

Submission to the Independent Review of Administrative Law

19 October 2020

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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Foreword

Judicial review provides a key means of holding the state to account. It allows individuals to challenge decisions of public bodies and central government which may violate a person's human rights or be otherwise unlawful. Accountability and maintaining a check on state power sits at the core of international human rights law. The fundamental purpose of judicial review must be protected.

Any reform in this area should be evidence-based and subject to wide consultation, including with those who have sought to use judicial review as a means of securing an effective remedy. The consequences of any recommendations should be fully considered and understood before changes are implemented.

The Commission is concerned that the Review will have both direct and indirect impacts on Scots law and Scottish courts. In particular, we are concerned that two different sets of judicial review principles and procedures will emerge depending on whether a power is UK-wide or devolved. The impact of this divergent approach could mean that a person's access to remedy would be reduced if a breach of their human rights occurred in a reserved area.

We believe there is a risk that the law surrounding judicial review will become unclear and that this uncertainty could remain for a number of years. The Commission strongly questions whether the stated problems with the way judicial review currently operates merit creating the levels of upheaval and uncertainty we believe reform in this area will bring.

The Commission is particularly concerned that, in human rights cases, any attempt to strike a different balance between the rights of individuals to challenge executive decisions and the need for effective and efficient government risks breaching the UK's international treaty obligations, perhaps most notably under the European Convention on Human Rights. If a change in the grounds of review or the approach to justiciability resulted in courts finding decisions lawful which they would previously have found to be unlawful on human rights grounds, then the

risk of breach of international treaty obligations, which explicitly protect the right to an effective remedy, would be greatly increased.

Finally, the Commission notes that the drivers behind the Review sit at odds with the human rights trajectory in Scotland. The National Taskforce for Human Rights, of which the Commission is a member, is working to establish a statutory framework for human rights that will incorporate internationally recognised human rights into Scots law. Whereas the Review appears to be considering ways in which to narrow access to judicial review or restrict the law of standing, the conversation in Scotland is focusing on questions around how to afford greater access to remedy or how to encourage the development of public interest litigation.

We are grateful to Professor Tom Mullen of the University of Glasgow, whose analysis has formed much of the basis of the Commission's thinking in this area. Professor Mullen's analysis is included in full below.

Independent Review of Administrative Law

Introduction

1. This paper is intended to assist the Scottish Human Rights Commission's (the "Commission") thinking in relation to the work of the Independent Review of Administrative Law (the "Review") which has been set up by the UK Government. The scope of the Review is restricted to judicial review of powers exercised by Ministers and public bodies with respect to the whole of the United Kingdom (UK) or with respect to England and Wales. It does not cover judicial review of Acts of the Scottish Parliament, nor decisions and actions of Scottish Ministers and other public bodies exercising powers with respect to devolved matters. For convenience, the powers within the scope of the Review will be referred to as "reserved powers". However, depending on what it recommends, the report of the Review may have direct or indirect effects on Scots Law, the Scottish courts and the work of the Commission. Precisely what the direct and indirect effects might be will, of course, depend on the recommendations made by the Review and at this stage we can only speculate what those might be.
2. The terms of reference of the Review require it to consider whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute and whether changes should be made to any of:
 - the grounds for judicial review;
 - the principle of justiciability;
 - the remedies for unlawful exercises of power; and
 - standing, judicial review procedure and costs/expenses.
3. Before discussing these matters, it is useful to consider the extent of similarity of the law of judicial review in the Scottish legal system as compared to that of England and Wales.

The context: similarities and differences between Scots and English Law

4. The grounds on which judicial review is exercised and the approach of the courts to the justiciability of decisions are essentially the same across the UK. The approach to determining the justiciability of questions put before the courts is also the same across the UK's legal systems. The remedies of unlawful administrative action are different in that, in Scots law, the remedies available are the same as the general remedies available in private law (declarator, reduction, interdict and so forth), whereas in the law of England and Wales the remedies available include both ordinary remedies such as declaration and injunction and special remedies such as a quashing order, a prohibiting order and a mandatory order. However, this difference is more formal than substantive. Taken together, the remedies in the two jurisdictions are functionally equivalent; for every English remedy there is a Scottish counterpart and in both jurisdictions all of the remedies are available in an application for judicial review.
5. The principles on which standing is afforded to litigants, including public interest standing, are also the same in both jurisdictions. There are, of course, separate courts and separate court procedures in the two jurisdictions but both jurisdictions have developed specialised procedures for judicial review and, in recent years, Scottish judicial review procedure has become increasingly similar to that of England and Wales. Notably, in both jurisdictions, a litigant must obtain the permission of the court to seek judicial review and must bring proceedings within three months of the cause of action arising.
6. Changes to the law of judicial review may have both direct and indirect effects on Scots law. Both are discussed in the rest of this paper.

Grounds of judicial review

7. The Review raises the question of the grounds on which the courts should be able to find decisions of public bodies unlawful. The introduction to the terms of reference gives an indication of how this question might be considered by the Review. It is required to “bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law.” In the remainder of this paper, I shall refer to this issue as that of whether there should be a “rebalancing” of judicial review.
8. Let us assume, therefore, that the Review concludes that there is a need to rebalance judicial review in favour of the interest in effective government and recommends changes to the grounds of review in order to achieve this rebalancing. If a uniform approach to judicial review of UK-wide powers is desired, then it is likely that the Review will recommend that changes to the grounds of review in Scots law are also necessary. Otherwise, UK-wide powers would be subject to judicial review on different grounds in the two legal systems. In the case of Ministerial powers, any new restrictions introduced in the law of England and Wales could easily be bypassed by applying for judicial review in Scotland instead of England, as a Secretary of State is regarded as domiciled throughout the UK. So, any change to the grounds of judicial review of reserved powers, such as those in the fields of foreign affairs, immigration control, social security and taxation (except for the devolved aspects of the latter two policy areas) would be very likely to extend to Scots law.
9. If the review remains within the scope set out in its terms of reference, it will not recommend changes to the grounds of review that apply to decisions and actions of Scottish Ministers and to other public bodies exercising powers with respect to devolved matters. However, the consequence of changing the grounds only with respect to the exercise of UK-wide powers is that the Court of Session would have to apply different grounds of review

according to whether the decision challenged was an exercise of UK-wide powers or an exercise of devolved powers. This would make the tasks both of the Scottish judges (in adjudicating questions of administrative law) and of Scots lawyers (in advising their clients) more complex and difficult given the need to keep two sets of judicial review principles in mind in dealing with administrative law cases.

10. We can only speculate as to the changes, if any, to the grounds of review which might be recommended. But, in whatever way they are expressed in any legislation which implements such recommendations, there will be a period of uncertainty over their precise meaning and application. This uncertainty will be much more significant than the uncertainty which normally arises over the interpretation of a new statute. That uncertainty is normally confined to the policy area covered by the particular statute, whereas the uncertainty arising from a revised formulation of the grounds of review would potentially affect cases arising under all statutes conferring UK-wide powers on public bodies.
11. Part of that uncertainty will be over the authority of pre-existing cases which define the scope and application of the grounds of review. Unless a clean break with the past, in which all pre-enactment cases on the grounds of judicial review cease to be relevant is attempted, and that seems very unlikely, then it may be unclear which of the prior cases will continue to provide an accurate statement of the law on the grounds of review and which of them remain binding or persuasive. That problem will have to be faced by judges and lawyers across the UK, but judges and lawyers in Scotland will face an additional difficulty. In cases concerning the exercise of devolved powers, they routinely refer to English authorities for guidance on the grounds of review. It may be difficult to decide what weight, if any, to give to many English cases decided after the enactment of revised grounds of review. Which of them should be seen as turning on aspects of the grounds of review which have been changed by the reforms and which turning on aspects which remain unchanged? The

latter may be relied upon but the former may not. This uncertainty could last for many years before the courts resolve all doubts about the meaning and effect of the legislation revising the grounds of review.

Justiciability

12. If a uniform approach to judicial review of reserved powers is desired, then changes to the approach to determining the justiciability of questions relating to reserved powers which are put before the courts would also have to extend to Scots law and to judicial review in the Court of Session. The points about complexity and uncertainty made in the preceding section would apply equally to any reform of the approach to justiciability.

Remedies for unlawful administrative action

13. The term “remedy” may be used in a variety of senses. In this section, I used it to mean the specific orders that may be made by a court to enforce any substantive rights which it may have recognised in proceedings before it. It would not automatically follow from the making of changes to the grounds of judicial review or the approach to justiciability in relation to reserved powers, that changes to the remedies available in Scots law should also be made. Nor would it follow from changes to the remedies available in the English courts, that equivalent changes to the remedies available in Scots law should necessarily be made. Legal remedies are in general a devolved matter and the two jurisdictions have long operated with common grounds for judicial review and a common approach to justiciability operating alongside different systems of remedies.
14. If there were a justification for changing the Scots law of remedies in judicial review in light of any recommendations made by the Review, it would have to be that some aspect of the Scots law of remedies unduly interfered with “the role of the executive to govern effectively under the law.” It is not clear why this might be thought to be the case. Were there to be changes to the law of

remedies in relation to decisions made under reserved powers, then it would be, in every case in which the Court of Session was minded to uphold the petitioner's substantive claim, for it note whether the case concerned the exercise of devolved or reserved powers, before deciding which remedies might be awarded.

Procedural reforms

15. The question posed in relation to procedural reforms is whether they are necessary in order to “streamline the process” of judicial review and the specific areas suggested for possible reform are: (a) disclosure; (b) the duty of candour; (c) the law of standing; (d) time limits; (e) the principles on which relief is granted; (f) rights of appeal, including on the issue of permission and; (g) costs and interveners.
16. As with remedies, it would not automatically follow from the making of changes to the grounds of judicial review or the approach to justiciability or changes to aspects of procedure in the English courts, that changes should be made to judicial review procedure in the Court of Session. Standing is perhaps in a different category. It is not in any event a matter of procedure and is discussed below.
17. Procedure in the Scottish Courts is in general a devolved matter and, until now, judicial review procedure has been regarded as entirely a matter for the devolved institutions and the Scottish courts. However, the terms of reference suggest that it might be necessary to change judicial review procedure as well as the substantive law in order to achieve the rebalancing of judicial review that is sought. That suggests that, if changes to judicial review procedure in the English courts are thought to be necessary, then equivalent changes to procedure in the Court of Session will be recommended. However, it is not clear what those changes might be. As with the other possible changes, this would add an additional layer of complexity to the legal process.

Standing

18. If the Review recommends reform of the law of standing as part of the rebalancing of judicial review, that reform might be a narrowing of the scope of public interest standing. Such a narrowing might reduce the prospects of decisions taken under reserved powers being challenged by persons who do not have a personal stake in the outcome of the case. We should, therefore, expect that any such restriction would apply equally to cases brought in the Court of Session which arise from the exercise of UK-wide powers, otherwise any restriction on standing could be bypassed merely by suing in the Court of Session rather than suing in the Administrative Court.
19. Given the terms of reference of Review, there should be no change in public interest standing for cases dealing with devolved matters. Again, as cases relating to reserved powers may be brought in the Court of Session, that court would have to apply different rules of standing according to whether it was dealing with a devolved or reserved matter.
20. The specific issue of standing in human rights cases is discussed below.

Human rights litigation

21. Although human rights arguments may be made in both courts and tribunals and in different types of legal action, an application for judicial review is often the most appropriate, or the only, means of having a claim that a person's human rights have been infringed determined. There is no express reference to human rights in the terms of reference for the Review, so the extent to which it might consider the role of judicial review as a remedy for infringements of human rights is unclear. However, we may note that the Conservative party election manifesto for the 2019 General Election stated: "We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and

effective government” and the appointment of the Review can be seen as implementing that manifesto promise. Also, given that the terms of reference are expressed very generally and no exceptions to any of the key concepts (e.g. justiciability, the grounds for judicial review) are stated, it is appropriate to assume that the role of judicial review as a remedy for infringements of human rights is part of the Review and that any proposals designed to rebalance judicial review will also apply to judicial review on human rights grounds. If human rights claims were excluded from any reforms suggested, that would significantly restrict the extent to which the aim of rebalancing was achieved as a significant number of judicial reviews are either predicated on the illegality of a policy on human rights grounds or are challenges to major one-off decisions on human rights grounds. That immediately raises the question of whether any reforms might affect the UK’s international treaty obligations or might affect the Human Rights Act 1998 and other legislation protecting human rights.

22. It is difficult to see how the balance struck in judicial review cases could be shifted significantly in favour of the executive without resulting in a breach of treaty obligations, most obviously those in the European Convention on Human Rights (“ECHR”). If a change in the grounds of review or the approach to justiciability resulted in courts finding decisions lawful which they would previously have found to be unlawful on human rights grounds, then the risk of breach of the ECHR by the UK would be greatly increased. Moreover, Article 13 ECHR requires that everyone whose rights under the ECHR are violated shall have an effective remedy before a national authority, so the inability to challenge a decision by way of judicial review when no other remedy was available would be a breach of Article 13 as well as a breach of the relevant substantive article of the ECHR.

Judicial review under the Human Rights Act 1998

23. If the UK Government did wish the courts to exercise a more restricted approach to judicial review in cases claiming

infringements of human rights, even though that might lead to breaches of its international law obligations, it would be necessary to amend the Human Rights Act 1998 ("HRA"). As a constitutional statute, the HRA is not subject to implied repeal (*Thoburn v Sunderland City Council* [2003] QB 151; *H v The Lord Advocate* [2012] UKSC 24, 2012 SC (UKSC) 308). Any such amendment would have to apply throughout the UK if UK-wide powers were to be equally subject to (or immune to) review across the UK's legal systems. However, assuming that the Review does not exceed its remit, the HRA in its current form would continue to apply to all decisions of public authorities in Scotland that are not exercises of UK-wide powers. Those decisions would include many of the decisions taken by the Scottish Ministers, local authorities and Scottish quangos across many fields of law including education, housing, social work, agriculture and the environment.

Judicial review under the Scotland Act 1998

24. The human rights protections in the Scotland Act 1998, notably the competence limitations set out in sections 29 and 57 of the Scotland Act 1998, would be unaffected as those relate only to devolved matters. Therefore, there should be no change to challenges to Acts of the Scottish Parliament made under section 29 of the Scotland Act 1998 or to actions of the Scottish Ministers under section 57 of that Act. The general comment made above applies equally here. If the HRA is amended to require the Court of Session to exercise a more restricted approach to judicial review, it will be necessary for the courts to apply different standards of review on human rights grounds according to whether the decision challenged is taken under reserved or devolved powers. This will make the task of both Scots lawyers and Scots judges in human rights cases more complex and could create uncertainty as to what the law is in the manner described above.

Judicial review under other legislation protecting human rights

25. Judicial review of executive action under legislation enacted by the Scottish Parliament should also be unaffected. Thus, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill which is currently before the Scottish is intended to incorporate the UNCRC into Scots law. If this Bill is enacted, any changes proposed by the Review should not affect judicial review under it.

Judicial review under other legislation

26. I have also been asked to consider the possible effect of the Review on challenging human rights violations in the broadest sense, i.e. not only under the HRA or other legislation designed to protect rights set out in general terms in international human rights treaties but in other legislation as well. In practice, specific aspects of certain human rights are best protected by enforcing the specific rights in domestic law created by legislation in the relevant policy area. Thus, for example, the protections against eviction in Scottish housing legislation can be used to enforce important aspects of the right to housing which is protected by Article 11 of the International Covenant on Economic, Social and Cultural Rights and other instruments.
27. The key question here is whether the relevant policy area is reserved or devolved. If it is reserved, then changes to the grounds of review may well have an impact on judicial review in the Court of Session. There is no suggestion that the Review will seek to restrict the right to seek judicial review on the ground that the decision made is inconsistent with the relevant statute. Therefore, the impact ought to be confined to situations in which the power which is exercised in such a way as to infringe a particular human right is a discretionary power. So, it is possible that the impact on rights aspects of which are affected by decisions under, for example, immigration legislation will be significant but that impact should be confined to review of discretionary decisions. However, housing, education, health and

some other areas of social policy (including some aspects of social security) are devolved, so there should be no impact on judicial review of decisions made under such legislation.

Standing in human rights cases

28. Section 7 of the HRA states that a person who claims that a public authority has acted unlawfully in terms of section 6 of the HRA may bring proceedings against that authority under the HRA, but only if a victim of the unlawful act. Section 7 also states that in order to have sufficient interest to make an application for judicial review, the person must be a victim of the act. These provisions replicate the victim test in the ECHR itself. That is a relatively strict standing test, so it is unlikely that the Review will recommend changes to the standing test in the HRA. However, any restriction on public interest standing is likely to be expressed in such a way as to restrict applications for judicial review on human rights grounds by public interest litigants.

Interventions

29. The Commission has powers to intervene in civil proceedings in the Scottish courts which relate to devolved matters. Those powers should not be affected by the Review. However, if the Review recommends that intervention in proceedings in the Administrative Court should be restricted, we should expect that any such restriction would apply equally to cases brought in the Court of Session. That will restrict the ability of other possible interveners, such as NGOs, to intervene in cases concerned with the exercise of reserved powers.

Professor Tom Mullen

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