against the Crown¹ it is not generally available in immigration or social security cases or the like. In that situation an order for declarator may be sought instead². An exception to the exclusion of interdict as a remedy against the Crown is where the subject matter of the action concerns an applicant's rights under European Community law³. It is also available against a local authority. It is not available in proceedings against the Scottish Parliament but the courts may instead make a declarator⁴. Nor is it available in proceedings against any member of the Parliament, the Presiding Officer or a deputy, any member of the Parliamentary staff or the Parliamentary corporation where the effect of granting the order would be to give a form of relief which was not available against the Parliament itself⁵.

1. Crown Proceedings Act 1947, s 21., c.f *M v Home Office*, [1994] 1AC 377, affirming [1992] QB 270; [1992] 2 WLR 73; [1992] 4 All ER 97.
2. *McDonald v Secretary of State for Scotland*, 1994 SC 234.
3. *R v Secretary of State for Home Department ex p Factortame (No. 2)*, [1991] 1 AC 603, [1990] 3 WLR 818, [1991] 1 All ER 70
4. The Scotland Act 1998, s 40(3).
5. 1998 Act, s 40(4). See also paragraph [16].

Specific implement or specific performance

[27]

Specific implement or performance is a common law remedy used to enforce a contractual obligation or to restore possession of property which has been fraudulently or violently taken from the applicant. By virtue of section 21(a) of the Crown Proceedings Act 1947 specific performance is not available against the Crown. Where there is a prima facie breach of European Community law then the courts require to grant an order if this is necessary to provide a remedy against that breach¹. Where it was alleged that a public body was in breach of European Community competition law by abusing a dominant position an interim order for the continuing performance of a contract *ad factum praestandum* was granted². A statutory formulation of the remedy is enacted as s 45(a) of the Court of Session Act 1988. Specific performance of a statutory duty is a statutory remedy available under s 45(b) of the Court of Session Act 1988 which requires to be brought by judicial review (RCS, rule 58.3(1)). In addition s 46 of the 1988 Act provides that where a respondent in any application or proceedings has done any act which may be prohibited by interdict, the court may ordain the respondent to perform any act which may be necessary to reinstate the petitioner in his possessory right, or for granting specific relief against the illegal acts complained of. It has been suggested that because it is a statutory remedy as distinct from the common law remedy of implement that these remedies are available against the Crown, notwithstanding Section 21 of the Crown

Proceedings Act 1947³. If that is so then there would seem no reason why in appropriate circumstances an order could not also be granted against the Crown under Section 46 of the 1988 Act. Specific performance by inferior courts and arbiters of their duties is part of the Court of Session's supervisory jurisdiction and any action seeking implement of such duties requires to be brought by way of judicial review. Neither specific implement nor specific performance (by virtue of being a like order) is available in proceedings against the Scottish Parliament but the courts may instead make a declarator⁴. Neither are these remedies available in proceedings against any member of the Parliament, the Presiding Officer or a deputy, any member of the Parliamentary staff or the Parliamentary corporation where the effect of granting such order would be to give a form of relief which was not available against the Parliament itself⁵.

1. *R v Secretary of State for Transport ex p. Factortame (No. 2)*, [1991] AC 603.
2. *Millar & Bryce Ltd v Keeper of the Registers of Scotland*, 1997 SLT 1000.
3. Clyde and Edwards, *Judicial Review*, para 23.36.
4. The Scotland Act 1998, s 40(3).
5. 1998 Act, s 40(4).

Liberation

[28]

This order was commonly sought in immigration and political asylum cases in which the client was detained pending determination of their application to remain in the country. Detention is supposed to occur only where there is supposed to be an action of last resort where there is no alternative, and in accordance with defined criteria set out in Immigration Service Instructions¹ and the Detention Centre Rules 2001. A statutory right to seek bail exists for persons arriving in the country who are detained under Schedule 2 of the Immigration Act 1971. This is mainly those people who are detained while their application for leave to enter is being considered or who are illegal entrants or who are to be removed. Bail could also be granted by an adjudicator to those who are appealing a

decision to an adjudicator or the Immigration Appeal Tribunal, or where there is an application for leave to appeal to the Court of Session. Where bail is refused the appropriate remedy is to seek judicial review of the detention². In addition where there is a judicial review of a determination of an adjudicator or the Immigration Appeal Tribunal and the petitioner has been detained pending his anticipated removal or deportation then it is possible to seek judicial review of the detention of the petitioner while the outcome of the judicial review proceedings is awaited. Although the adjudicator would apparently have the jurisdiction to grant bail in such circumstances, in practice they will decline to do so since the matter is before the Court of Session. It is Home Office policy that where a person is detained the initial decision to detain should be reviewed by an Inspector within 24 hours, and any continuing detention should be further reviewed on a weekly basis³. It has been held that where the indefinite detention of an individual was at stake there was a predisposition in Scots law towards the securing of liberty, but that the power of the court in such cases was no wider than its general power to review administrative acts and there was no independent discretionary power to override the administrative decision nor was there any universal proposition that in all immigration cases there is an onus on the Crown to satisfy the court of substantial grounds for detention⁴. Since detention is only supposed to be carried out in accordance with fixed criteria the basic presumption however must be that the person is entitled to liberty and the Secretary of State has good reason for detention. In a judicial review of the decision to keep the person in detention it is usually necessary to argue that the decision was unreasonable⁵. In Scotland detainees were formerly kept in prisons, although this is a practice which was criticised because of the detrimental consequences for those detained⁶. At the time of writing there is one immigration Removal Centre operating in Scotland. This is the Dungavel Removal Centre (formerly Dungavel Prison, closed and re-opened as Dungavel Detention Centre and then renamed by the Nationality, Immigration and Asylum Act 2002. The 2002 Act also provides for the use of Accommodation Centres, although at the time of writing there were none operating in either Scotland or England. Apart from the Immigration Service Instructions on Detention

there are additional materials by which to measure the appropriateness or reasonableness of any particular decision to detain⁷. There is also a statutory provision concerning liberation and interim orders⁸. In practice this provision is not relied upon and it is doubtful whether in practice it would make any real difference to the tests applied by the court when deciding whether or not to grant the order.

1. Immigration Service Instructions on Detention, 3 December 1991 and 20 September 1994; Chapters 38 and 39 of the Immigration Services Operational Enforcement Manual, (found in Division D of Butterworth's *Immigration Law Service*), this material dates from 21 December 2000.
2. See for example *Zhu v Secretary of State for the Home Department*, 1998 SLT 1251 (petitioner not successful on basis of balance of convenience as measured by the risk of absconding). A subsequent application to Strasbourg was declared inadmissible, see *Zhu v United Kingdom* (Application No. 36790/97), ECtHR, 12 September 2000.
3. Immigration Service Instruction on Detention, 3 December 1991.
4. *Singh v Secretary of State for the Home Department*, 1993 SLT 950.
5. *Sokha v Secretary of State for the Home Department*, 1992 SLT 1049.
6. See Report on H.M. Prison Greenock by H.M. Chief Inspector of Prisons (1995), paras 6.29-6.40. After the publication of this Report there was a disturbance in the prison during 1997 in which 4 persons awaiting deportation were subjected to a racially motivated attack.
7. UNHCR Executive Committee Resolution 44(38) 1986; Council of Europe Recommendation R(87)3, 12 February 1987 ('the European Prison Rules'); European Convention of Human Rights, Article 3.
8. Court of Session Act 1988, s 47.

Payment

[29]

A conclusion for payment may be sought where there is a clear obligation to make payment of a specified sum or the petitioner is entitled to repayment of an unlawful charge¹.

1. For example *British Oxygen Co. v South of Scotland Electricity Board*, 1959 SC (HL) 17.

Damages for unlawful acts

[30]

Damages may be available in respect of unlawful or negligent acts. Unlawfulness can be used in two different senses. It can mean any act which involves a procedural error or an error in the exercise of a discretion, including the exercise of a discretion while exercising a statutory power. This occurs where the relevant body or person has the power to act or decide but does not exercise that power accurately, or does so negligently. Where this is the position then the official or body cannot be made responsible for any loss arising without making and proving an allegation of malice¹. The other sense in which the term unlawful is used is where the act is entirely outwith the lawful authority or competence of the authority or individual acting. When a public official can be said to have acted without any legal basis for doing so then the action is ultra vires and the official will be held liable without the need for an averment of malice or want of probable cause². It will however be necessary to establish that the defender knew the act was beyond his powers or was recklessly indifferent to that fact, and also that he either knew or was recklessly indifferent to the fact that the act would probably injure the pursuer or a class of persons of which the pursuer was a member³. Damages may be available against the Scottish Parliament in respect of any act outwith its legislative competence⁴. In addition damages can be recovered for a breach of EC law⁵. Where there is a wide legislative discretion there will be no liability to pay damages unless the breach is grave and manifest, but there is no need to establish that the breach was intentional or negligent⁶. Clearly discriminatory legislation with likely serious consequences for those affected by it which

was enacted in the face of opposition from the European Commission was a breach of community law which was sufficiently serious to entitle payment of damages upon proof of loss⁷. Where domestic legislation does not provide or allow for full compensation then the domestic legislation should be disapplied in order to ensure full effect is given to Community rights⁸.

1. *Rae v Linton*, (1875) 2 R 669; *Micosta v Shetland Islands Council*, 1986 SLT 193; *Shetland Line (1984) Ltd v Secretary of State for Scotland*, 1996 SLT 653.
2. *Bell v Black and Morrison*, (1865) 3 M 1026; *McCreadie v Thomson*, 1907 SC 1176; *Robertson v Keith*, 1936 SC 29; *Hester v MacDonald*, 1961 SC 370.
3. *Three Rivers District Council v Governor & Co. of the Bank of England (No 3)*, [2000] WLR 1220; [2000] All ER 1.
4. *Whaley v Lord Watson*, 2000 SC 340; 2000 SCLR 279.
5. *Francovich and Bonifaci v Italian Republic*, [1991] ECR I-5357.
6. *R v Secretary of State for Transport ex p. Factortame*, [1996] ECR I-1029.
7. *R v Secretary of State for Transport ex p. Factortame (No. 5)*, [1999] 3 WLR 1062.
8. *Marshall v Southhampton and South-West Hampshire Area Health Authority (No. 2)*, [1993] ECR I-4367.

Damages for breach of statutory duty or negligence

[31]

In *Kelly v Monklands District Council*¹ it was held that the Housing (Homeless Persons) Act 1977 gave rise to a liability in damages². In *Mallon v Monklands District Council*³ damages of £100 were awarded where the petitioner had symptoms of reactive depression following an earlier finding that the local authority had failed to fulfill their statutory duties under the 1977 Act. Following the decision of the House of Lords in *O'Rourke v Camden London Borough Council*⁴ the decisions in *Kelly* and *Mallon* should be considered to have been over-ruled, and that there are no damages liable to be paid for a negligent failure by a local authority to fulfill its responsibilities under what is now Part

II of the Housing (Scotland) Act 1987. Indeed standing the decision of the House of Lords in *X (Minors) v Bedfordshire County Council*⁵ it was widely thought to be doubtful whether under the common law there could be many cases where an award of damages for negligence in carrying out a statutory duty would be obtainable. The blanket immunity from liability in damages for negligence has also been found by the European Court on Human Rights to breach the right to a fair hearing under Article 6 of the European Convention on Human Rights⁶. Following that case the UK courts have been more guarded in their approach and accepted that public policy considerations which justify the imposition of a common law duty of care will not apply in all circumstances, and that there may also need to be an inquiry into the facts before it can be decided whether or not a duty of care arises or not⁷.

1. 1986 SLT 169.
2. Following *Thornton v. Kirklees Metropolitan Borough Council*, [1979] Q.B. 626.
3. 1986 SLT 347.
4. [1998] AC 188, [1997] 3 WLR 86, [1997] 3 All ER 23, (1997) 29 HLR 793.
5. [1995] 2 AC 633, [1995] 3 WLR 152, [1995] 3 All ER 353.
6. *Osman v UK*,
7. *Barrett v Enfield London Borough Council*, [1999] 3 WLR 79; *Phelps v Hillingdon London Borough Council*, 2000 TLR 581.

Interim Orders

[32]

RCS 58.7(b) provides that at the stage of granting first orders the Lord Ordinary having heard counsel or other person having a right of audience may grant any interim order sought. Section 47(1) of the Court of Session Act 1988 provides that interim interdict or interim liberation may be granted on the motion of any party to the cause. Section 47(2) of the 1988 Act provides that the Court may make such order regarding the interim possession of any property to which the cause relates or regarding the subject matter of

the cause as the Court may think fit. The usual types of interim order which are likely to be sought are for suspension, interdict, liberation or performance. It is questionable whether an interim order for declarator can be sought as this would appear to be pre-judging the issue between the parties¹. It is not possible to seek the production of documents as an interim order².

1. *Ayr Town Council v Secretary of State for Scotland*, 1965 SC 394; *R v Inland Revenue Commissioners ex p. Rossminster*, [1980] AC 1014, but see also discussion in Clyde and Edwards, *Judicial Review*, at para 24.12.
2. *Kelly Petitioner*, 1985 SC 333.

BRINGING A JUDICIAL REVIEW

Who can initiate proceedings, where and how

[33]

In order to be able to bring a challenge by way of judicial review there must be sufficient title and interest in the subject matter of the application. In most welfare law cases there will be little difficulty about this because it is the person who is directly affected by the act or decision or failure to act on the part of the person required to do so who will be bringing the challenge. The question of whether sufficient title exists can be complicated, and it may or may not be possible to claim sufficient title on a number of different grounds¹. For example a company running a river tour business had an interest as business rivals to challenge the vires of a local authority's decision to also provide river tours using steamers operated by the authority under a local Act as ferries, but they had no title. The same people did have sufficient basis as harbour ratepayers and persons entitled to vote or stand in elections for harbour trustees to qualify as having a relevant interest in the local authority's decision². Where a statutory duty is laid on a public body which is designed to benefit the public generally then any person who can qualify an interest may have title to sue³. Members of the general public or a body representative of their interest did have a title as to bring a challenge to a circular concerning the interpretation of a

regulation related to extra payments for severe weather conditions because this was a social security benefit available to every member of the public who qualified for it, but they did not have sufficient interest in the subject matter of the petition because no one had claimed the benefit, no decision had yet been made on the interpretation of the regulation, any adverse decision could be appealed and therefore the interest of the applicants was too remote⁴.

1. For fuller discussion of issues of title and interest, Bradley, *Administrative Law*, Stair Memorial Encyclopaedia, and Clyde and Edwards, *Judicial Review*, Chapter 10.
2. *D & J Nicol v Trustees of the Harbour of Dundee*, 1915 SC (HL) 7.
3. *Wilson v Independent Broadcasting Authority*, 1979 SC 351.
4. *Scottish Old People's Welfare Council Petitioners*, 1987 SLT 179.

The meaning of 'victim' for the human rights challenges

[34]

Under s 7 of the Human Rights Act 1998 a challenge to an act or a proposed act of a public authority may only be made by the victim of the unlawful act. A person is a victim of an unlawful act only if they are the victim for the purposes of Article 34 of the ECHR¹. To be a victim for the purposes of Article 34 it is sufficient to be at risk of being directly affected by the act². A representative body or pressure group would not have title and interest to qualify as a victim under Article 34 merely through acting as a representative of a person who was a victim³. There could of course be circumstances where it was itself the victim of the unlawful act. The consequence of this test is that there may be circumstances in a judicial review where a representative group was one of the parties to the action, but it would not be able to argue those parts of the action which involved a challenge under the 1998 Act.

1. 1998 Act, s 7(4) and (7).

2. *Marckx v Belgium*, (1979) 2 EHRR 330.
3. *Norris and National Gay Federation v Ireland*, (10581/83), (1984) 44 DR 132; *Purcell v Ireland*, (15404/89), (1991) 70 DR 262; *Open Door Counselling Ltd v Ireland*, (1992) 14 EHRR 115.

Who should proceedings be brought against - identifying the correct respondent

[35]

In most instances it should be obvious who the correct respondent is, because it is the person or body who is responsible for the the act or decision complained about, *e.g.*, in a homelessness case it is the local authority which made the decision. There are some deviations from this general rule. In a challenge to a decision of an immigration adjudicator or an Immigration Appeal Tribunal it was usually the Secretary of State for the Home Department who is called as the respondent. Intimation was given to the Office of the Solicitor to the Advocate General for Scotland as the appropriate department representing the Home Office in Scotland. Practitioners need to be aware of the decision of Lord Philips in *Tehrani v Secretary of State for the Home Department*, 2003 SLT 808 concerning questions as to jurisdiction and the proper respondent. At the time of writing this decision had been appealed to the Inner House of the Court of Session and the Opinion of the Court is expected soon. There is also a Practice Note which requires that the petition is intimated to the immigration adjudicator who made the decision for their interest in the subject matter of the action¹. In practice the immigration adjudicator and the Immigration Appeal Tribunal, although appointed as an independent tribunal service run under the auspices of the Lord Chancellor's Department, take no part whatsoever in defending the proceedings, beyond passing any relevant file of papers in their possession onto the Home Office. It is the Home Office, notwithstanding that they are the contra arguing party, who take the decision whether or not to oppose the judicial review proceedings.

1. P.N. No. 1 of 1992.

Time constraints - mora, taciturnity and acquiescence

[36]

Unlike the position in England, in Scotland there is no formal time limit within which judicial review proceedings must be started. However it has been noted that it is a process designed to give speedy consideration to problems which arise and where time is of materiality, and in such a situation potential litigants should lose no time in raising proceedings otherwise they face the risk of a possibly successful plea of mora, taciturnity and acquiescence¹. The plea is based on a form of personal bar in which the applicant is held to have acquiesced in the decision or act now being complained about. The delay and taciturnity in bringing proceedings are taken as signs of acquiescence in that act or decision. Even if the potential petitioner could be said not to have acquiesced in any act or decision, a delay may be fatal because of a change in position or a material change in circumstances which takes place before the matter is brought into court. The exact amount of time for any such change can only be determined by the facts and circumstances of the particular case as delay which is material in one context may not be material in another². In one case it was held that, notwithstanding an admitted breach of natural justice, a failure to take any steps to preserve the status quo in the twenty four days between the decision being made and the decision being implemented by a third party was sufficient to establish acquiescence by mora and taciturnity³. Any delay may also mean that the decision to be challenged has already been implemented and the decision is spent, in which case it is too late to reduce the decision⁴. The passage of time in itself is not sufficient to establish a plea of mora and taciturnity as an essential ingredient of the plea is that there has been some consequence flowing from the passage of time⁵. Nor is there foundation for the concept of a plea that a petition may be refused simply because there has been unreasonable and undue delay⁶. A respondent taking a plea of mora and taciturnity ought therefor make relevant averments in support of the plea of the manner in which they have been prejudiced or other reason they are founding on in support of the plea, otherwise it will be repelled notwithstanding any unreasonable delay in presenting

the petition⁷. If these averments and the plea is insisted upon the matter then a second hearing should be fixed in order to hear evidence as to the prejudice suffered⁸. A further point that needs to be noted is that where judicial review is being brought against a public authority on the basis of an unlawful act under the Human Rights Act 1998, proceedings must be brought within one year of the date of the act complained of unless the court considers it equitable to allow a longer period⁹. This provision does not effect the common law rules on mora, taciturnity and acquiescence.

1. *Atherton v Strathclyde Regional Council*, 1995 SLT 557.
2. *Noble v City of Glasgow Council*, Lord Eassie, 2001 SLT 2; *Uprichard v Fife Council*, 2000 SCLR 949.
3. *Hanlon v Traffic Commissioner*, 1988 SLT 802.
4. *Shetland Line (1984) Ltd v Secretary of State for Scotland*, 1996 SLT 653.
5. *Singh v Secretary of State for Home Department*, 2000 SLT 533.
6. *Singh v Secretary of State for Home Department*, 2000 SLT 533; *Uprichard v Fife Council*, Lord Bonomy, 2000 SCLR 949.
7. *Chowdry v Secretary of State for Social Security*, Lord Carloway, (28 March 2000 unreported).
8. *Conway v Secretary of State for Scotland*, 1996 SLT 689.
9. Human Rights Act 1998, s 7(5).

Legal aid

[37]

In the normal course of events a person who is likely to require legal aid should await the outcome of an application for increased expenditure or the legal aid application before taking any steps in the interim as payment will not be made for work done prior to the effective date shown on the legal aid certificate¹. Judicial review proceedings however can frequently require steps to be taken on an urgent basis in order to protect the clients position and without the luxury of waiting for a full legal aid certificate. Regulation 18

provides that legal aid may be made available (i) where specific steps have to be taken as a matter of special urgency to protect the applicants position, or (ii) in other circumstances where the Board is satisfied that steps require to be taken as a matter of special urgency to protect the applicants position. In the first of these situations the specific steps are set out in regulation 18(2), and the solicitor fills in application form CIV/SU2 which has to be submitted to the Board within 28 days of the work being done. Of the specific steps covered by this measure the most pertinent to a judicial review are initiating proceedings for suspension or suspension and interdict and initiating such proceedings as are necessary to enable an application to be made for interim liberation in an immigration matter. Other situations of special urgency not covered by this require to be submitted to the Scottish Legal Aid Board on form CIV/SU4 before any steps are taken and the Board will then consider this application. A CIV/SU4 application form may be faxed to the Board, which will intimate its decision on the application by telephone. It should be noted that special urgency cover is not itself an award of legal aid and does not mean that legal aid will be granted when the full application is submitted. A decision of the Board to refuse an application for legal aid may in itself be made the subject of a judicial review². However the test for such a decision is that of *Wednesbury* unreasonableness³. Where the Board refuses legal aid for a judicial review of its own decision then the Board must refer the application to the Sheriff of Lothian and Borders⁴.

1. Legal Aid (Scotland) Act 1986, ss 4, 13, 33(2) and see also *Drummond & Co v Scottish Legal Aid Board*, 1992 SLT 337.
2. *K v Scottish Legal Aid Board*, 1989 SLT 617.
3. *Associated Provincial Picture Houses v Wednesbury Corporation*, [1948] KB 223; *AB v Scottish Legal Aid Board*, 1991 SCLR 702; *Venter v Scottish Legal Aid Board*, 1993 SLT 147; *Fife Regional Council v Scottish Legal Aid Board*, 1994 SLT 96; *McTear v Scottish Legal Aid Board*, 1997 SLT 108; *The Recorder*, Spring 1991, p 3.

4. Legal Aid (Scotland) Act 1986, s 14(4); *Scottish Legal Aid Board's Reference (No. 1 of 1995)*, 1995 SCLR 760; *Dryburgh v Scottish Legal Aid Board*, 1997 SLT (Sh Ct) 55, 1997 Hous LR 69.

What information/documents will be needed to draft a petition

[38]

General: Any person who has to draft a petition for judicial review will need to see the decision which is being complained about and the information provided to the decision maker. In some instances this information might consist solely of the information provided by the client. In other cases it will also include information gathered by or provided to the decision maker in the course of inquiries. If possible the decision maker should be asked to provide a copy of any information not seen by those advising the client. In addition these papers should be accompanied by a precognition which sets out the clients' circumstances, the history of the matter up to the making of the decision and the clients' complaints about the merits of the decision or the manner in which the decision was made. Where the complaint concerns the application or failure to apply a particular policy or procedure then the relevant policies or procedures will also need to be provided. Where it is intended to seek interim orders from the court then it will be necessary to provide sufficient information as to justify granting the order being sought. Any information which might be relevant to refusing the order should also be produced. There is little point in seeking an interim order for accommodation when information damaging to the prospects of success is withheld from those acting on behalf of the petitioner. RCS 1994, r 58.6(2) provides that the petitioner shall lodge with the petition all relevant documents in his possession or control. Where documents are being founded upon which are not within the possession or control of the petitioner these documents should be specified in a schedule appended to the petition, together with the name of the person who possesses or controls the document¹. In homelessness cases this might consist of the homelessness file of the respondent local authority together with any internal policy documents or guidelines provided by the respondent for the benefit of its staff. In

immigration cases this might consist of the file of another solicitor, immigration consultant or adviser and the file of the decision maker(s) whose decision(s) forms the subject matter of the petition. If the decision, act or omission and the basis on which it is questioned are not apparent from the face of any documents lodged then an affidavit must be lodged which states the terms of the decision, act or omission and the basis on which it is complained of².

1. RCS 1994, r 58.6(3).
2. RCS 1994, r 58.6(4).

[39]

Particular: Homelessness: The general comments above apply. In addition it is common for representations to have been made by or on behalf of the applicant, and these can be made verbally or in writing. If they have been made in writing full copies of all representations and responses should be produced. If made verbally then the details should be provided in the precognition. The housing authority might well have its own internal policy for dealing with homelessness cases, and where there is a possibility of a breach of that policy then it should also be produced. Where interim accommodation is being sought then information as to the last accommodation occupied by the petitioner, the reason for the loss of that accommodation and their present and immediately foreseeable circumstances should be provided.

What other information/documents would be helpful

[40]

Housing, social security and immigration cases are typical examples of situations where the decision which is being complained about can have a knock on effect. For example since the decision complained of there may have been a change in the petitioner's personal circumstances which means that instead of seeking to judicially review the decision complained of the most appropriate course of action would be a fresh application

to the decision maker. Even if that is not the case the change of circumstances, while not relevant to a judicial review of the decision complained of, might be relevant in terms of the balance of convenience when asking the court to grant interim orders. Best practice would be to draw attention to any change of circumstances so that consideration can be given to the most suitable course of action to be taken. A precognition setting out the effect on a third party should be obtained. A typical example in an immigration context might be that since a decision to remove a person, which is being challenged on grounds of unreasonableness, that person has since married or had children and their removal would not only prejudice the petitioner's rights but it would in addition interfere with the petitioner's family life. Details of how this would be the case ought then to be set out in the petition.

Using counsel and Edinburgh agents

[41]

There are a number of counsel who have experience of particular subject areas, and as a consequence have also developed particular experience in judicial review practice. On many occasions they are required to take urgent steps to provide advice and/or draft a judicial review petition. In addition to the matters referred to in paragraphs [38] and [40] it is helpful from their point of view to have a letter of instruction which summarises the factual position and either narrates the basis of the intended challenge, or seeks particular advice in relation to that aspect of the matter which is causing concern. There is no requirement on solicitors outside Edinburgh to use Edinburgh agents, although some do so because they are not familiar with the procedural requirements of the Rules of Court, or in case there are any last minute developments which mean that for practical reasons a physical presence in Edinburgh is helpful (such as copying and delivering to counsel the Respondents answers and productions).

First orders from the court

[42]

R 58.7 of RCS 1994 provides that on being lodged the petition shall, without appearing in the Motion Roll, be presented to the Lord Ordinary forthwith in court or in chambers (a) for an order specifying (i) such intimation, service and advertisement as may be necessary, (ii) any documents to be served with the petition, (iii) a date for the first hearing and (b) any interim order. Where an interim order is sought this will trigger any caveat lodged by the respondent. Where no interim order is sought a caveat is unlikely to be triggered. The result of the rule is that an appearance will always be required by counsel or other person with right of audience in order to move even the most straightforward motion for a first order for intimation and service of the petition and for the fixing of a first hearing. Although there is no requirement for an application for leave this rule has the practical effect of creating a judicial sift of applications for judicial review. As a consequence any person appearing may be required by the Lord Ordinary to explain the merits of the petition in more depth than is apparent on the face of the petition itself. Where the petition seeks interim orders the triggering of the caveat may have the result in the respondent appearing not only to oppose the granting of any interim order but also in seeking refusal of the order for intimation and service and the fixing of a first hearing¹. Where the orders for intimation and service are granted the petitioner's representative is usually asked to specify a period for the *induciae*. In practice it is typical to ask for a period of 21 days, unless there is a particular reason for seeking a shorter period. In any event the first hearing in the case cannot be heard any earlier than seven days from the granting of first orders². While the court can make an interim order which regulates the position of the parties prior to disposal of the cause at this stage it cannot apparently make any other order concerning the conduct of proceedings pending the first hearing³.

1. *Sokha v Secretary of State for the Home Department*, 1992 SLT 1049; *Butt v Secretary of State for the Home Department*,
2. RCS 1994, r 58.7.
3. *Kelly, Petitioner*, 1985 SC 333.

First hearings

[43]

After the interlocutor pronouncing intimation and service is granted the interlocutor is taken to the office of the Keeper of the Rolls for the fixing of a date for the first hearing. RCS 1994, r 58.8 provides that a respondent who intends to appear at the first hearing shall intimate that intention to the petitioner's agent and the Keeper not later than 48 hours before the date of the hearing. The respondent may also lodge answers and any relevant documents. In practice many first hearings are fixed for a date at least several weeks after the granting of first orders. Where the respondent is the subject of a considerable workload, as with the Home Secretary, it is common for the convenience of both parties to fix a date according to the availability of the parties counsel and dates available from the Keeper. This can in some instances lead to hearings taking place between four and ten months after the granting of first orders. Because of the way the rules are drafted this can have the result of not knowing from some considerable time what attitude a respondent might take to any particular application. If the respondent then puts in substantive answers on the day of the first hearing, or just a couple of days beforehand, it might not be possible for the petitioner to be in a position to deal with the merits of the case at the first hearing. Nor is there any provision in the rules for seeking any order from the court between the granting of first orders and the date of the first hearing. At the first hearing itself the Lord Ordinary may determine the petition or make such order for further as is thought fit¹. RCS 1994, r 58.9(2)(b) sets out what sort of further orders might be made, and these range from adjourning or continuing the hearing to another date to making an order for answers to be lodged or for a reporter to be appointed to report on such matters of fact as might be specified to the fixing of a second hearing².

1. RCS 1994, r 58.9(2).
2. See *e.g., Noble v City of Glasgow Council*, 2000 Hous LR 38.

Recovery of documents

[44]

Because there is no provision in the rules of court for a petitioner to seek the recovery of documents at the stage of granting first orders or between then and the fixing of the first hearing, it appears that the earliest this can be done is at the first hearing itself¹.

1. RCS 1994, r 58.9(2)(b)(vii), *c.f.*, *Kelly Petitioner*, 1985 SC 333.

Second hearings

[45]

It is not very common for second hearings to be fixed. Where this has happened the order should specify the issues to be dealt with at that hearing¹. All documents and affidavits which are to be founded upon must be lodged not later than seven days before the date of the second hearing². The second hearing should be fixed in consultation with the Lord Ordinary and the parties³. It may be necessary for the proper disposal of the case that the case is put out on the By Order roll if the judge hearing it considers that particular information is necessary⁴.

1. RCS 1994, r 58.9(2)(b)(ix).
2. RCS 1994, r 58.10(2).
3. RCS 1994, r 58.10(1).
4. RCS 1994, r 58.10(3).