JUDICIAL REVIEW IN SCOTLAND:
A Practitioner's Guide
For D.A.R.E
JUDICIAL REVIEW IN SCOTLAND:
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Preface

This book began life as a general survey of the manner in which judicial review procedure has been used in practice in Scotland since 1985, the year when the accelerated procedure for making applications to the supervisory jurisdiction of the Court of Session was first introduced by Act of Sederunt. With the enactment of the Human Rights Act 1998 and the Scotland Act 1998, however, it became clear that the background against which the practice of judicial review could properly be understood had been radically altered. Accordingly, any purely historical account of how judicial review has been used in practice from 1985 to 1998 would be insufficient guidance as to how judicial review can and should be developed in the future once these Acts have come into force.

The passing of the Human Rights Act 1998 and the Scotland Act 1998 has resulted in the creation of a new constitutional settlement for Scotland within the United Kingdom. The Scotland Act 1998 has established a new Scottish Parliament with broad powers to legislate on a wide variety of domestic issues in Scotland. These powers of the new Holyrood Parliament are expressly made subject to a variety of constraints including that they must be exercised in a manner which does not contravene those provisions of the European Convention of Human Rights which have been designated by the Human Rights Act as incorporated "Convention rights". It is a condition of the validity of legislation emanating from the Scottish Parliament and Executive that it accords with the requirements of these Convention rights. It is the duty of the judges to ensure that these limitations are indeed adhered to and that the Convention rights are properly respected by the newly devolved Parliament and Administration, as well as by all other "public authorities" as defined by section 6 of the Human Rights Act 1998. Further, section 3 of the Human Rights Act imposes on the judges a new interpretative obligation in relation to primary and subordinate legislation emanating from the Union Parliament at Westminster, whereby they are required so far as it is possible to do so, to read and give effect to it in a way which is compatible with Convention rights. The book which has resulted, therefore, is both a retrospective account of how the judicial review procedure has been used until now in Scotland, and a prospective analysis as to how, in the light of these new constitutional developments, judicial review may be used in time to come.

Running through the descriptive account of the law given in this book, however, there is also a prescriptive theme. This is a theme which also runs through my earlier works EC Law for UK Lawyers and Decisions of the European Court and their Constitutional Implications and may be summarised by the claim that domestic law and practice must not be considered in isolation but have to be placed within a comparative and, more specifically, a European or civilian law context.
It is my view that the proper evolution of the law in Scotland, particularly in the area of judicial review, can only be achieved by lawyers and judges adopting a more open and outward looking approach which considers how other legal systems have dealt with similar problems. We should be willing to learn from other legal systems and be ready, where appropriate, to receive their doctrines where these have been more fully developed or worked out, adopting and adapting them to our own situation. It is also argued that this outward looking perspective, and the whole process of legal reception, must not be confined to the English speaking common law world. Yielding to the temptation to make comparisons only with English law or English derived systems is, it seems to me, a form of intellectual laziness and one which is not true to the civilian roots of Scots law. It appears to rest on the common, if unspoken, assumption that since English is the common language of the courts in Scotland than only laws made and judgments delivered in English can be of any possible relevance to our own situation.

Instead the approach which is advocated in this work is one which while seeking to avoid legal antiquarianism emphasises the continuing relevance of Scots law's much vaunted common ancestry with the legal systems of continental Europe. If Scots law is indeed to be a living and dynamic legal system, it is my view that its practitioners need to be open to the re-establishment of intellectual links with contemporary civilian systems so as to bring about the trade and spillover in ideas and concepts which characterised Scots law and Scottish legal education prior to the 1707 Union with England. Indirect links between Scots law and the contemporary European legal systems have, in any event, already been statutorily established by, among other provisions, the European Communities Act 1972, the Civil Jurisdiction and Judgments Act 1982, the Contracts (Aplicable Law) Act 1990, the Competition Act 1998 and the Human Rights Act 1998. The first four mentioned statutes require the courts of this country to have regard to and decide cases in accordance with the principles laid down by and any relevant decisions of the Luxembourg based European Court of Justice. The Human Rights Act 1998 requires the domestic courts to take into account all relevant decisions of the Strasbourg based European Court of Human Rights and European Commission on Human Rights. The decisions of both the Strasbourg institutions and of the Luxembourg courts will, of necessity, reflect and mediate at least some of the principles and approaches to be found within the continental civilian legal traditions. The European comparative approach, supplementing if not displacing reliance upon decisions and developments in other English speaking common law jurisdictions, is therefore not only historically justified in the context of the coherent growth of Scots law but is one which is statutorily enjoined of the courts and those who practice before them. A comparative European law approach accordingly informs the descriptive treatment of judicial review throughout the book.

The book falls into two parts: the general part, constituted by Chapters 1 to 6; and the specific part, consisting in Chapters 8 to 14. The general part begins in Chapter 1 with an account of the uses of judicial review, when it might be sought and by whom and what might be achieved by it. Chapter 2 looks at the substantive principles of judicial review. Chapter 3 surveys the
impact of Human Rights considerations on judicial review in Scotland, both prior and subsequent to the enactment of the Human Rights Act 1998. Chapter 4 sets out the possibilities for judicial review of Westminster legislation, both under reference to the principles of European Union law and having regard to the justiciable provisions of the 1707 Treaty of Union. Chapter 5 considers the implications for judicial review of the Scotland Act 1998. Chapter 6 concludes the general part of the book with a look at judicial review procedure in practice.

The specific part of the book consists of eight chapters dealing with the impact that judicial review has had in a number of discrete areas of law and practice. Chapter 7 deals with agriculture and fisheries. Chapter 8 considers the vexed question of the applicability of judicial review to employment issues. Chapter 9 deals with environmental protection and planning matters in the context of judicial review. Chapter 10 analyses the judicial review cases concerned with immigration and asylum decisions. Chapter 11 concerns judicial review of decisions of the Scottish Legal Aid Board and of the Criminal Injuries Compensation Board and Authority. Chapter 12 looks at the way in which judicial review has had an impact on certain functions of local authorities, notably in the fields of education provision, housing and homelessness, licensing, public procurement and the provision and supervision of community care. Chapter 13 considers judicial review and free expression issues, particularly the question of political impartiality and the broadcasters. The book concludes with Chapter 14 on criminal justice and prisoners rights in judicial review.

This book has modest aims. It does not seek to emulate either the comprehensiveness of an academic treatise, nor the definitiveness and authority of judicial pronouncements. This is a book written by a lawyer practising before the courts. The book summarises past case law so far as relevant. It also sets out a number of criticisms of some past Scottish decisions, and suggests arguments for possible future development of the law. There are, of course, at least two sides to every argument and it is the privilege and responsibility of the advocate that he or she be able and willing to appear and argue for either side in any case. Rather than any final statement of how the law is or ought to be then, this work should instead be seen as a resource book for all those who practice before the courts. It seeks to provide them with some of the tools or raw materials for legal argument, and to highlight possible areas of the law which seem to me to be in need of further elaboration and refinement.

The writing of this book was supported by a grant from the Alexander Maxwell Law Scholarship trust. I am very grateful to the trustees for the confidence they showed in me in making an award to me, and also to the Lord President, Lord Rodger of Earlsferry, Professor Neil MacCormick and Phillip Brodie QC for their willingness to recommend this project for such an award.

In writing the book I received much support from my friends, family and colleagues. I would like to thank, in particular, my mother Teresa O’Neill, as well as Jason Coppel, Laura Dunlop, Douglas Edington, David Fairnie, my clerk Christine Ferguson, Gillian Gibson, William Holligan, Makis Komnenos, Mary Lynchehaun, Jan McCall, Elaine Motion, Jo Pawley, and
Eric Stark. All of these individuals contributed in their particular ways to the completion of this work. Butterworths Editorial staff have been as understanding, patient and helpful as ever, for which I am truly grateful. Any errors in this work, which attempts to take account of the law as it stood at the beginning of 1999, remain my own.

Aidan O'Neill
Advocates Library
Parliament House
Edinburgh
April 1999
On 2 October 1997, as a result of the negotiations undertaken under the aegis of the Inter-Governmental Conference, the member states signed the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the EC and certain related acts. The Treaty came into effect on 1 May 1999, the date by which it had been duly ratified by all the member states.

The aim of the new Treaty was to improve the readability of the Community Treaties by repealing and deleting obsolete provisions and this simplification exercise resulted in amended treaties with renumbered articles. In this text both the original and renumbered articles of the Treaty establishing the EC are given and the table of EC legislation contains both pre- and post-Amsterdam versions of the Treaty. A destination table detailing the renumbered articles can be found at OJ C340, 10.11.97 p 85. For ease of reference Chapter 58 of the Rules of the Court of Session ('Applications for Judicial Review') is set out in Appendix 1 and the 'Convention Rights' contained in Schedule 1 of the Human Rights Act 1998 are set out in Appendix 2.
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Chapter 1

The Uses of Judicial Review

'[W]henever an inferior judge, no matter of what kind, fails to perform his duty or transgresses his duty, either by going beyond his jurisdiction or by failing to exercise his jurisdiction when he is called upon to do so by a party entitled to come before him, there is a remedy in this court ... The same rule applies to a variety of other public officers, such as statutory trustees and commissioners, who are under an obligation to exercise their functions for the benefit of the parties for whose benefit those functions are entrusted to them ... [I]n making such orders against inferior judges, or statutory trustees, or commissioners or the like, this court is exercising an exclusive jurisdiction - a jurisdiction which cannot possibly belong to any other court in the country'.

'[W]e do not have a developed system of administrative law, perhaps because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases, the courts have had to grope for solutions and have found that old powers, rules and procedures are largely inapplicable to cases which they were never designed to deal with'.

1 See Forbes v Underwood (1886) 13 R 465 per Lord President Inglis at 467-468.
2 Ridge v Baldwin [1964] AC 40, HL per Lord Reid at 72.

INTRODUCTION

1.01 The two quotations noted above encapsulate a fundamental difference in approach as between the two jurisdictions of Scotland and England regarding the practice and development of judicial review. The first quotation from Lord President Inglis in 1886 is regarded by the contemporary Scottish judiciary as capturing the essence of the supervisory jurisdiction of the Court of Session as a form of procedure with its roots firmly established in the past with an unbroken continuity to the present day. The second quotation from Lord Reid sitting in 1964 in an English appeal in the House of Lords is seen by English lawyers and judges to herald a revolutionary moment in English law, the development of a distinct system of administrative law designed to tackle new problems in a new way.

1.02 It is a commonplace that in the last thirty years in the United Kingdom, notwithstanding the lack of any specialised administrative law tribunals, there has been an exponential growth in the development of a separate body of administrative law with its own remedies principles and doctrines, distinct from those which apply to the sphere of private law¹. In the absence of a separate judicial hierarchy for administrative law, what has been developed in both England and Scotland have been new legal procedures, distinct from the procedures which apply to ordinary private
law actions. The new English procedure for judicial review, known as Order 53, was introduced by the courts in England in 1977\(^2\) and was given statutory backing by sections 29 and 31 of the Supreme Court Act 1981\(^3\). In Scotland the simplified judicial review procedure was created by a 1985 Act of Sederunt and is now contained in Chapter 58 of the Rules of Court 1994\(^4\). It has no express primary legislative backing.

1.02 The Uses of Judicial Review

1.03 Under these new procedures the High Court in England and the Court of Session in Scotland can more readily and expeditiously exercise their existing supervisory jurisdiction over the proceedings and decisions of lower courts, (quasi)-judicial tribunals and of any other bodies charged, in England, with the performance of public acts and duties or, in Scotland, to which jurisdiction, power or authority had been delegated or entrusted by statute, agreement or any other instrument\(^5\). These new procedures have encouraged a rapid growth in the applications to the courts for judicial review and the law itself has developed markedly.

1.04 In England and Wales the rapid development of this new body of law has been judge led, rather than by any act of the national legislature\(^6\). For English judges judicial review case law from the 1950s and earlier is regarded as an unreliable guide to the present, and instead the novelty and modernity of the new administrative law is highlighted, leading to a willingness to embrace new solutions and to learn from and adopt some of the practices particularly of continental European legal systems which have long histories of a quite separate system of administrative law distinct from the ordinary civil remedies and procedures of their private law\(^2\).

1.05 In Scotland, however the tendency has been for judges the context of judicial review, however, to emphasise their continuity with the past practice of the Court of Session over the last two centuries with a

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\(^4\) ie Act of Sederunt (Rules of the Court of Session 1994) 1994, SI 1994/1443, Chap 58 (rr 58.1-58.10; (formerly r 260B ff)). See further Chapter 6 and Appendix 1.


\(^6\) See Lord Goff of Chievely noted in *Kleinwort Benson v Lincoln City Council* ([1998] 3 WLR 1095 at 1118 C) (emphasis added):

‘Occasionally, a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of the law. Perhaps the most remarkable example of such a development is to be found in the decisions of this House in the middle of this century which led to the creation of our modern system of administrative law.’

\(^2\) See Lord Scarman *The Development of Administrative Law: obstacles and opportunities* (1990) Public Law 490 at 491:

‘Administrative law has to be a developing legal science which it is the duty of judges aided by practitioners and scholars to keep abreast with the pace of change in public administration.’
corresponding unwillingness openly to contemplate developments unsupported by earlier precedent. Judicial review in Scotland has then tended to develop reactively in relation to the more fluid English system of administrative law, with some of the innovations south of the Border – particularly in relation to the substantive grounds for judicial review, gradually being accepted as applying also in Scotland – while other English developments – notably the private law/public law divide – being rejected as contrary to the underlying ethos of the Scottish system.

1.06 It may be, however, that the new constitutional position in Scotland created by the re-establishment of a Scottish Parliament by the Scotland Act 1998 and the domestic incorporation by the Human Rights Act 1998 of certain of the rights contained in the European Convention on Human Rights and associated protocols will, in time, lead the judges of the Court of Session to re-consider their past somewhat conservative approach and usher in a new period of judicial activism in Scotland unseen since the time of Stair. The purpose of this chapter is to set out where Scotland currently stands in relation to judicial review and to assess the prospects for future development.

WHAT IS JUDICIAL REVIEW?

1.07 Judicial review is a form of legal procedure under which a party seeks to impugn before the Court of Session a particular decision and, generally, asks the courts to quash the decision complained of so that the original decision maker is forced to re-consider the whole matter anew. It is concerned not with the merits of the particular decision as such, but with the decision making process. It should be noted that judicial review as an appeal to the general supervisory jurisdiction of the courts is a form of procedure which is exclusive to the Court of Session. Sheriff courts have no general supervisory jurisdiction at common law to police the actions of the administration. As Sheriff Principal O’Brien noted in City of Edinburgh District Council v Round & Robertson:

‘I have already referred to the pre-eminent jurisdiction of the supreme court in correcting fundamental nullities in the face of a statutory prohibition against an appeal. In my opinion it is at this point that the appellants’ argument founders. Whatever be the position in England, the sheriff court does not have an overriding jurisdiction of this kind. That was made abundantly clear by the House of Lords in Brown v Hamilton District Council, 1983 SLT 397. . . . The wider issues raised by the appellants are in my view matters for the supreme court in an appropriate process.’

The sheriff has, then, no general supervisory jurisdiction at common law to police the actions of the administration, albeit that the sheriff is under many specific enactments called upon to exercise an appellate function in relation to various administrative decisions. In many of these cases the sheriff is himself acting under the statute in an administrative capacity and may be empowered on appeal to substitute his own opinion for that of the original decision maker if he is satisfied that it is wrong on the merits.
Judicial review to the Court of Session is available against the actions of a sheriff acting in his administrative capacity.

1. See eg the decision in McDonald v Secretary of State for Scotland (No 2) 1996 SLT 575, Extra Division of Lords Weir, Clyde and Brand confirming this limitation on the jurisdiction of the Sheriff.
2. 1987 SLT (Sh Ct) 117 at 119–120 (emphasis added).
3. See MacPhail on Sheriff Court Practice (2nd edn, 1998) at Chapter 26 for a summary of some of the statutory administrative appellate functions conferred upon the sheriff in relation to general administrative matters.
4. See eg Carvana v Glasgow Corporation 1976 SLT (Sh Ct) 3. Cf Latif v Motherwell District Council Licensing Board 1997 SLT 419.
5. See eg the judicial reviews of the findings of a sheriff in a fatal accident inquiry in Lothian Regional Council v Lord Advocate 1993 SLT 1132, OH and Smith v Lord Advocate 1995 SLT 375, OH. In Milton v Argyll & Clyde Health Board 1997 SLT 565, OH the sheriff's decision on expenses in a successful appeal by the petitioners under the Nursing Homes Registration (Scotland) Act 1938, s 3(3) against an order of the respondents cancelling the registration granted to them to run a nursing home was made subject to a petition for judicial review.

1.08 Judicial review differs from other forms of legal procedure in that in judicial review the court is not asked, nor indeed is it permitted, to make up its own mind on the merits of the case and substitute its decision for that originally complained of. All that the court may do is either affirm the decision as having been reached in accordance with the law, or if the decision is found to have been reached in contravention of the general law to order its reduction or make such other appropriate order or orders in relation to the vitiated decision.

1 Chief Constable of North Wales Police v Evans [1982] 1 WLR 1115 at 1173 per Lord Brightman.

1.09 In judicial review, the Court of Session acts rather in the role of schoolmaster who does not tell his pupils the answers to a problem but instead advises them that they have got it wrong, exhorts them to go back and do it again, and admonishes them to try to get it right on the second attempt. The idea is, perhaps, that eventually the decision maker will learn from his mistakes and a culture of good administration will thereby be created. As Lord Donaldson MR stated in an English context:

'The... remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court... has created a new relationship between the courts, and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration'.

1 R v Lancashire County Council, ex p Huddleston [1986] 2 All ER 94, CA 1 at 945.

1.10 In judicial review the court is at all times acting only in a supervisory capacity, however. For the court to go beyond this general supervisory function and take the substantive decision itself would be to usurp the functions of public authorities and confuse the administration of justice with the justice of administration. Any such direct involvement in administrative decision making might be thought inappropriate given the judges' lack of time, of experience and expertise, and of democratic accountability.

1.11 Following the comments of Lord Keith of Kinkel in Brown v Hamilton District Council and Stevenson v Midlothian District Council regretting the
absence of an accelerated Scottish procedure for the resolution of administrative law disputes, the Dunpark Working Party on Procedure for Judicial Review of Administrative Action was set up to consider suitable amendments to the Rules of Court in order to achieve savings in the time and cost of applications to the Court of Session’s supervisory jurisdiction. The Dunpark Committee’s recommendations were, for the most part, implemented by Act of Sederunt in 1985 and following their consolidation in 1994 the Judicial Review Rules now comprise Chapter 58 of the Rules of the Court of Session³.

1.12 The following preliminary questions necessarily arise in relation to the practice of judicial review by the court:

(1) whose decisions are subject to judicial review?;
(2) what kinds of decisions are subject to judicial review?;
(3) when is a party entitled to seek judicial review?;
(4) on what grounds might decisions be subject to judicial review?;
(5) what remedies might be obtained on judicial review?

WHOSE DECISIONS ARE SUBJECT TO JUDICIAL REVIEW?

1.13 Private law concerns the relationships and dealings between individual actors. Such matters, for the most part, fall within the ordinary jurisdiction of the courts whereby the courts are required to reach their own decision on the merits of any claim, choosing from among the competing contentions of the parties before it. Judicial review, however, is more concerned with the relationships between the individual and the collectivity of the people, the πολις or res publica.

1.14 Stair distinguished between public and private rights as follows:

‘Public rights are those which concern the state of the commonwealth; Private rights are the rights of persons and particular incorporations’¹.

While Erskine made the following distinction between public and private law:

‘The public law is that which hath more immediately in view the public weal, and the preservation and good order of society; as laws concerning the constitution of the State, the administration of government, the police of the country, public revenues, trade and manufactures, the punishment of crimes etc. Private [law] is that which is chiefly intended for ascertaining the civil rights of individuals’².

1 Stair Institutions 1, 1, 23.
2 Erskine Institute 1, 1, 29.
1.15 In judicial review the Court of Session polices or supervises the public law seeking 'to redress all wrongs for which no other remedy is provided'. The Court of Session is in effect carrying out a constitutional function – delimiting the powers of public authorities and clarifying the extent of their obligations to those who come before the courts seeking redress. It is arguably because the court is dealing with the claims of individuals vis-à-vis emanations of the State, that the court has to date imposed upon itself the self-denying ordinance of not substituting its decision for that of the original decision maker.

1 Kames Historical Law Tracts (4th edn, 1778) at 228–229.

1.16 It is plain, for example, from article 18 of the Treaty of Union between England and Scotland, that the distinction between laws 'concerning public right, policy and civil government and those which concern private right' was one long recognised in Scots law and was preserved subsequent to the 1707 Union. The application of the supervisory judicial review jurisdiction of the Court of Session as it developed in the nineteenth century did not, however, rely upon any clear or hard and fast distinction between 'private law' and 'public law'. As has been observed, in the context of the rules concerning the liability of public authorities:

'As Scots law does not have any clear division between public and private law, and as it lacks any separate system of courts for dealing with public law questions, it is not surprising that it is difficult to find any clear exposition of what is comprehended by the notion of public body, public authority, or, indeed, public official'?


1.17 Various factors may account for this: the prevailing constitutional culture in which judicial review was originally developed was not one which favoured judicial activism and the courts were anxious to be seen to give due deference to the Crown and to the dictates of Parliament; there was no generally recognised concept of fundamental human rights requiring the courts' particular protection against the organs of the State; and the physical seat of Scotland's post-Union legislature, the Westminster Parliament, and the principal offices of its government were for the most part situated outwith the territorial jurisdiction of the Scottish courts, with the Scottish Office only being set up only in 1886 and for much of its early years its centre of operations remained London.

1.18 There is House of Lords authority for the proposition that Scotland has continued to exist as a 'nation' since the 1707 Union, if the word 'nation' is used in its 'popular in contrast to its legal sense'. Scotland has not, however, been a sovereign state since that time. One early nineteenth century House of Lords decision went so far as to describe the Court of Session subsequent to the 1707 Union as a 'court of local jurisdiction' rather
than one of general jurisdiction, with consequently no power to pronounce declarators on matters of public law affecting the whole Union, such as the right of foreigners to claim the status of 'British subject'\(^2\).

1. See *Ealing London Borough Council v Race Relations Board* [1972] AC 342, HL per Lord Simon of Glaisdale at 364. See also *Power v Northern Joint Police Board* [1997] IRLR 610, EAT.

2. See *Macao v Officers of State* (1822) 1 Sh 138, HL.

1.19 Perhaps because of this loss of a sovereign legislature within its territory, the development of judicial review in Scotland from the nineteenth century onward seems to have arisen, not from a consideration of broader constitutional concerns to mark the boundaries of lawful central government and regulation, but rather to ensure that inferior courts and tribunals or other bodies acting in a quasi-judicial capacity or administrative capacity respected the general law, stayed within the limits of their powers and conformed to the standards of proper procedure. As Lord Kinnear stated:

‘Wherever any inferior tribunal or any administrative body has exceeded the powers conferred on it by statute to the prejudice of the subject, the jurisdiction of the court to set aside such excess of power as incompetent and illegal is not open to dispute’\(^1\).


1.20 Thus, applications for judicial review have been heard against decisions of the Lyon Court\(^1\) and the sheriff when acting in civil matters\(^3\), the Valuation Appeal Tribunal of the Wool Marketing Board\(^3\), of a disciplinary tribunal of a local Fire Authority\(^4\), of an NHS Hospital Board considering an appeal by a doctor against dismissal\(^5\), of the National Insurance Commissioner\(^6\) and of the Valuation Appeal Committee\(^7\) on the basis that these bodies were all acting in a quasi-judicial capacity.


2. *Adair v Colville & Sons* 1926 SC (HL) 51. Cf *Bell v Fiddes* 1996 SLT 51, OH where the existence of specific provision in the Rules of the Court of Session for suspension and/or reduction of an inferior court decree was held to preclude reliance on the general judicial review procedure.

3. See *Barrs v British Wool Marketing Board* 1957 SC 72. See also *British Wool Marketing Board v King* [1994] European Commercial Cases 433, OH.

4. *McDonald v Lanarkshire Fire Brigade Joint Committee* 1959 SC 141.


1.21 The existence of a more broadly ‘constitutional’ facet to judicial review in Scotland may, however, be seen from the fact that the decisions of local authorities (and, in the nineteenth century statutory, trustees and commissioners) when exercising delegated legislative\(^1\) or administrative\(^2\) functions have always been found to be subject to review under the supervisory jurisdiction of the Court of Session. The decisions of District Licensing Boards not otherwise appealable under statute have been held to be judicially reviewable\(^3\). Similarly the actions and omissions of (quasi-) public authorities and organisations such as the Boundary Commission\(^4\),
the Scottish Legal Aid Board, the Criminal Injuries Compensation Board, the Independent Broadcasting Authority, the Forestry Commissioners, Harbour authorities, the Civil Aviation Authority, the Keeper of the Registers of Scotland, chief constables, the remaining Rail Authorities, the regulatory organisations supervising the provisions of financial services, the Scottish Universities and of the sheriff acting in an administrative capacity have all been found in various situations to be subject to review by the court.

1.22 The question whether or not actions against the BBC should properly be taken by way of judicial review or by way of ordinary procedure has not yet been definitively settled. In Houston and Chalmers v British Broadcasting Corporation, the Inner House granted an interim interdict to two candidates for the Scottish Local council elections of 6 April 1995 from the Labour and Liberal Democrat parties respectively against the corporation broadcasting an interview with the then Prime Minister John Major in an action brought by way of summons. In Scottish National Party v British Broadcasting Corporation, Lord Gill refused an application for interim interdict and dismissed as irrelevant a judicial review petition seeking review of the corporations’ broadcasting policy on the party conferences. This matter is more fully discussed in Chapter 13.

1995 SC 433.
2 23 September 1996, unreported, OH. See Munro ‘SNP v BBC round 2’ (1996) 146 NLJ 1433 for a commentary on this decision.

1.23 Ministerial decisions made under a particular delegated statutory power have been found to be subject to judicial review, as have discretionary decisions made by ministers under some executive function delegated to them, including the claim to public interest immunity against the disclosure of Crown documents. There has to date, however, been little consideration in Scotland of the possibility of judicial review of the actions
of ministers of the Crown acting under general Crown prerogative. In McDonald v Secretary of State for Scotland, the Lord Ordinary, Lord Hamilton, rejected the submission made on behalf of the Secretary of State and upheld the competency of a petition for judicial review of a decision by the Secretary of State not to exercise the discretion afforded him under section 263 of the Criminal Procedure (Scotland) Act 1975 to refer a criminal case to the High Court as if it were an appeal, regardless of whether or not an appeal against conviction or sentence had previously been decided by the High Court or the person convicted has petitioned for the exercise of the royal prerogative of mercy.

1.24 The strict public law/private law distinction in Scottish judicial review seems to have been lost over time, perhaps through lack of reliance thereon or simply because it did not capture the complexity of the uses to which judicial review was put in Scotland. Thus, on the grounds that they were also acting in a quasi-judicial capacity, the Court of Session has been willing to judicially review the activities and decisions of arbiters whether appointed under statute or by private contract between the parties, on the basis that 'the position of an arbiter is very much like that of a judge in many respects'.

1 Carnegie v Nature Conservancy Council 1992 SLT 342, OH.
2 Forbes v Underwood (1886) 13R 365 per Lord President Inglis at 367. See, more recently, Kyle and Carrick District Council v A R Kerr & Sons 1992 SLT 629, OH and Shanks & McEwan (Contractors) Ltd v Mifflin Construction Ltd 1993 SLT 1124.

1.25 And judicial review has been used in relation to the acts of purely private bodies, even when they were not obviously acting in a quasi-judicial capacity. It has, for example, been found to be competent to seek judicial review of the activities of a privatised airport operator providing airport taxi licences. While disputes concerning the internal affairs of the Scottish Catholic Church, the Free Church of Scotland and the Free Presbyterian Church of Scotland have all been held to be subject to the supervisory jurisdiction of the Court of Session notwithstanding that these are, in law, simply private voluntary associations. Similarly, the internal workings and deliberations of the Scottish Football Association, the Scottish Labour Party and the St Andrews Ambulance Association have also been held to be subject to the supervisory jurisdiction of the courts. The affairs of the Church of Scotland are, by contrast, subject only to their own ecclesiastical law and the ordinary secular courts have in general no jurisdiction over them.
1.25  The Uses of Judicial Review

1  Case v Edinburgh Airport Ltd (23 February 1989, unreported).
2  McDonald v Burns 1940 SC 376.
3  McMillan v Free Church (1862) 24D 1282.
4  Brentnall v Free Presbyterian Church 1986 SLT 471.
7  Alexander McDonald v Council of St Andrews Ambulance Association (18 December 1998, unreported) OH.
8  See the Church of Scotland Act 1921 and Logan v Presbytery of Dumbarton 1995 SLT 1228, OH. Quaere the position of judicial review being used to ensure the enforcement of directly effective Community law rights such as equal treatment regardless of sex on the established church courts, on which see Helen Percy v Church of Scotland Board of National Mission (EAT/1415/98) (22 March 1999, unreported).

1.26  Originally, English law similarly refused to make a distinction between public law and private law matters. As Lord Wilberforce has stated:

'The expressions 'private law' and 'public law' have recently been imported into the law of England from countries unlike our own which have separate systems concerning public law and private law. . . . In this country they must be used with caution for typically English law fastens not upon principles but upon remedies'.


1.27  In England and Wales the use of has judicial review increased exponentially, particularly since the 1977 reforms to the English Supreme Court procedure which consolidated the procedure for seeking the prerogative orders of certiorari, prohibition and mandamus which were historically available against public bodies and placing them under the same procedural umbrella as the method for obtaining the remedies of declaration and injunction which had always been available against both public and private bodies. The nearest equivalents of these orders in Scots law are, respectively: reduction; suspension; specific implement; declarator; and interdict all of which, historically at least, were available in Scotland against both private individuals and public bodies including the Crown.

1 See now the Supreme Court Act 1981, s 31(2) which provides the current statutory basis for these reforms.

1.28  From the 1977 reforms onward, as part of the 'groping for solutions' in the expanding area of the judicial control of administrative action, the courts in England and Wales began increasingly to rely upon a distinction between private rights and public remedies. Somewhat surprisingly, this development has been ascribed by one commentator to the influence of Scots law, particularly as mediated through the Scottish judges in the House of Lords.

1 See O'Reilly v Mackman [1983] 2 AC 237, HL.
2 See generally Jacob The Republican Crown (1996) on the importance of the Scottish contribution to the development of English public law.

1.29  More recent reference in Scotland to the public law/private law distinction in judicial review has, however, come to be seen as an attempt to
import into the analysis of the basis for the supervisory jurisdiction of the Court of Session an alien concept from English law, despite the fact that in English law it is itself a recent development influenced by continental European administrative law systems, particularly those of France and Germany. Thus, whereas in English law it might be said that it is the acts of public bodies using or abusing public law powers which can be subject to judicial review, in Scots law the question to be asked is not whose acts are subject to judicial review, but rather what kinds of acts are subject to judicial review.


1.30 Further, as we have seen, in England the judges have accepted that the new judicial review procedure marks a break with the past, Lord Diplock noting in CCSU that any decisions before the early nineteen sixties being of little relevance to the manner in which the English courts will now approach judicial review matters. The activist approach of the English bench, in particular of the House of Lords, in developing and expanding the scope and substance of judicial review, is a conscious response to what has been seen by the judges to be the growing dominance of Parliament by the Executive. In the absence, as the Law Lords see it, of effective recourse to Parliament by individuals to obtain redress for wrongs suffered by them at the hands of the public authorities, and ‘to avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen thirty years ago’.

3 See R v Secretary of State for the Home Department, ex p the Fire Brigades Union [1995] 2 AC 513, HL per Lord Mustill at 567 (emphasis added).

1.31 By contrast, as was noted at the outset of this chapter the modern development of judicial review by the judges in Scotland has, as with most areas of judicial reform or development of Scots law, been characterised by an element of judicial conservatism or caution, in which the continuities with the past have been emphasised and any overtly political or broader constitutional purpose disavowed. As Professor W A Wilson observed:

'It cannot be said that the Scottish judiciary has been a major agency of change in the last hundred years. The House of Lords has made abrupt turns from time to time and perhaps that is the appropriate place for changes to be made. The Court of Session has been, on the whole, conservative; it has refused to break new ground, not only because there was precedent against it, but also because there was no precedent for it. . . . The best that can be said for the judges is that they have kept the system going; that is, perhaps, their function.'
1.31 The Uses of Judicial Review


WHAT KINDS OF DECISIONS ARE SUBJECT TO JUDICIAL REVIEW?

1.32 In West v Scottish Prison Service an attempt was made by the Inner House to reconcile the various strands of the past case law in which the supervisory jurisdiction of the Court of Session has been exercised over the past two centuries and to set out a principled and consistent basis which could henceforth be relied upon to de-limit the scope of judicial review in the future. It was noted by the court in West that the 1986 amendments to the Rules of the Court of Session which introduced the new fast track judicial review procedure was, and could only be, a procedural amendment rather than any substantive change to the court's jurisdiction, since it had been introduced by Act of Sederunt rather than by any (amendment to) primary legislation. Further, standing the long reliance upon the court's supervisory jurisdictions in cases concerning the activities of private bodies, it did not seem appropriate to the then Lord President Hope, giving the Opinion of the court, for the limits of judicial review to be defined, as in England, by reference to public or private law.

1.33 Instead, Lord Hope suggested that the paradigmatic case for the exercise of the supervisory jurisdiction of the Court of Session was 'to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument' for the purpose of ensuring that 'the person or body does not exceed or abuse that jurisdiction, power or authority, or fail to do what the jurisdiction or authority requires.' The supervisory jurisdiction was held to apply to 'the acts or decisions of any administrative bodies and persons with similar functions, as well as those of inferior tribunals'.

1.34 In relation to the hard cases of contractual rights and obligations such as those between employer and employee with which on the facts of West the court was specifically concerned, Lord Hope emphasised that the only times in which the supervisory jurisdiction might appropriately be exercised was where there was an identifiable tri-partite relationship between the person or body to whom the jurisdiction, power or authority has been delegated or entrusted, the person or body by whom it has been delegated or entrusted and the person or persons in respect of whose benefit that jurisdiction power or authority is to be exercised. The
tripartite relationship would seem to be an echo, in administrative law, of the Scots private law doctrine of *ius quesitum tertio* in contract.

1.35 The tri-partite test is clearly intended to indicate that purely bipartite transactions or exchanges, for example contracts, should not fall within the ambit of judicial review. The conclusion that has been drawn from Lord Hope’s remarks by a number of academic commentators is that the existence of such a tri-partite relationship should *in all cases* be seen as a necessary pre-requisite to the court competently exercising its powers of judicial review. They have then gone on to note the difficulties with such an approach¹. These difficulties have been encapsulated as follows:

The concept of the tri-partite relationship has not appeared in any previous case, and no similar concept appears to have influenced the development of the supervisory jurisdiction. The major difficulty in applying it is that it is both over-inclusive and under-inclusive. It is so broad and so vague in its terms that it would apply to many situations which have never been thought to be subject to judicial review. It would, for example, apply to a referee in a sporting contest. It is also very difficult to apply the definition to some important categories of decision which are clearly reviewable. It does not seem to apply to the exercise of prerogative powers by Government Ministers, and can only be applied to the exercise of statutory powers by public bodies by assuming that this involves delegation by Parliament. That however, appears to trivialise the concept and again to extend it to situations not previously covered by judicial review².


1.36 The tri-partite test is certainly something of an elusive concept. For example, although the situations in *Naik*¹ and *Joobeen*² were indistinguishable on their facts (the parties being respectively girlfriend and boyfriend who had been dismissed simultaneously from participation in the same University course) in the former case the Lord Ordinary, Lord McLean, held that there was a tri-partite relationship such as to make the matter suitable for judicial review, while in the latter case Lord Prosser also then sitting in the Outer House held that the dispute was essentially a contractual one for which the ordinary causes of action were appropriate and judicial review inappropriate.

1 *Naik v University of Stirling* 1994 SLT 449, OH.

2 *Joobeen v University of Stirling* 1995 SLT 120, OH.

1.37 In practice, however, the tri-partite analysis has not always been insisted on by counsel before the courts, nor has it been invariably applied by the judges of the Outer House, in determining whether or not judicial review is the appropriate procedure in the cases before them¹. But even if not accepted as a test which should be applied in all cases, the tri-partite analysis may still be seen to be a useful indicator of the competency of proceeding by way of judicial review in particular areas of the law, notably in disputes concerning contracts and in particular employment matters.

1 See eg *Reilly v University of Glasgow* [1996] Education Law Law Reports 394.
1.38 In summary, although it seems plain that the primary use of judicial review to date has been to protect the individual against the excesses or abuses of the powers of the State, it cannot be stated definitively that in Scots law it is the public or private nature of the body against whose decision a remedy is sought that determines whether or not judicial review is competent. The flexibility that this gives judicial review in Scotland has been welcomed, in that in principle it allows the Scottish courts to continue to regulate the activities of private bodies in name which in effect exercise quasi-monopolistic powers in public life.


1.39 The public/private distinction in English judicial review has come under increasing attacks by both academics, practitioners and judges for precisely its lack of flexibility in dealing with situations in which the State has permitted certain of its functions to be operated by independent agencies or private bodies operating throughout the mechanisms of private law. Judicial review has been refused in England and Wales to challenge decisions of the Jockey Club, of the English Football Association and of the Insurance Ombudsman, on the grounds that these are private bodies with no sign either of any specific underpinning by the State or that in their absence the State would intervene to create a body to carry out their functions. Similarly, the decision of a private school to expel a child, of the Chief Rabbi to suspend a rabbi from rabbinical activities and of the Imam of a local mosque to decide on eligibility to vote in a mosque election were all held not to be susceptible to judicial review, notwithstanding the lack of any alternative contractually based remedies. It is arguable that all of these or similar decisions would be reviewable in Scotland on the application of the tri-partite test.

5 R v Football Association, ex p the Football League Ltd [1993] 2 All ER 833. Cf Ferguson v Scottish Football Association 1996 GWD 11–601, OH and Dundee United Football Club v Scottish Football Association 1998 SLT 1244, OH per Lord Bonomy in both of which cases the competency of judicial review in Scotland on the activities of the Scottish Football Association was confirmed.
8 R v Chief Rabbi, ex p Wachman [1993] 2 All ER 249.
1.40 Speaking extra-judicially, Lord Hope has noted that 'there has been no opportunity for Inner House to re-examine the opinion in *West* in the light of subsequent developments'. It is suggested that a number of factors will indeed require the Court of Session to reconsider any absolute rejection of a public law/private law distinction in judicial review in Scotland. Firstly, the re-establishment of a Parliament situated in Scotland will, it is suggested, significantly increase the calls upon the Court of Session to exercise its supervisory jurisdiction in relation to the proceedings, acts and omissions of that body—it will be straining the tripartite test if the only basis for the courts reviewing the activities of the Scottish Parliament is *qua* delegated parish council of the Westminster legislature. Secondly, the fact that the Human Rights Act 1998 specifically provides that the courts may grant such relief or remedy or make such orders within its jurisdiction in relation to the acts of 'public authorities' which would be incompatible with a Convention Right means that the courts in Scotland already have to address directly the question of what is a public authority and when is it acting as such. Thirdly, the fact that the direct effect of directives of European Community law is applicable only to public bodies as 'emanations of the State' means that the Scottish courts will require to consider whether or not a body, whatever its legal form, has been made responsible for providing a public service under the control of the State and has for that purpose special powers granted to it beyond those which result from purely private law situations. Finally, continental European administrative law as mediated through the jurisprudence of the Strasbourg based European Court of Human Rights, to which ever greater reference will be made, the domestic incorporation of the European Convention on Human Rights, will have a growing influence on the development of domestic judicial review in Scotland such as to emphasise the particular nature of the rights and obligations of the public administration vis-à-vis the individual.

1 Lord Hope of Craighead ‘Helping each other to make law’ 1997 Scottish Law and Practice Quarterly 93 at 102.
2 See the Human Rights Act 1998, ss 6–8. See also Appendix 2.
5 See eg *Foster v British Gas plc* [1991] IRLR 268, HL (holding that the privatised British Gas remained an emanation of the State) and *National Union of Teacher v Governing Body of St Mary’s Church of England (Aided) Junior School* [1997] IRLR 242, CA in which an grant aided school outwith the direct State sector was nonetheless held to constitute an emanation of the State.

1.41 It may be that the courts in Scotland will then adopt a more functionalist approach to questions of the limits of judicial review such that the decisions of public bodies or bodies exercising a public function vis-à-vis the individual as a member of the general public will be accepted as amenable to judicial review, whether or not any tri-partite relationship can be discovered, invented or imposed. The tri-partite test may still be
1.41 The Uses of Judicial Review

retained in relation to purely contractual matters where the body in question is dealing with an individual not as a member of the general public but rather as an equal contracting party, whether as an employee or a commercial contractor. Without the suitable tripartite relationship in the contractual case, judicial review should not be found to be competent. The intensity of the court’s review of the decision in the particular case, in the sense of the strictness of the application of the principle of judicial review, might then depend on such factors as the importance of the decision (for example is breach of fundamental rights being alleged?), the nature of the decision making body, the availability of other remedies or means of redress and the seriousness of the consequences of the decision upon the individual in question.

WHEN IS A PARTY ENTITLED TO SEEK JUDICIAL REVIEW?

1.42 The use of Chapter 58 Judicial Review procedure is mandatory for all applications to the supervisory jurisdiction of the Court of Session\(^2\), unless other specific procedures have been provided for under the Rules of Court\(^2\). The way in which the courts have in practice applied this procedure is considered in detail in Chapter 6 where such matters as exhaustion of statutory remedies, title and interest to sue, the consideration of academic or hypothetical questions and the application of principles of \textit{mora}, taciturnity and delay are all discussed.

1 \textit{Sleigh v City of Edinburgh District Council 1988 SLT 253.}
2 \textit{Bell v Fiddes 1996 SLT 51, OH.}

ON WHAT GROUNDS MAY JUDICIAL REVIEW BE SOUGHT?

1.43 In \textit{West} the court stated as follows:

‘An excess or abuse of jurisdiction may involve [i] stepping outside it, or failing to observe its limits, or [ii] departing from the rules of natural justice, or a [iii] failure to understand the law, or [iv] the taking into account of matters which ought not to have been taken into account. The categories of what may amount to an excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law.

There is no substantial difference between English and Scots law as to the grounds on which the process of decision-making may be open to review. So reference may be made to English cases in order to determine whether there has been an excess or abuse of the jurisdiction, power or authority or a failure to do what it requires\(^3\).

1 \textit{West v Scottish Prison Service 1992 SC 385 at 413.}

1.44 Thus while the conceptual basis for deciding which acts might be subject to judicial review differed as between Scotland and England, the grounds on which judicial review might be brought is essentially the same as between the two jurisdictions, and is open to further development.
Currently, the principles of judicial review allow a court to quash an administrative decision only if the petitioner can establish that the decision was flawed or tainted because contrary to the requirements of administrative law: namely that it was illegal, procedurally flawed, or irrational\(^1\). Future grounds for development as substantive grounds for judicial review are the principle of proportionality and breach of fundamental human rights. These substantive grounds will be looked at in more detail in Chapters 2 and 3.

1. **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374, HL per Lord Diplock at 410–411. This classification of the substantive principles of judicial review into three distinct but inter-related heads of challenge was specifically approved in Scotland in **Lakin v Secretary of State for Scotland** 1988 SLT 780.

### WHAT ARE THE REMEDIES WHICH MAY BE SOUGHT UNDER JUDICIAL REVIEW?

1.45 Rule of Court 58.4(b) gives the court the power to make such order as it thinks fit in relation to the decision under review ‘including an order for reduction, declarator, suspension, interdict, implement, restitution, payment (whether of damages or otherwise) and any interim order’. Arguably, an order under section 45(a) of the Court of Session Act 1988 which provides that ‘the Court may on application by summary petition ... order the restoration of possession of any real or personal property of the possession of which the petitioner may have been violently or fraudulently deprived’ should also be available on judicial review\(^1\).

1 The annotator to the Rules of the Court of Session suggests at paras 58.3.4 and 58.4.1(6) that such a section 45(a) restoration of property remedy may not be available under judicial review since it has not been expressly included in the Rules in the way that the section 45(b) specific performance of a statutory duty has been.

### Effective remedy under Community law

1.46 In cases involving a European Community law element, the Court of Justice has held that any national rules, including procedural rules, which might impair, even temporarily, the full force and effect of Community law must be set aside\(^1\). Hence in **Factortame**\(^2\) the European Court ruled that the effective protection of Community law rights meant that national courts should have the power to grant interim orders protecting such rights. Any national procedural rules which prevented the interim protection of Community rights must be disapplied. The following propositions relating to interim protection may be derived from the decisions in **Factortame**:

- in any case in which an individual claims to have a right protected under Community law, the national courts have an immediate duty to consider the merits of the claim under Community law and to reach a view thereon;
- if it appears to the national court that the claim is a good one, then all national rules which impede the enjoyment of that directly effective right should be set aside;
1.46 The Uses of Judicial Review

- if it appears to the national court that there may be some merit in the claim, but that a final decision on the matter requires an authoritative interpretation of the Community law from the European Court, then a reference should be made to that court under article 177\(^3\) of the Treaty of Rome;
- pending the outcome of this reference, the putative right under Community law should be protected by the national court granting all and any such orders as are necessary to ensure proper protection of the claimed Community right;
- any national rules, be they procedural or substantive, which would otherwise impede the interim protection of the putative Community law right should be set aside by the national court while awaiting the final judgment of the Court of Justice.

1 Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629. See, most recently, Joined Cases C-10,22/97 IN.COGE. '90 (22 October, 1998, unreported) ECJ.
3 Now art 234 following the Treaty of Amsterdam re-numbering.

Interim interdict

1.47 In Scotland the issue of interim protection in Community law, as in purely domestic cases, is assessed on the standard principles: namely, that the pursuer must show that there is a prima facie case indicating a serious issue to be tried on the merits.

1.48 In general, however, the courts are reluctant to grant interdict against public authorities apparently exercising their statutory powers\(^1\) and will not be used to compel a public authority to exercise discretionary powers within its jurisdiction in a particular way\(^2\) unless supported by findings of bad faith\(^3\).

1 See Central Regional Council v Clackmannan District Council 1983 SLT 666.
2 Fleming v Liddlesdale District Committee (1897) 24R 281.
3 Pollock School v Glasgow Town Clerk 1946 SC 373.

1.49 Any application for interim interdict has to be able to show a convincing prima facie case on the merits supported by a contention that unless the restraining order is granted the petitioner will suffer irreparable harm which cannot be compensated by a subsequent claim in damages\(^1\). The court should then consider whether damages would be an adequate remedy, and, if not, whether the balance of convenience favours the grant of an interdict\(^2\). If the application passes these tests then an interdict order may be pronounced against the decision maker prohibiting him acting upon his decision and ordering suspension of the decision pending a final decision on the merits of the challenge by the court\(^3\).

2 See R v Ministry of Agriculture, Fisheries and Food, ex p Monsanto plc [1998] 4 All ER 321, DC where it was held in refusing interim relief on referring a number of questions for resolution by the European Court of Justice that until set aside a public decision (in casu the grant of a
What are the Remedies which may be Sought Under Judicial Review? 1.53

licence to a commercial competitor of the petitioner to supply a herbicide) should be respected, having regard to the fact that the purpose of a licensing procedure is to serve the public or common interest and not to protect private commercial interests.

3 See eg Highland Regional Council v British Railways Board 1996 SLT 274.

1.50 Thus in Lord Advocate v Dumbarton District Council; Lord Advocate v Strathclyde Regional Council a case which concerned conjoined applications of judicial review on the question of whether or not as a matter of principle the Crown was bound by the requirements of planning statutes in the absence of express provision or necessary implication, interim interdict was pronounced against Strathclyde Regional Council at First Orders on 25 March 1986 by the Lord Ordinary, Lord Cullen, while on 16 May 1986 the Lord Ordinary, Lord Clyde, refused interim interdict against Dumbarton District Council but at First Order granted interim suspension of the enforcement and stop notices issued.

1 1990 SLT 158, HL.

1.51 In English law, it is standard procedure that a person or body in whose favour an interlocutory injunctive order (whether mandatory or prohibitory) is pronounced will provide a cross-undertaking in damages to the other party in the event that the interim relief ultimately be held ill-founded. An exception to the requirement of such a cross-undertaking has been made in the case of local authorities seeking to enforce the general law of the land. In Scotland it is generally accepted that the grant of a wrongful interdict may lead to a claim for damages on its reduction or recall on grounds other than change of circumstances. However such cross-undertakings are not normally specifically requested.

1 Kirklees Borough Council v Wickes Building Supplies Ltd [1992] 3 WLR 170, HL.

Interim liberation

1.52 In immigration petitions where the applicant has been placed in detention pending the finalisation of arrangements for his removal from the United Kingdom, orders for interim liberation from detention as provided for under section 47(1) of the Court of Session Act 1988 which provides, so far as relevant, that ‘in any cause containing a conclusion or crave for interdict or liberation, the Division of the Inner House or the Lord Ordinary (as the case may be) may, on the motion of any party to the cause, grant interim interdict or liberation’. This matter is more fully discussed in Chapter 10.

Reduction

1.53 Reduction is probably the most common of the remedies sought under judicial review. On reduction of a particular decision, the court quashes the original decision and remits the matter to the decision maker to re-consider the whole matter anew. It is not the function of the court to substitute its own view for that of the decision maker as to what the correct decision should be. Even where the court is satisfied that an administrative body has erred in law in reaching its decision, the court is not bound to
reduce the decision if that remedy would have no practical effect and thus the person seeking reduction has no substantial interest in having it set aside\(^1\).

1 See remarks to this effect in King v East Ayrshire Council 1998 SC 182.

### Declarator

1.54 One aspect of the court's unwillingness to be involved in purely academic or hypothetical disputes is their often expressed unwillingness to grant 'bare declarators' as between private parties\(^1\). Standing the terms of section 21(1) of the Crown Proceedings Act 1947 which apparently prohibits orders of interdict, specific implement or delivery from being pronounced against the Crown and permits in their stead only orders 'declaratory of the rights of the parties', bare declarator may, however, be the only remedies open to a party against the Crown\(^2\).

1 Ayr Magistrates v Lord Advocate 1950 SC 102.

2 See eg Ross v Lord Advocate 1986 SLT 602 and Sutherland District Council v Secretary of State for Scotland 1988 GWD 4-167. Cf Ayr Magistrates v Secretary of State for Scotland 1966 SLT 16 where a conclusion for interim declarator against the Crown was refused.

### Damages

1.55 In theory, damages might be awarded in Scotland in the course of a petition for judicial review. In practice, a specific monetary award has been made in only one reported case to date\(^1\). Judicial review procedure is intended to permit a speedy simple and flexible approach to the resolution of disputes concerning alleged abuse of power. It is more suited to narrow legal questions, rather than to complex factual disputes. Its form is not particularly suited to large damages claim which require detailed and lengthy pleadings by both sides to clarify issues between the parties on the correct approach to the assessment of loss\(^2\).

1 Mallon v Monklands District Council 1986 SLT 347.


1.56 Further the courts have often to apply substantive public policy considerations at least in non-European law contexts\(^3\), to limit the possibility of public authorities being found liable in damages when apparently acting under statutory powers\(^2\) by, for example, requiring a finding of malice or bad faith before any liability in damages arises\(^3\).

Specific performance of a statutory duty

1.57 Section 45(b) of the Court of Session Act 1988 provides as follows:

'The Court may on application by summary petition –

(b) order the specific performance of any statutory duty, under such condition and penalties (including fine and imprisonment where consistent with the enactment considered) in the event of the order not being implemented, as to the court seem proper.'

1.58 Rule of Court 58.3(1) specifically provides that any application for specific performance of a statutory duty brought under section 45(b) of the 1988 Act should be made by way of petition for judicial review. Section 45(b) of the 1988 Act is derived directly from section 91 of the Court of Session Act 1868 and is the nearest equivalent in Scots law to the English order of mandamus. In *T Docherty Ltd v Burgh of Monifieth* Lord President Clyde said this:

'Under s 91 of the Court of Session Act 1868 ... authority is given to the court upon an application by a summary petition to order specific performance of a statutory duty. The present proceedings are in the form of a summary petition, and, in my opinion, s 91 of the 1868 Act can properly be invoked to enforce the provisions of s 219 of the 1892 Act if the respondents are in breach of them. It was argued that this remedy was not available if some alternative method was provided in some other statute. But I see no warrant for this contention in the unequivocal terms of s 91 of the 1868 Act*1.

1 See eg *The Carlton (Edinburgh) Hotel Company Limited v The Lord Advocate and The Secretary of State for War 1921 1 SLT 126.* Cf *Lord Advocate v City of Glasgow District Council 1990 SLT 721* for the procedure in a petition brought against a local authority under the parallel provisions for enforcement of statutory duty under the Local Government (Scotland) Act 1973, s 211(3).

2 1971 SLT 13 at 15. See also *Leishman v Scott 1926 SC 418* and *Langlands v Mason 1962 SC 493.*

3 This dictum was applied by Lord Davidson in *Walker v Strathclyde Regional Council (No 1) 1986 SLT 523,* OH.

1.59 In *Carlton Hotel Co v Lord Advocate* Lord Salvesen expressed the view that an order for specific performance under section 91 of the 1868 Act could competently be pronounced against a minister of the Crown, although both Lord Cullen at first instance and Lord Dundas in the Division reserved their opinions on this point in the absence of fuller argument. Lord Salvesen observed, as matter of principle, that:

'To decide otherwise would be to hold that, when a duty was laid by Act of Parliament on a Minister of the Crown, it must remain a dead letter so far as the rights of private individuals are concerned.*1

1 1921 SC 237 at 249.

1.60 The remedy has rarely been sought against the Crown and is more commonly applied in relation to the duties of local authorities and other
public bodies. Thus in *Tayside Regional Council v British Railways Board* Lord Prosser granted an order against the respondents requiring them to reopen and maintain a level crossing over a railway line at Broughty Ferry in accordance with their specific statutory duty to that effect\(^2\).

1 See eg *T Docherty v Burgh of Monifieth* 1970 SC 200 and *Walker v Strathclyde Regional Council (No 1)* 1986 SLT 523.

2 9 December 1993, unreported, OH.

### Specific Implement

1.61 Section 46 of the Court of Session Act 1988 provides that where a respondent in any application or proceedings before the court has done any act which the court might have prohibited by interdict, the court may ordain the respondent to perform such acts as may be necessary to grant the petitioner specific relief against the illegal act complained of. Such positive orders ordaining a party to carry out a certain course of action ('mandatory injunctions' in the terminology of English law\(^1\)) have to date rarely been granted by the courts where damages are a competent and available remedy. There are some signs, however, that the civil law basis of the Scots law of contract is being re-discovered with the judges being more ready to grant orders for specific performance as the primary remedy to breach of contract\(^2\). There is a continuing reluctance to grant such remedies at an interim stage relying instead on the possibility of a claim for damages being made after the facts\(^3\).

1 See the decision of the English Court of Appeal in *R v HM Treasury, ex p British Telecommunications plc* [1994] 1 CMLR 621 on mandatory injunctions.

2 See the following cases: *Retail Parks Investments v The Royal Bank of Scotland (No 2)* 1996 SC 227; *Co-operative Insurance Society v Halfords* 1998 SLT 90, OH; *Co-operative Insurance Society v Halfords* 1998 SC 212, OH; and *Highland & Universal Stores v Safeway* 1998 GWD 3–136. Cf the decision in *Co-operative Insurance Society v Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297, HL.

3 See eg *Argyll v Guinness* 1987 SLT 514 and *McCulloch v Rodger* [1996] 7 Eu LR 393.

1.62 In matters where questions of Community law arise, however, a more 'natural law' approach would appear to have to be taken by the courts in that they are required to ascertain the purpose of national legislation and assess its compatibility in intention and effect with the ends of a higher law set out in the treaties and the judgments of the European Court. Thus, in *Millar & Bryce Limited v Keeper of Registers of Scotland*\(^4\) in reliance upon the Community law principle of effective protection of Community law rights, positive orders *ad factem praestandum* under section 47(2) of the Court of Session Act 1988 were pronounced by the Lord Ordinary against the Crown on the basis that the petitioners had established a prima facie case that the respondents were acting in breach of Community competition law, in particular article 86 of the Treaty of Rome relating to abuse of a dominant position.

What are the Remedies which may be Sought Under Judicial Review? 1.68

Interdict against the Crown

1.63 In *McDonald v Secretary of State for Scotland*¹, the Second Division held, contrary to the approach of the House of Lords in the English case of *M v Home Office*² that as a matter of strict interpretation of the Crown Proceedings Act 1947, it was not competent to seek interdict against the Crown in Scotland in matters concerning purely domestic law.

1.64 The effect of the decision of the European Court of Justice in *Factortame 2¹*, however, is to make available to individuals who can show that their rights and interests under Community law required protection, both permanent and interim injunctive relief against the Crown or its officers.

1.65 Further, it may be that a purposive approach to the interpretation of section 8(1) of the Human Rights Act which provides that in relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order within its powers as it considers just and appropriate will lead the courts in Scotland to accept the competency of their pronouncing interdict against the Crown in cases in which a breach of a Convention right is alleged or established.

1.66 Section 21(1)(a) of the Crown Proceedings Act 1947 is in the following terms:

'[W]here in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance but may in lieu thereof make an order declaratory of the rights of the parties.'

1.67 Section 21(2) of the 1947 Act goes on to provide that in civil proceedings no injunction or court order should be made against any officer of the Crown if the effect of making such an order would be to grant relief which would not have been otherwise available in proceedings taken against the Crown directly¹.

1.68 The Scottish common law pre-1947 differed from the English in that in Scotland interdicts¹ or orders for specific performance² could competently be pronounced against the Crown and its servants³. The conventional reading of the purpose of the 1947 Act was to that it was intended to

1 1994 SLT 692.
2 [1993] 3 All ER 537, HL.
4 See *Adams v Naylor* [1946] AC 543, HL for an application of the rules of the pre-1947 English law in this area.
make new uniform UK wide provision on remedies against the Crown and bring the Scottish and English courts into line with one another. The Crown would therefore be subject to the same remedies no matter in which part of the United Kingdom it was sued. 

1 See Bell v Secretary of State for Scotland 1933 SLT 519, Russell v Hamilton Magistrates (1895) 25 R 350 at 352 and Somerville v Lord Advocate (1893) 20 R 1050.  
2 See Carlton (Edinburgh) Hotel Co Lid v Lord Advocate 1921 SC 237 at 242.  

1.69 In British Medical Association v Greater Glasgow Health Board it was held that Health Boards in Scotland, even if providing services on behalf of the Crown, could not rely on any Crown immunity conferred under the 1947 Act to prevent, in appropriate circumstances, an order for interdict being pronounced against them. In the Second Division, the expression the Crown was said, for the purposes of the 1947 Act, to be limited to ministers of the government and civil servants acting under their direction, and not generally to those acting as agents for the Crown. In the only substantive judgment in the case before the House of Lords, Lord Jauncey, in dismissing the appeal against the finding that health boards could competently be interdicted, noted:

'It is, in my view, inconceivable, that Parliament should have intended to fetter the right of the subject to obtain a prohibitory order more strictly in Scotland than in England, particularly when the historical background [that interdict was available against the Crown in Scotland] is remembered.... [T]he general purpose of the Crown Proceedings Act 1947 was to make it easier rather than more difficult for a subject to sue the Crown. To hold that the Act had clothed with immunity from prohibitory proceedings a body which prior to its passing would have enjoyed no such immunity would be to run wholly counter to its spirit'.

1 1989 SC 65, HL per Lord Jauncey at 94-95 (emphasis added).

1.70 In Factortame 1 the House of Lords considered section 21(1) of the 1947 Act in the context of an English appeal and held that their effect was that no injunctive relief could be granted against the Crown or against any officer of the Crown acting in that capacity in any purely domestic civil proceedings, including applications for judicial review. The effect of the decision of the European Court of Justice in Factortame 2 was, however, to make available to individuals who could show that their rights and interests under Community law required protection, both permanent and interim injunctive relief against the Crown or its officers. There were thus created two separate paradigms: where Community law rights were at issue the English courts had power to grant injunctions against the Crown; where purely domestic law questions were at issue, however, the English courts had not such power to grant prohibitory orders against the Crown.

1 R v Secretary of State for Transport, ex p Factortame (Factortame 1) [1990] 2 AC 85, HL.  
2 Case C-213/89 R v Secretary of State for Transport, ex p Factortame (Factortame 2) [1990] ECR I-2433, ECJ; [1991] 1 AC 603, HL.
What are the Remedies which may be Sought Under Judicial Review? 1.74

1.71 In *M v Home Office*, however, the House of Lords considered anew the question as to whether or not the courts in England had power to enforce the law, in purely domestic situations, by either injunction or contempt proceedings against a minister acting in his official capacity. Lord Templeman suggested (at 437) that if there was found to be no such power, as had apparently been decided by their Lordships in *Factortame 1*, this would mean that the executive obeyed the law as a matter of grace rather than as a matter of necessity: a proposition which, it was said, would reverse the result of the English Civil War.

1 [1994] 1 AC 377, HL.

1.72 Lord Woolf, who delivered the leading judgment in the Lords, described the anomaly resulting from the decisions in *Factortame 1* and *Factortame 2* whereby Community law rights and interests were, in effect, better protected by the United Kingdom courts than purely national law rights, as an ‘unhappy situation’. He went on:

‘It would be most regrettable if an approach which is inconsistent with that which exists in Community law should be allowed to persist if that is not strictly necessary’.

He therefore made a finding be made that that *Factortame 1* had been wrongly decided insofar as it prohibited interim injunctions to be granted against the Crown. This departure from the ruling in *Factortame 1* was concurred in by all four of the other judges in the case.

1 [1994] 1 AC 377 at 422G.

1.73 Lord Woolf’s formal (in contrast to his policy orientated) justification for this shift in position was done in two stages: firstly, by construing section 21 of the Crown Proceedings Act 1947 against the historic background of per-1947 English common law as narrowly as possible. He stated:

‘[T]he effect of the 1947 Act can be summarised by saying that it is only in those situations where prior to the Act no injunctive relief could be obtained that section 21 prevents an injunction being granted. In other words, it restricts the effect of the procedural reforms so that they do not extend the power of the courts to grant injunctions. That is the least that can be expected from legislation intended to make it easier for proceedings to be brought against the Crown’.

1 [1994] 1 AC 377 at 413B per Lord Woolf (emphasis added).

1.74 The second stage in his formal justification for departing from the *Factortame 1* ruling was for Lord Woolf to give the broadest possible construction to section 31(2) of the Supreme Court Act 1981. Section 31(2) gave statutory authority to the changes in English judicial review procedure first introduced in 1977 by Order 53 of the Rules of the Supreme Court. Lord Woolf was of the view: firstly, that section 31(2) of the 1981 was expressed in unqualified terms and equated declarations and injunctions; secondly, that there was no objection in principle either before or after the 1947 Act to declarations being made against officers of the Crown;
and finally, that the 1981 statute was therefore to be read as expressly permitting injunctions to be pronounced against officers of the Crown in judicial review proceedings, in the same way as declarations always have been granted. This was an argument which had already found favour with Lord Woolf when he had sat as a judge of the Court of Appeal. This same argument had, however, already been considered by the House of Lords in Factortame and rejected by Lord Bridge in the leading speech in that case.

1 Section 31(2) of the 1981 Act is in the following terms: ‘A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review seeking that relief has been made and the High Court consider that having regard to (a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari; (b) the nature of the persons or bodies against whom relief may be granted by such order and (c) all the circumstances of the case, it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be’.

2 See R v Licensing Authority, ex p Smith Kline & French Laboratories Ltd (No 2) [1990] QB 574. Compare too with the analysis by Hodgson J in R v Secretary of State for the Home Department, ex p Herbage [1987] QB 872 to the effect that section 38 of the 1947 Act excluded judicial review applications from the definition of civil proceedings for the purposes of section 21 and so permitted the courts to pronounce both prohibitory and mandatory injunctions against the Crown at least in the context of judicial review.

3 R v Secretary of State for Transport, ex p Factortame (Factortame 1) [1990] 2 AC 85 at 149–150.

1.75 At common law in England the rule was that neither the prerogative orders such as prohibition and certiorari nor injunctions could be pronounced directly against the Crown as such (on the basis that the Crown could not command itself either to do or enjoin itself not to do a specific act). Crown servants were, however, liable for their own actions, and such order were therefore available in proceedings taken against Crown servants personally: they were not permitted to hide behind this immunity of the Crown. On the broad expansive reading of the reforms contained in section 31(2) of the 1981 Act as proposed by Lord Woolf, section 21(1) of the 1947 Act was to be re-interpreted as meaning only that an injunction or order for specific performance could not be pronounced in judicial review proceedings against the Crown itself, but that where the action or power complained of was that of a Crown servant, even one acting in an official capacity, such orders may competently be pronounced.

1 See Tamaki v Baker [1901] AC 561.

1.76 In M v Home Office the differences between rights under Community law and those under purely national law was cited by the judges as one reason for making a radical change in the position in national law. The decision was, as we have seen, formally justified by Lord Woolf in terms of a re-interpretation of a purely national procedural statute. This formal justification poses problems for the uniform interpretation of the law and protection of legal rights throughout the United Kingdom since the statute in question, the Supreme Court Act 1981, is one which applies only in England and Wales. Accordingly, the question as to whether or not the courts in Scotland had the power post-1947 to grant interdicts against the Crown remained to be decided.
1.77 This very question came before the Second Division of the Inner House of the Court of Session only five months after the decision of the House of Lords in *M v Home Office*. In *McDonald v Secretary of State for Scotland*¹ Lords Ross, Morison and Sutherland were faced with a party litigant, a serving prisoner in Glenochil prison, seeking interim interdict against the Secretary of State or anyone on his behalf from carrying out searches on him without lawful authority, warrant or justifiable cause. An action for damages and interdict had been raised by the prisoner before the Sheriff Court. His motion for interim interdict had been refused as incompetent by the sheriff, the sheriff principal and the matter was now appealed to the Inner House. The appellant was not professionally represented. The court, however, appointed senior counsel as *amicus curiae* to assist it on the law, given that the pursuer was appearing for himself. The Secretary of State was represented by the then Lord Advocate, Lord Rodger of Earlsferry, together with junior counsel.

¹ 1994 SC 234.

1.78 Lord Ross expressed the view that insofar as Lord Woolf's views on the meaning and import of section 21 of the Crown Proceedings Act 1947 were based on 'the peculiarities of English law' rather than 'principles of general jurisprudence' they would not bind the courts in Scotland, notwithstanding that these views related to a provision of a United Kingdom Act which applied equally to Scotland and England¹.

¹ Cf *Dalgleish v Glasgow Corporation* 1976 SC 32 per Lord Justice Clerk Wheatley at 52.

1.79 Lord Ross went on to describe Lord Woolf's reasoning on the effect of section 21(1) on the pre-existing English common law matter as 'difficult' and 'clearly obiter' (at 240F) and as 'not easy for a Scottish lawyer to understand' (at 242E) concluding that he was 'not persuaded that his [Lord Woolf's] observations are of assistance when consideration is being given to the application of the [1947] Act to Scotland' (at 242G). Instead he accepted, *tout court*, the submissions of junior counsel for the Secretary of State that one effect of the 1947 Act was to 'deprive litigants in Scotland of a right which they had previously had, namely, a right to obtain interdict and interim interdict against the Crown' (at 239E).

1.80 The *amicus curiae* offered no counter argument to the proposition that since the action in *McDonald* had been raised as an ordinary action before the sheriff court it constituted 'civil proceedings' for the purposes of the 1947 Act and that accordingly interdict could not competently be pronounced against the Crown in the course of such an action. He did suggest, however, that had the action been raised as a judicial review petition there was scope for arguing that these did not constitute 'civil proceedings' for the purposes of the 1947 Act and accordingly that interdict might be pronounced by the Crown in the course of an application of the supervisory jurisdiction of the Court of Session. Lord Ross though that there would be 'formidable difficulties' with any such submission but stated that it was not necessary to determine the matter in the process, given that the action before them had been raised as ordinary civil proceedings before the sheriff.
The decision of the Second Division in *McDonald*, and the manner in which it disposes of *M v Home Office* is unsatisfactory in a number of important respects. Firstly, the Inner House did not consider any of the ‘principles of general jurisprudence’ on which the House of Lords’ decision in *M v Home Office* was avowedly based. These included:

- the principle that the Executive should be subject to the rule of law;
- the principle that the individual should have an effective legal remedy against any violation of his rights, no matter the identity of the party carrying out such violation;
- the principle that it is undesirable that there be a disparity between the unlimited remedies available in the national courts where points of Community law are at issue as opposed to those cases raising matters purely of domestic law.

Secondly, in distinguishing their interpretation of the effect of section 21 of the Crown Proceedings Act 1947 from that taken by the House of Lords in *M v Home Office* the Second Division failed to give due weight to the principle that United Kingdom wide provisions should be interpreted uniformly in both Scotland and England and Wales. No reference was however made by the judges of the Inner House to the observations of Lord Reid in *Lord Advocate v Dumbarton District Council*¹ to the effect that:

‘There would appear to be no rational grounds on which a different approach to the construction of a statute [which applies uniformly to the whole of the UK] might be adopted for the purpose of ascertaining whether or not the Crown is bound by it according to the jurisdiction where the matter is being considered.’

1 1990 SLT 158 at 163, HL (emphasis added).

Thirdly, the judges in *McDonald* failed to give sufficient consideration to the avowed purpose of the 1947 Act which as we have seen was intended to liberalise existing English procedures restricting remedies against the Crown and so provide a uniform approach throughout the United Kingdom. Instead the Second Division took an apparently literalist approach to the wording of section 21 and attempted to apply this to a background of the pre-existing Scots common law.

It is clear, however, that Part II of the 1947 Act was never drafted with Scots common law in mind: section 21(1) refers to ‘injunctions’; section 38 defines civil proceedings as proceedings in the ‘High Court’ and the ‘County Court’ for the recovery of fines and penalties but does not include ‘proceedings on the Crown side of the Queen’s bench division’. None of these phrases has any meaning in Scots law. The judges in *McDonald* found themselves baffled and could find no meaning and effect in Scots law to the provisions of section 21(2) of the Act which apparently makes a distinction between actions taken against the Crown and those taken against officers of the Crown. In Scotland the Crown is regarded as an ‘indivisible entity’¹ and actions against the Crown in Scotland can only be directed against an officer of the Crown: either the Lord Advocate by virtue of the Crown Suits
(Scotland) Act 1857 or the Secretary of State under section 1(8) of the Reorganisation of Offices (Scotland) Act 1939.

1 See Smith v Lord Advocate 1980 SC 227 per Lord Avonside at 231.

1.85 Given that the Act is drafted in the terminology of and assuming a background of foreign law, it is impossible for a judge in Scotland to take a literal approach to the statutory text. There has, of necessity, to be a translation and interpretation of the words used in the Section to see how they might make sense in the context of Scots law.

1.86 It is not enough to translate individual words used in the section and apply them without further ado to the Scottish situation. This, however, seems to have been the extent of the translation which the judges in MacDonald were willing to consider. Thus, in accordance with section 43(a) of the Act, for ‘High Court’ they read ‘Court of Session’, for ‘county court’ they read ‘sheriff court’ and for ‘injunction’ they read ‘interdict’. Lord Ross however seemed much less happy with the suggestion by the amicus curiae that the reference in section 38 to ‘proceedings on the Crown side of the Queen’s bench division’ should be read in a Scottish context as ‘applications to the supervisory jurisdiction of the Court of Session’.

1.87 Presumably, then, the reference in section 38 to proceedings on the Crown side of the Queen’s Bench Division is to be ignored as meaningless in a Scottish context. Similarly section 21(2) is also to be ignored as meaningless in a Scottish context since it is not possible to have actions directly against the Crown in Scotland as actions against the Crown have to be directed against the Lord Advocate.

1.88 The fact that the Scottish judges in MacDonald chose to translate some English law terms, but choose not to translate certain other terms shows that whatever they were doing in construing section 21, they were not taking a literalist or neutral approach to the text in question. Instead they were applying unspoken and selective canons of interpretation. The problem with selecting and translating individual words in a sentence is that it may distort the meaning of the whole phrase. The correct approach must be to seek to translate the provision as a whole.

1.89 It is submitted that the only defensible canon of interpretation when faced with a transplanted provision of foreign law which is to be applied in Scotland is firstly to understand what that provision does and is intended to do in its home context. Once the purpose and effect of section 21 of the 1947 Act in English law is established, then any translation of this provision into Scots law must seek to ensure that the same result is achieved in Scotland. This approach may be termed teleological or purposive interpretation: taking the provision as a whole in context, rather than selectively translating individual words therein.
1.90 The authoritative statement from Lord Woolf as to the effect of section 21 in English law is that, in the context of an Act the purpose of which is to liberalise the situation governing actions against the Crown, it simply preserves in English civil proceedings other than judicial review the accepted position whereby injunctions could not be pronounced against the Crown directly, but could arguably still be pronounced against its officers both when acting personally and in an official capacity.

1.91 Because of the manner in which the relevant provisions of the 1947 Act has been approached by the judges in *McDonald* (selective translation of particular words) the authoritative statement from the Second Division as to the effect of section 21 in Scots law, is that it, in the context of an Act the purpose of which is to liberalise the situation governing actions against the Crown, is that it removes once and for all, no matter the form of application to the courts in Scotland, the long accepted right of the individual to seek interdict against Crown servants. A liberalising Act is thus interpreted as having a profoundly illiberal effects in Scotland. The same provision of a United Kingdom wide statute, drafted in the terminology of English law, is given diametrically opposed meanings, depending on whether it are considered by a Scots or English judge. An Act which was intended to provide for uniform remedies against the Crown throughout the United Kingdom results in there being made available remedies in England which are removed in Scotland. This is, to say the least, somewhat paradoxical and counter-intuitive.

1.92 If, on the other hand, a purposive contextual approach to the translation of text of section 21 into Scots law is taken, it will be interpreted as having the same effect as in England: namely to preserve the pre-existing common law position in Scots law which allows for, in certain circumstances, interdict to be pronounced against the Lord Advocate or the Secretary of State representing the Crown in their official capacity. It might be objected that this interpretation will be to evacuate the text of section 21 of all meaning. The response to that, is that given the overall intent of the Act, and given the reliance upon English terminology and the English common law in the drafting of section 21, the provision will have no effect in Scots law. If such an interpretation is accepted then the purpose of the Act, namely to create a uniform system of remedies throughout the United Kingdom, will be preserved. In any event, the Second Division in *McDonald* appear to have had not regard to the possible inter-relation between the 1947 Act and the Court of Session Act 1988 which, like the English Supreme Court Act 1981 which was relied upon by Lord Woolf in *M v Home Office*, consolidated and gave specific post-1947 statutory backing to the powers of the Court of Session in the causes before it.
Chapter 2

The Principles of Judicial Review

'A decision of the Secretary of State acting within his statutory remit is ultra vires if he has improperly exercised the discretion confided to him. In particular, it will be ultra vires if it is based upon a material error of law going to the root of the question for determination. It will be ultra vires, too, if the Secretary of State has taken into account irrelevant considerations or has failed to take account of relevant and material considerations which ought to have been taken into account. Similarly it will fall to be quashed on that ground [of ultra vires] if, where it is one for which a factual basis is required, there is no proper basis in fact to support it'.

1 Wordie Property Co Ltd v Secretary of State for Scotland 1984 SLT 345 per Lord President Emslie at 347–348.

INTRODUCTION

2.01 In Chapter 1 we noted the general consensus, at least among English legal academics, practitioners and judges, that judicial review is best understood as a new, emerging and responsive branch of the law, still in the process of formation by an activist judiciary consciously seeking to meet the challenge posed by the perceived changes in the United Kingdom constitution in the past thirty years. It is clear that the developing body of administrative law is extraordinarily open to outside influences, particularly from other jurisdictions which have had longer periods in which to develop and refine their notions of administrative law.

2.02 This exchange of ideas and concepts among legal system is no new phenomenon. Classical Roman law as set out in the Corpus Iuris Civilis permeated the legal cultures of continental Europe from the Middle Ages onward. Scots law too was particularly influenced in the seventeenth century by the developing Roman Dutch jurisprudence and doctrine of the Netherlands. English lawyers regularly cite, and English judges regularly apply, dicta from cases emanating from New Zealand, Australia, the United State of America and other jurisdictions in the Anglo-American common law family.

2.03 What is unusual about the contemporary reception of administrative law doctrines in the context particularly of the English legal system, is
that many of the new ideas and concepts referred to by the judges have their origins not in other English speaking jurisdictions, but in the administrative systems of continental Europe. As Lord Diplock noted in Council of Civil Service Unions v Minister for the Civil Service future cases might lead to further European influenced development of the grounds upon which an administrative action might be subject to judicial review. He stated:

'I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community'¹.

¹ [1985] AC 374 at 410.

2.04 In West too, the Inner House also specifically allowed for the possibility of future development in the substantive bases for judicial review, stating:

'The categories of what may amount to an excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law'¹.


2.05 Given that there is acknowledged to be 'no difference of substance'¹ between the laws of England and Scotland as regards the grounds on which judicial review may be sought, it is to be expected that the principles of administrative law in Scotland will come to be similarly influenced by these same continental European systems, whether directly or as mediated through the decisions of English judges.

¹ See Lord Fraser in Brown v Hamilton District Council 1983 SC (HL) 1 at 42.

THE INFLUENCE OF EUROPEAN ADMINISTRATIVE LAW

2.06 There are a number of reasons to explain this 'civilising' of administrative law in the United Kingdom: firstly the fact that continental European legal systems have a long history of a separate and full developed system of administrative law; secondly the impact of the administrative jurisprudence of the European Court of Justice where European Community law has to be applied in an administrative context by the national courts of the United Kingdom; and thirdly the ever-growing influence of the Strasbourg European Court of Human Rights in cases where it is alleged that the public authorities have breached an individuals fundamental rights as guaranteed under the European Convention of Human Rights. We shall look at these in turn.
French and German domestic administrative law

2.07 The two main branches of the codified civilian laws of Europe, namely the French Napoleonic system and the later Germanic system, have both long treated the law governing the individuals relations with the State as quite separately from the law governing the rights and duties of individuals inter se. Not only are their rules of private and administrative law distinct, but the very courts which apply them are divided into wholly separate hierarchies. Thus in the French system, the private law courts have their supreme court in the Cour de Cassation, while their administrative law courts answer ultimately to the Conseil d'État. German courts are divided into even more hierarchies depending on the body of law which they administer, with separate court structures dealing with matters such as taxation, labour law and administrative law, all ultimately subject to the jurisdiction of the German Federal Constitutional Court (the Bundesverfassungsgericht) charged with ensuring that the German Basic law (the Grundgesetz) is respected in their decisions and by all other organs of the State.


2.08 The German and French administrative law court systems have, over the years of their existence developed a number of general principles of administrative law which, in the absence of any valid contrary statutory provision, are held to bind the Administration to observe certain standards of conduct in their dealings with the citizen. In French law these general principles include the presumption of equality before law, the prohibition of retro-active effect to laws and administrative decisions and the rights of the defence (les droits de la défence) or respect for natural justice. In the German administrative law system one of the most important general principles is that of proportionality (Verhältnismäßigkeit) which has been held also to constitute a fundamental constitutional principle underpinning the German Basic Law.


2.09 By contrast with the Continental systems, administrative law in the United Kingdom is still at an early stage of development. The legal systems of Scotland, Ireland and England all developed without reference to the trend toward systematisation and codification which was common to the legal systems of west continental Europe during and after Napoleon. In particular in none of those legal systems, which for convenience we might call Anglo-Celtic, did there grow up a separate judicial hierarchy for the review of administrative acts. Without the separate systems of courts a body of administrative law, distinct from the remedies provided for in private law, was slow in developing.
2.09

The Principles of Judicial Review

1 For a general historical overview of the two systems, see Sabino Cassese 'Il problema della convergenza dei diritti amministrativi: verso un modello amministrativo europeo?' (1992) 2 Rivista italiana di diritto pubblico comunitario 25.

2.10 Thus, the domestic administrative law systems of France and Germany have become mines of useful ready made general principles for the developing administrative law system in England and Wales and in Scotland to pick up and adapt for use in the prevailing constitutional culture of the United Kingdom.

1 See M Chiti 'Administrative Comparative Law' in (1992) 4 European Review of Public Law 11.

The influence of the European Court of Justice

2.11 The application of these general principles of Continental administrative law is, in any event, not always a matter of choice for the domestic courts of the United Kingdom. In situations involving the application and interpretation of European Community law within the United Kingdom, the courts of both Scotland and England may be obliged to apply the general principles of Community administrative law, many of which originate from the domestic French and German administrative law systems.

2.12 The European Court of Justice has developed a system of administrative law, inspired by both French and German law, and characterised by the application of the general principles of law as part of its duty under article 164 (now art 220 post-Amsterdam Treaty) of the Treaty of Rome to ensure that in the interpretation and application of the Treaty the law is observed. The Court of Justice is charged with the task of seeing that both the member states and the institutions of the Community respect the Community treaties and therefore seeks to ensure the proper administration of the Community order within a legal framework. Thus, one of the Luxembourg Court’s fundamental concerns has always been to guarantee the proper exercise of the powers of the various central Community institutions and to protect the rights and interests of persons, whether natural or corporate, affected by them.


2.13 Another central concern of the Court of Justice has been that Community law should be applied uniformly throughout the Member States. As the court has stated:
'The purpose of article 177 of the EEC Treaty is to ensure that all provisions which form part of the legal order are applied uniformly within the Community so as to avoid any variation in their effects resulting from the interpretation given to them in different Member States'.

1 Case C-192/89 Sevince v Staatssecretaries van Justitie [1990] ECR 3461 at 3501, para 11.

2.14 This concern with the uniform interpretation and application of Community law has resulted in the formulation by the European Court of Justice of a general duty on the part of national judges faithfully to apply Community law in its entirety to the matters at hand. This general duty has two aspects. The first aspect is that, since it is imperative that the integrity of Community law be maintained, national judges should not consider themselves free to rule on the validity of Community acts. If a national judge has doubts as to the validity of any Community acts he or she must refer the matter to the Court of Justice which alone can give an authoritative ruling on the matter. In exceptional circumstances, however, where the national court fears that serious and irreparable damage may result to one party and where appropriate financial indemnities against any loss to Community institutions are available, the Court of Justice allows that the national court may order interim suspension of a Community measure, pending a final ruling on its validity by the Court of Justice. The Court of Justice has allowed, in the same situation, that national courts may also order positive interim protective measures of implementation contrary to the terms of an apparently valid Community provision, pending the final determination by the Court of Justice of the validity of the Community provision in question.


2.15 As the court stated in Firma Foto-Frost:

'Divergences between courts in the Member States as to the validity of Community Acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty... Since article 173 gives the Court of Justice exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare that act invalid must also be reserved to the Court of Justice'.

2.16 It follows from the importance accorded to the uniform interpretation and application of Community law that where national rules relate to objectives within the scope of the Treaty provisions they should be in keeping with the objectives pursued by the Community provisions. Accordingly, the second aspect of the duty of uniform interpretation and application is that where questions of national law arise which impact upon Community law issues, the national judges have to interpret and apply the national law in the same way as a Community law judge would. This means that the national law should be interpreted in a purposive teleological fashion to further the aims of Community law. The European Court has imposed an 'interpretative obligation' on national courts to use the same principles and modes of reasoning as used by the Court of Justice when they are faced with matters of Community law, in order to ensure that advancement of the aims and objectives of the Communities as outlined in the Treaties and adumbrated in the case law of the court.


2.17 It should be clear to any lawyer trained in any of the legal systems of the United Kingdom that the European Court of Justice does not approach legal texts in the same way as common law judges. The Court of Justice describes its task of interpreting the law as one of uncovering and furthering the purpose of the particular provision. In performing this task, the court does not consider itself to be bound by the precise wording either of treaty provisions, or of secondary legislation. The wording of any provision has to be read in context. The context, which includes a consideration of the overall spirit and scheme of the Treaty, will reveal the purpose of the provision. The wording then has to be re-read in such a way as to ensure the achievement of its purpose. This approach to the legislative text is known as 'teleological' interpretation. As has been observed by one former member of the court and now judge in the House of Lords:

'[F]or the European Court, the teleological method frequently precedes and conditions the textual method of interpretation.'


2.18 For domestic lawyers in practice the primary significance of the European Court's approach to interpretation is that the sort of arguments that would appeal to a national court in a particular case are not necessarily the same as those that would appeal to the Court of Justice and vice versa. In particular, the fact that the Court of Justice is frequently prepared to ignore the literal meaning of a provision in favour of an interpretation which furthers its own view of the guiding objectives of the Treaty broadens considerably the scope for legal argument about provisions of Com-
The Influence of European Administrative Law

2.19 The doctrine of the primacy of Community law over national law means that national judges of the Member States have to treat their national legislation and administrative decisions within the field of Community law according to the same general principles as the judges of the European Court of Justice would treat secondary Community legislation and Community administrative decisions. In interpreting and applying the treaties, the Court of Justice has developed a whole body of unwritten law, consisting mainly in principles of administrative justice and the protection of fundamental human rights. The way in which the Court of Justice has used the doctrine of human rights is considered more fully in Chapter 3. These doctrines, which had no explicit basis in the Treaty of Rome as originally drafted, have been termed the general principles of Community law. As has been noted by Laws J:

'These fundamental principles, which also include proportionality and legitimate expectation, are not provided for on the face of the Treaty of Rome. The have been developed by the European Court of Justice... out of the administrative law of the member states. They are part of what may perhaps be called the common law of the Community. That being so, it is to my mind by no means self-evident that their contextual scope must be the same as that of Treaty Provisions relating to discrimination [article 12, formerly 6a] or equal treatment [article 141, formerly 119], which are statute law taking effect according to their express terms'.

1 Article 12(1) of the post-Amsterdam Treaty of Rome is in the following terms:
'Within the scope of the application of this Treaty, and without prejudice to any specific provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

See, too, article 13 (formerly 6a) which provides as follows:
'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

2 Article 141(1) of the post-Amsterdam Treaty of Rome is in the following terms:
'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.'
2.20 General principles are applied by the court in order to determine the boundaries of proper or lawful administrative action by both Community institutions and by national governments acting in the sphere of Community law. Where a Community law issue arises in respect of national administrative action, the general principles of Community law must be applied by national courts in the same manner as they would be applied by the Court of Justice. This also means that national judges of the member states have to treat their national legislation and legal doctrines within the scope of application of the EC Treaty in the same way as the judges of the Court of Justice treat secondary Community legislation.


2.21 National law within the field of Community law, being subordinate thereto, is held to be valid only insofar as it respects the general principles of law which were originally developed by the Court of Justice in determining the validity of the administrative acts of Community institutions. These principles, too, have to be applied and interpreted by United Kingdom courts in assessing the 'lawfulness' of 'Euro-constitutionality' of domestic law and executive action as against the rights and obligations created by Community law. Domestic courts and national lawyers have, accordingly, to be aware of these principles and the manner in which they have been applied by the court to date. In this way doctrines of Community administrative law become incorporated into the member state's national constitutional law when the validity either of national primary and secondary legislation or administrative decision (having effects) in the field of Community law is considered.

2.22 The national judges are duty bound in cases involving Community law to apply such Community law doctrines such as equality of treatment, respect for legal certainty, protection of fundamental rights, and the tests of proportionality to assess the validity of their national laws and the lawfulness of their national administration.

1 See Case C-271/91 Marshall v Southampton and South West Hampshire Area Health Authority (No 2) [1993] ECR I-4367.


4 Case 181/84 R v Intervention Board for Agricultural Produce, ex p Man (Sugar) [1985] ECR 2889.


2.23 The Court of Justice has also developed the notion of procedural fairness and the concept of the rights of the defence in European Community law to the extent that these form the basis, inter alia, of a duty on both national and Community administrative authorities to give reasons
for their decisions. The Court of Justice has held that a right to a fair hearing
implies the ability to test the legality of a decision which in turn requires
that reasons be given for that decision.

3 See generally Louis Dubois 'A propos de deux principes généraux du droit communau-

2.24 The Court of Justice has also accepted that certain substantive rights,
having their origin in the German constitution, are also protected under
Community law. The Court of Justice has held that the right to pursue a
trade or profession of one's choice as well as the right to property are both
recognised under Community law\(^1\), albeit not as absolute rights but
viewed in relation to their social function. Accordingly Community laws
which adversely affect established property or profession rights will be
held to be invalid if found to constitute a disproportionate and intolerable
interference infringing the very substance of the rights of the individual.


2.25 The system of administrative law of the European Community as
developed by the European Court of Justice is, then, particularly influential
in the development of the national administrative laws of the United
Kingdom\(^2\). Where a judicial review case in England or Scotland has a
Community law element to it, then the application of such European
derived general principles of administrative law is no longer discretionary,
but mandatory on the national courts of the United Kingdom\(^2\). The tendency
is then for the national courts then to apply general principles derived
from Community administrative law even in areas where there is no
immediate Community connection, an effect termed spill-over\(^3\).

1 See Lord Slyn of Hadley 'But in England there is no . . .' Festschrift für Wolfgang Zeidler
(1987) Vol 1, 397; Lord Mackenzie-Stuart 'Recent Developments in English Administrative
Law - the impact of Europe?' in F Capotorti et al (eds) Du droit international au droit de
2 See eg R v Minister of Agriculture, Fisheries and Food, ex p Roberts [1991] 1 CMLR 555 on the
designation of licensed ports for particular imports; R v Minister of Agriculture, Fisheries and
3 J Schwarze 'Tendencies towards a common administrative law in Europe' [1991] European
Law Review 3; J Schwarze 'Developing Principles of European administrative law' [1993]
Public Law 229; J Schwarze Towards a Common European Public Law' (1995) 1 European
Public Law 227; and J Jowell and P Birkinshaw 'English Report' in J Schwarze (ed) Administrative
Law under European Influence: on the convergence of the administrative laws of the
EU Member States (1997).

2.26 The explicit acceptance of European derived principles of adminis-
trative law in areas outwith the ambit of Community law is seen by many
writers as an important symbol, being understood as part of a general
'Europeanisation' of the national laws of the United Kingdom. The idea is
that there will gradually develop, by osmosis, a common administrative
law of Europe. The model is one of the mutual influence and a natural
tendency toward greater integration of the legal systems of the member
states of the European Community.

39
The impact of the European Convention on Human Rights

2.27 In Salah Abdadou v Secretary of State for the Home Department, a case decided prior to the incorporation of the European Convention on Human Rights by the Human Rights Act 1998, Lord Eassie sitting in the Outer House made the following observations on the question of the inter-relationship between the judicial review of executive discretionary decision making and the European Convention on Human Rights:

‘In the present state of our law it is I think clear that direct reference to the European Human Rights Convention as a means of judicially controlling or reviewing the exercise of administrative discretion is not permissible. ... In light of the speeches in Brind[1] I do not consider that merely averring a breach of the Convention would be relevant to invalidate an exercise of administrative discretion. ... [I]n judging whether a decision is unreasonable, in the sense of being outwith the range open to a reasonable decision taker, the human rights context is important and the more substantial interference with human rights the more a court will require by way of justification, in the sense of its being within that range[2]. However, while the fact that a decision is in breach of the Convention may assist in a contention that it is unreasonable in the Wednesbury sense, the ultimate test must be whether the decision falls outwith the range or span of decision open to a reasonable decision taker.’

1 1998 SC 504, OH per Lord Eassie at 518 (emphasis added).
2 R v Secretary of State for the Home Department, ex p Brind [1991] AC 696, HL.
3 Cf R v Secretary of State, ex p Urmaza (11 July 1996, unreported) per Sedley J quoting with approval the applicant’s submission in R v Ministry of Defence, ex p Smith [1996] 2 WLR 305, [1996] QB 517, CA to the effect that in cases where human rights violation are alleged the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is substantively reasonable.

2.28 Lord Eassie concluded that the decision to remove the petitioner, an Algerian national and illegal immigrant who had married a British national, to Algeria when in the middle of a murderous civil war was both a disproportionate interference with the petitioner’s rights under article 8 of the European Convention and also unreasonable in the Wednesbury sense. It is of particular note that in finding the decision to remove to Algeria to be ‘disproportionate in the sense used in the Strasbourg jurisprudence’ the Lord Ordinary did not feel constrained by the Strasbourg court’s references to their need to respect the contracting state’s margin of appreciation or discretion in relation to the control of entry of non-nationals into its territory.
2.29 This approach set out by Lord Eassie allows for reference to be made to the Strasbourg Court's jurisprudence as a check on whether discretionary administrative action can be said to be Wednesbury unreasonable. The national court does not, however, see itself as bound by the Strasbourg court in its analysis of the proportionality of particular national action. Thus, it can allow the national court to accord greater substantive protection to the Convention rights of individuals than might be accorded them by the European Court of Human Rights itself.

1 See R v Secretary of State for the Home Department, ex p Gangadeen [1998] Imm AR 106, CA for evidence of a similar approach to Strasbourg case law in England.

2.30 The legitimacy of this potentially expansive approach to human rights protection post-incorporation is confirmed by the terms of section 2(1)(a) of the Human Rights Act 1998 which obliges a national court or tribunal determining a question which has arisen under the Act in connection with any Convention right only to 'take into account' any judgment, decision, declaration or advisory opinion of, among other Convention institutions, the European Court of Human Rights so far as relevant to the proceedings.

2.31 The non-binding nature of the decisions of the Strasbourg Court on national courts is to be contrasted with the position of the European Court of Justice in matters concerning European Community law. National courts are obliged to decide cases involving matters of substantive Community law under the Treaty of Rome and associated treaties, or involving jurisdictional or conflict of laws question arising between the member states under the Brussels and/or Rome Conventions 'in accordance with the principles laid down by and any relevant decision of the European Court of Justice'.

1 See the European Communities Act 1972, s 3(1); the Civil Jurisdiction and Judgments Act 1982, s 3 and the Contract (Applicable Law) Act 1990, s 3.

2.32 Nevertheless, it is clear that in taking account of the jurisprudence of the Strasbourg court in reviewing the compatibility of the acts or omissions of public authorities with the requirements of the European Convention, national courts will be called upon to interpret and apply the general principles of administrative law which the European Court of Human Rights has set out in its case law over the past 50 years.


2.33 These principles of good administration in accordance with 'the rule of law in a democratic society' have been divided into substantive and procedural principles. The substantive principles include the following: lawfulness; equality before the law; conformity to statutory aim; proportionality; objectivity and impartiality; protection of legitimate trust and
vested rights; and openness. The procedural principles have been summarised as follows: access to public services; the right to be heard; a right to representation and assistance; the right to due notification of a decision with explanatory reasons and an indication of the remedies available for challenging the decision; and the execution of administrative acts within a reasonable time.

1 See The Administration and You: Principles of administrative law concerning the relations between administrative authorities and private person—a handbook Council of Europe Publishing (1996).

THE SUBSTANTIVE PRINCIPLES OF JUDICIAL REVIEW IN SCOTLAND

2.34 As we have seen in Council of Civil Service Unions v Minister for the Civil Service Lord Diplock re-classified the principles of administrative law which were then accepted by the courts as grounds for challenging executive acts. Lord Diplock stated that an executive act might be susceptible to judicial review on the following grounds: its 'illegality', that is to say that the decision maker did not correctly understand the law that regulated his decision making power and/or did not give effect thereto; its 'procedural impropriety' where there was failure by the executive or administrative tribunal to observe the appropriate procedural norms; and its 'irrationality', if the decision which was so outrageous as to be outwith the bounds of the rational.


2.35 In considering the general principles of judicial review which might be available before the Scottish courts we shall retain this tri-partite analytical schema, which may be summarised by saying that there is a duty on the decision maker to act lawfully, fairly and reasonably. It should of course be borne in mind that three heads are not water-tight categories, but may inter-relate and overlap.

THE PRINCIPLE OF LAWFULNESS

2.36 For a decision to be tainted by 'illegality' in administrative law terms, it has to be shown that the decision maker did not correctly understand the law that regulated his decision making power and/or did not give effect thereto. The determination of this test generally requires a close reading of the specific authorising provisions by virtue of which the particular administrative power purports to be exercised.
2.37 Where a decision-maker acts contrary to the law, his decision may be said to be unlawful or illegal, and thus liable to be struck down by the court in judicial review. This truism hides a number of important specific principles which the courts use as guides in assessing whether or not the complained of conduct may be permitted to stand. Among the more specific principles are the following:

- that the decision-maker should act only within the specific terms of the jurisdiction granted to him (the principle of ultra vires)\(^1\);
- that the decision-maker should not exercise his lawful powers in bad faith or in order to further some improper purpose (the principle of abuse of powers or détournement de pouvoir)\(^2\);
- that the decision-maker should not fetter his discretion by application of a rigid rule or policy;
- that in reaching his decision, the decision-maker should take into account all relevant and material considerations\(^3\);
- that, in reaching his decision, the decision-maker should not take into account irrelevant considerations;
- that like cases are to be treated alike and any differences in treatment are to be objectively justified (the principle of equal treatment);
- that legal certainty is to be preserved.

1 See eg Watt v Lord Advocate 1979 SC 120 and Rae v Criminal Injuries Compensation Board 1997 SLT 291.
2 Edinburgh District Council v Secretary of State for Scotland 1985 SLT 551.
3 See Wordie Property Co Ltd v Secretary of State for Scotland 1984 SLT 345 per Lord Emslie at 347–348.

### Acting beyond one’s powers

2.38 The vires of a particular action is determined by a detailed analysis of the particular terms of the instrument which confers authority on the decision-maker. Clearly whether or not a decision-maker can be said to be acting within or outwith his powers depends upon the precise terms of the statute or other instrument on which his authority is based. If he acts in accordance with the powers either expressly conferred by, or necessarily implied from because reasonably incidental to, the terms of that instrument, he will be acting intra vires. Insofar as he exceeds those powers he may be said to be acting ultra vires. Such action is illegal because, particularly in the case of bodies constituted by statute, they have no authority except such as Parliament has conferred upon them, or which is reasonably incidental to the carrying out of those functions which have been conferred upon them\(^4\).

4 Using ferries for pleasure cruises was held to be outwith the powers of a harbour authority in D and J Nicol and Dundee Harbour Trustees 1915 SC (HL) 7 since not reasonably incidental to the authorised purpose of running a ferry service.
2.39 Thus the House of Lords has held that, in the absence of specific statutory authority, an English local authority is not entitled to charge for giving advice to the public. Neither are local authorities in England permitted to borrow from financial institutions in order to engage in speculative investments as a means of debt management. Such actions have been held to be unlawful because ultra vires since neither expressly authorised by statute nor reasonably incidental to the carrying out of the authorities’ functions.

1 McCarthy & Stone (Developments) Ltd v London Borough of Richmond-upon-Thames [1992] 2 AC 48, HL.

2.40 In Watt v Lord Advocate the Inner House found that the decision of the National Insurance Commissioner to refuse an individual unemployment benefit when he was laid off from his employment was made in error of law because no consideration was given as to whether or not the individual was directly interested in the trade dispute which led to the work stoppage, as was required by statute. It was held that the decision-maker’s error was such as to cause him to misconstrue the very question he was supposed to ask of the claim and thereby to act in excess of his proper jurisdiction. The decision was accordingly reduced as ultra vires.

1 1979 SC 120.

2.41 The question arises, however, as to whether or not it is possible for a tribunal and/or other decision-making body to make an error of law in reaching its decision, but yet remain within its jurisdiction. In England it appears to be generally accepted, on the basis of the House of Lords decision in Anisminic Ltd v Foreign Corporation Commission that any legal errors made in the course of exercising lawful powers renders a decision ultra vires and reducible by the courts, on the basis of the legal fiction that all errors in law must have arisen either by the decision-maker taking into account irrelevant factors or failing to take into account relevant factors. As Lord Diplock noted in O’Reilly v Mackman:

‘[T]he landmark decision of this House in Anisminic... has liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determination by inferior courts and statutory tribunals was concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that the Anisminic case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it found them, it must have asked itself the wrong question ie one into which it was not empowered to enquire and so had no jurisdiction to determine. Its purported ‘determination’ not being a ‘determination’ within the meaning of the empowering legislation, was accordingly a nullity’.

Similarly, and more recently, in Boddington v British Transport Police Lord Irvine of Lairg, speaking in his judicial capacity stated that:

'[Anisminic] made obsolete the historic distinction between errors of law on the face of the record and other errors of law. It did so by extending the doctrine of ultra vires so that any misdirection in law would render the relevant decision ultra vires and a nullity'.

1 [1998] 2 WLR 639, HL at 646A (emphasis added).

By contrast, in Watt v Lord Advocate, Lord President Emslie observed that 'not every misconstruction of a statutory provision by a statutory tribunal in the course of reaching its decision will render that decision a nullity' and noted obiter that 'it seems clear that, however much this is to be regretted, the Court of Session has never had power to correct an intra vires error of law made by a statutory tribunal or authority exercising statutory jurisdiction'. Thus, the decisions of Anisminic and Watt v Lord Advocate are regularly cited before and by judges sitting in the Outer House in support of the proposition that 'review for error of law is available in Scotland only if the error involves excess or abuse of jurisdiction or erroneous refusal to exercise a jurisdiction'.

1 1979 SC 120 at 129 and 131.
2 See eg Rae v Criminal Injuries Compensation Board 1997 SLT 291 per Lord MacFadyen. See also O'Neill v Scottish Joint Negotiating Committee for Teaching Staff 1987 SLT 538 per Lord Jauncey at 651.

In theory, then, a court in Scotland may identify a clear error in law made by a decision maker but then hold that the decision is unreviewable because the error was made within the four corners of the exercise of its jurisdiction. This apparent divergence between English and Scottish approaches to a central substantive principle of judicial review is difficult to account for, or indeed to justify in the light of the pronouncements both of the Inner House and of the House of Lords to the effect that 'there is to be no substantial difference between Scots law and English law as to the grounds on which the process of decision making may be open to judicial review' and that these grounds include 'failure to understand the law'.

1 See Milton v Argyll & Clyde Health Board 1997 SLT 665, OH and Yeaman v Little (1906) 8 F 702.
2 West v Scottish Prison Service 1992 SC 385 at 413.
3 Brown v Hamilton District Council 1983 SLT 397, HL.
4 In Shanks & McEwan (Contractors) Ltd v Mifflin Construction Ltd, 1993 SLT 1124, OH Lord Cullen suggested at 1130D that the statement of the Inner House in West that 'failure to understand the law' would open up a decision to review was to explained as being restricted to a failure which was of such a character as to entail an excess or abuse of jurisdiction.
2.45 It is submitted that further clarification is required from the Inner House as to whether or not the distinction set out by Lord President Emslie in *Watt v Lord Advocate* between a decision maker who misconstrued certain statutory provision in the course of trying to answer the right question (intra vires error in law) and one who misconstrued the question which he had to answer (ultra vires error in law) is a distinction which should usefully be maintained in modern Scots administrative law¹.

1 In *Cooper v City of Edinburgh District Licensing Board* 1991 SLT 47 Lord President Hope stated at 49:

'Under reference to the case of *Watt v Lord Advocate* and to several more recent English cases, counsel for the petitioner submitted to us that recent trends in England rendered it unnecessary in order to have a decision overturned by judicial review to show that that decision involved error of law which was ultra vires of the body making the decision. He submitted that this trend should be followed in Scotland. Having concluded that the board has not been shown to have made any error of law, we find it unnecessary to consider this matter for the purposes of the present case. Indeed, we find the present case more generally to be an inappropriate case in which to express any views on this matter'.

Improper purpose

2.46 Where an authority exercises its lawful powers for a purpose other than that for which they were specifically intended or conferred, the resulting decision may be struck down by the courts as being in breach of the principle of legality. Thus, where a local council used its powers to grant or refuse an entertainment license on the basis of an animal welfare policy seeking to discourage the use of live animals in performance, it was held to have acted illegally¹. Similarly, the Inner House held that the running of passenger trains on three sections of line at times and locations of which were of no conceivable benefit to the public was no more than an attempt by British Railways Board to avoid following a statutory closure procedure involving consultation of their decision to withdraw the London to Fort William sleeper service. The court found that the Board's decision was motivated by an improper purpose and granted appropriate relief to the petitioners to ensure that proper consultations were carried out on the proposal to end that specific railway passenger service².

1 *Gerry Cottle's Circus Ltd v City of Edinburgh District Council* 1990 SLT 235.
2 *Highland Regional Council v British Railways Board* 1996 SLT 274.

Abuse of discretion

2.47 The discretion conferred by law upon a decision maker should not be exercised partially or arbitrarily, and it for this reason that the decision maker may formulate general policies to guide the exercise of his discretion. Policies which have been published may also generate legitimate expectations that they will normally be followed. These policies must not, however, be applied as if they were rigid rules such to exclude any regard for the special circumstances of the particular case under consideration. Thus, in *Salah Abdadou v Secretary of State for the Home Department*³ Lord Eassie reduced a decision of the Immigration authorities to refuse the petitioner leave to remain in the United Kingdom following his marriage to a British national on the grounds that the authorities had unlawfully
fettered their discretion by rigidly applying their policy in marriage cases as set out in Circular DP/3/93 so as to exclude from consideration for such leave all such marriages of less than two years standing, as calculated from the date from which any enforcement action had been commenced.

1 1998 SC 504, OH.

2.48 In so deciding, Lord Eassie adopted the approach set out by Lord Weir in *Elder v Ross & Cromarty District Licensing Board*:

'Where a statutory body having discretionary power is required to consider numerous applications there is no objection to it announcing that it proposes to follow a certain general policy in examining such applications. Indeed, in certain circumstances it may be desirable to achieve a degree of consistency in dealing with applications of similar character. Moreover, there is nothing wrong with policies being made public so that applicants may know what to expect. However, such a declared policy may be objectionable if certain conditions are not fulfilled. A policy must be based on grounds which relate to and are not inconsistent with or destructive of the purposes of the statutory provisions under which the discretion is operated. Moreover, the policy must not be so rigidly formulated so that, if applied, the statutory body is thereby disabled from exercising the discretion entrusted to it. Finally, the individual circumstances of each application must be considered in each case whatever the policy may be. It is not permissible for a body exercising a statutory discretion to refuse to apply its mind to that application on account of an apparent conflict with policy.'

1 1990 SLT 370 at 311.

**Failure to take into account relevant matters**

2.49 Classically, the failure by an authority to take into account matters it should have had considered is regarded as a breach of the principle of legality. Thus, in *Carr v Secretary of State for Scotland* Lord Milligan quashed a decision of the Secretary of State rejecting a recommendation from the Parole Board to release a prisoner on licence. The petitioner had been convicted of culpable homicide and had been sentenced to twelve years imprisonment. The petitioner had served a number of years in prison and the Parole Board reviewed her circumstances on two occasions and recommended that she be released on licence. This recommendation was rejected by the Secretary of State on the grounds that he did not consider that she had served a sufficiently long period of her sentence to satisfy the requirements of punishment and deterrence. No reference was made in the decision letter to the particular circumstances of the petitioner’s case. It appeared that the decision to reject the recommendation of the Parole Board had been reached on the application purely of general policy considerations. On the grounds that he had failed to indicate that he had taken into account the petitioners particular circumstances, the Secretary of State’s decisions was quashed as unlawful and the matter was remitted to him to consider anew.
Taking into account irrelevant matters

2.50 Under section 17 of the Mental Health (Scotland) Act 1984 an individual may be admitted to a hospital and detained there if he is suffering from mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in a hospital and where the mental disorder from which he suffers is a persistent one manifested only by abnormally aggressive or seriously irresponsible conduct, such treatment being likely to alleviate or prevent a deterioration of his condition. A person subject to such compulsory detention (termed a 'restricted patient') may appeal to the sheriff against his continued detention. Under section 64 of the Act the sheriff is directed to pronounce an absolute discharge of the restriction order 'if he is satisfied – (a) that the patient is not, at the time of the hearing of the appeal, suffering from mental disorder of a nature or degree which makes it appropriate for him to be liable to be detained in a hospital for medical treatment, or (b) that it is not necessary for the health or safety of the patient or for the protection of other persons that he should receive such treatment'1.

1 Mental Health (Scotland) Act 1984, s 64 (emphasis added).

2.51 In Reid v Secretary of State for Scotland2 an individual who had been ordered to be detained in Carstairs State Hospital without limit of time following his plea of guilty to a charge of culpable homicide in 1967 appealed to the sheriff under section 64(1)(a) claiming that he was not suffering from mental disorder of a nature or degree which would make it appropriate for him to be liable to be detained in a hospital for medical treatment. The sheriff refused the appeal on the grounds, among others, that it remained necessary for his own health and safety and for the protection of the public that he should continue to be compulsorily detained in the State Hospital. The appellant sought judicial review of this decision on the basis that the sheriff had reached his decision after taken into account irrelevant considerations, namely the health and safety and public protection matters set out under section 64(1)(b), when he should have confined himself to the question as to whether or not the petitioner was suffering from a treatable mental disorder. The judicial review petition was unsuccessful at first instance3, but was upheld by the Inner House4 on the grounds that in refusing the appeal the sheriff had indeed taken into account matters other than those to which the terms of the statute specifically directed him. When the matter was further appealed to the House of Lords, however, the interlocutor of the Lord Ordinary was restored5 on the grounds that on a close reading of the statutory provisions in question, the sheriff had not in fact taken into account any irrelevant considerations.

1 [1999] 2 WLR 28, HL.
2 R v Secretary of State for Scotland 1997 SLT 555, OH.
3 R v Secretary of State for Scotland 1998 SC 49.
4 See Reid v Secretary of State for Scotland [1999] 2 WLR 28, HL per Lord Clyde at 54.
The principle of legal certainty

2.52 The principle of legal certainty in Community law entails that the law should be clear and predictable and able to be relied upon by those subject to it, whether individuals or member states. It is a general principle of wide application. Legal certainty requires, for example, that Community measures should only apply to individuals after the legislative texts have been duly published and affected individuals given the opportunity to acquaint themselves with the contents. Further, the legislative provisions applied should be governed by an elementary consistency and coherence sufficient to enable the individual to discern the consequence (legal and financial) of his activities. It has also been held to follow from the principle of legal certainty that ambiguous provisions of tax legislation should be read contra proferentem and given the interpretation which favours the rights of the individual against those of the public authority.

1 See Case C-354/95 R v Ministry of Agriculture Fisheries and Food, ex p National Farmers Union [1997] ECR I-4559 at para 17 where the court states that where difficulties in the interpretation of a Community regulation arose from the complexity of the subject matter to which it related there was no infringement as such of the principle of legal certainty.

2 Case 98/78 Racke v Hauptzollamt Mainz [1979] ECR 69 at para 15: 'A fundamental principle in the Community legal system requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it.'

3 See the opinion of Advocate General Cosmas in Case C-63/93 Duff v Minister of Agriculture [1996] ECR I-4559 at para 24.


2.53 In general, the Court of Justice will strike down provisions which seek retroactively to impose or validate criminal or penal sanctions on past conduct. Exceptionally, however, retroactive legislation which is necessary to achieve a particular lawful purpose and which respects the legitimate expectations of those affected by it may be permitted by the Court of Justice. By contrast, judgments of the Court of Justice are generally retroactive in effect. They are said to be declaratory of what the law always was rather than creative of new law. For example, when the court finds that a Community provision has direct effect it is generally said to have direct effect as from the date of the adoption of the measure, rather than from the date of judgment. The court has, however, claimed the power to limit the effect of certain of its judgments such that they apply retrospectively only to the case at hand and to any actions actually commenced before the delivery of judgment. This power has been used sparingly, in cases where the court's new decision which would otherwise have a substantial economic impact.

1 Case 63/83 R v Kirk [1984] ECR 2689 at 2718: 'The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in article 7 of the European Convention ... As a fundamental right it takes its place among the general principles whose observance is assured by the Court of Justice.'


3 The court has limited the effect of its judgements in this way as regards the direct effect of article 119 (Case 43/75 Defrenne v SABENA (No 2) [1976] ECR 455); in finding that a
University registration fee payable by non-nationals in Belgium was contrary to Community law (Case 24/86 Blaizot v University of Liège [1988] ECR 379) and in holding that article 119 applied to the payment of employment pensions (Case 262/88 Barber v Guardian Royal Exchange Assurance Group plc [1990] ECR 1-1889).

2.54 The principle of legal certainty has not figured greatly in the jurisprudence of the courts of the United Kingdom to date. Until the coming into force of section 102 of the Scotland Act 1998 which allows the courts to suspend or to limit the retrospective effect of its rulings in relation to successful challenges to the vires of the legislative activity of either the Scottish Parliament or Scottish Executive, the courts of this country had no power to limit the temporal effect of their judgments, and the principle of respect for Westminster Parliamentary sovereignty has been such that the courts have accepted the validity of legislation with express retrospective effect. It may be that with the coming into force of the Human Rights Act 1998, the prohibition against retroactivity of legislative and administrative acts will come to be more broadly accepted by the courts as the basis for judicial review.

1 See eg the War Damage Act 1965 passed by Parliament in response to, and to overrule retrospectively, the judgment of the House of Lords in Burmah Oil Co v Lord Advocate [1965] AC 75 that compensation was payable in respect of damage done by British Army troops in Burma during the Second World War. See, more recently, the War Crimes Act 1991 by which the jurisdiction of UK courts was extended retrospectively in respect of war crimes committed by then non-British nationals overseas.

THE PRINCIPLE OF FAIRNESS

2.55 The principle of administrative law that a decision-maker should act fairly in reaching his decisions is not directed to the substantive fairness or unfairness of the outcome of the particular decision, but rather concerns the procedures adopted in reaching that decision. As Lord President Clyde stated in Barrs v British Wool Marketing Board:

'It is not a question of whether the Tribunal has arrived at a fair result - for in most cases that would involve an examination into the merits of the case upon which the Tribunal is final. The question is whether the Tribunal has dealt fairly and equally with the parties before it in arriving at that result. The test is not, has an unjust result been reached? but, was there an opportunity afforded for injustice to be done? If so, the decision cannot stand".

1 1957 SC 72 at 82.

2.56 To similar effect are the following comments of Lord Johnston in Shetland Line (1984) Ltd v Secretary of State for Scotland:

'Upon the authorities reviewed the concept of unfairness in the context of judicial review is limited to procedural matters, subject to the general qualification that a decision that can be categorised as irrational may well also therefore be unfair. However, if one is looking at the question of unfairness in the abstract or in isolation, it does not in my opinion extend to a substantive ground for judicial review standing on its own".
2.57 ‘Procedural impropriety’ in administrative law terms is when there is failure by the executive or administrative tribunal to observe the appropriate procedural norms. The requirements of procedural fairness are not confined by the specific provisions of the statute or other instrument which confers decision making power on a body. The courts are ready to imply a variety of procedural safeguards, depending on the circumstances, to ensure that justice is seen to be done and the decision reached in a fair manner. Thus, in R v Secretary of State for the Home Department, ex p Fayed the English Court of Appeal found that in relation to applications for British citizenship, notwithstanding that there was no statutory obligations upon the Secretary of State to give his reasons for refusing an application where the matter was within his discretion, fairness required the minister to inform the applicants, prior to making a final decision on their applications, of the nature and substance of any matters weighing against the grant of the application in order to give them an opportunity of addressing these matters. As with the principle of legality, then, procedural fairness encompasses a number of more specific principles, among which are the following:

- the principles of natural justice, including the right to a hearing and the rule against bias;
- the principle of equal and consistent treatment;
- the right to reasons for a decision;
- the duty to respect legitimate expectations;
- the right of access to the courts; and
- the duty to carry out proper consultations.

1 Lloyd v McMahon [1987] 1 AC 625, HL at 702–703.
2 [1997] 1 All ER 228, CA.
3 See Stewart v Secretary of State for Scotland 1996 SLT 1203 and Young v Criminal Injuries Compensation Board 1997 SLT 297.
4 See London & Clyde-side Estates Ltd v Secretary of State for Scotland 1987 SLT 459.

Natural justice

2.58 The basic principle of natural justice is that no person against whom an adverse decision might be taken should be denied a fair hearing to allow him to put his side of the case. What constitutes a ‘fair hearing’ depends on the particular circumstances of the case, including the character of the
decision-making body, the kind of decision it has to make and the statutory or other framework in which it has to work. Thus, it has been held that the refusal by the Criminal Injuries Compensation Board to grant an oral hearing to an applicant did not constitute a denial of natural justice since the requirement on the applicant to provide all relevant information in written form could be said to give him reasonable opportunity of presenting his case. In the context of such administrative non-adversarial proceedings he was given the right to be heard, albeit without a hearing. Technical rules of evidence, such as the prohibition on hearsay, have been said to form ‘no part of the rules of natural justice’ in the context of administrative hearings.

1 See Board of Education v Rice [1911] AC 179, HL per Lord Loreburn LC at 182: ‘The administrative body] must act in good faith and fairly listen to both sides, for that is the duty lying upon everyone who decides anything. But I do not think that they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who were parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.’

2 See JAE (Glasgow) Ltd v City of Glasgow District Licensing Board 1994 SLT 1164, OH per Lord Cullen at 1168.

3 Young v Criminal Injuries Compensation Board 1997 SLT 297, OH per Lord Gill.

4 See R v Deputy Industrial Injuries Commissioner, ex parte Moore [1965] 1 QB 456 per Diplock LJ at 487.

2.59 In Errington v Wilson the Inner House rejected the suggestion that a distinction could usefully be drawn between an administrative body’s broad duty to act fairly and the specific duties of a (quasi-) judicial tribunal to act in accordance with the requirements of natural justice. The expressions ‘acting unfairly’ and ‘acting contrary to natural justice’ were held to be inter-changeable. The point which arose in the case was simply whether or not this duty to proceed fairly meant, in the circumstances of a hearing before a justice relating to the seizure by a local food safety officer of food intended for human consumption, that the petitioner should have been accorded a right directly to cross-examine the food safety witnesses. It was held that it did.

1 1995 SLT 1193.

2.60 It may be that situations in which a body is considering the imposition of a penalty on an individual, for example in the context of a disciplinary hearing, should be contrasted with situations in which the administrative body is considering whether or not to confer a particular benefit on an individual, for example a licensing board hearing an application for a regular extension to permitted hours. In the former case the requirements of natural justice might be said to apply more stringently such as to afford a party the right to lead evidence or to cross-examine witnesses. In the latter case, the requirements of natural justice might be said to be met where there has been an opportunity to put one’s case and to make submissions on an ex parte basis, conversely that the denial of the opportunity to make representations may amount to prejudice and failure on the part of the decision maker to act fairly.
2.61 Under European Community law it is a general principle that an individual is entitled to be informed of the case against him and to be heard in his own defence when a decision is proposed which the administrative authority knows will cause substantial detriment or will otherwise seriously affect the interests of that person by, for example, the imposition of substantial penalties or fines. Further, in Community law, the privilege against self-incrimination has been developed as one of the basic principles of natural justice. The Court of Justice has held that it is for the Community authorities to establish a breach of Community law. An individual cannot be compelled to answer questions where his answers would constitute admissions of unlawful activity.

2 Case 374/87 Orkem v Commission [1989] ECR 3283, [1991] ECR 3283. Compare, however, the decision of the Court of Justice in Case C-60/92 Otto BV v Postbank BV [1993] ECR I-5683 where it was held that Netherlands rules on the compulsoriness of witnesses in civil proceedings between private parties did not infringe the Community law principle.

2.62 The European Court of Human Rights, too, has held that under article 6.1 of the European Convention which guarantees a right to fair trial, a person was entitled to remain silent and not incriminate himself and that any attempt to use pecuniary sanction to force an individual to produce potentially incriminating documents was in breach of this article. Further in Saunders v United Kingdom the European Court of Human Rights found that section 434 of the Companies Act 1985, which required persons under investigation by Department of Trade and Industry company inspectors to answer questions and produce documents, failing which they would be found guilty of contempt of court and subject to the penalties arising therefrom, to be contrary to fair trial provisions of article 6 of the European Convention.

1 Funke v France [1993] 1 CMLR 897.

The duty of consistency – treating like case alike

2.63 The principle of equality is a general principle of Community law and is not confined to matters of discrimination on grounds of sex or nationality. Rather it is the principle that like cases should be treated alike, and that differences in treatment which rest on distinctions which cannot be objectively justified are unlawful. By corollary, individuals who are in objectively different positions should not be treated similarly.

1 The principle of equal treatment without regard to sex is specifically provided for in article 141 (formerly article 119) of the post-Amsterdam Treaty of Rome and related Directives. See Case 43/75 Defrenne v SABENA (No 2) [1976] ECR 455.
2.63 The Principles of Judicial Review

2.64 In Scots administrative law the principle of equal treatment has primarily been referred to and applied in the context of the rules of natural justice. Natural justice has been said to require that parties before a decision making body are to be treated fairly and equally. The substantive principle of equality was however considered in the Outer House in Brown v Secretary of State for Scotland where it was found, after an article 177 reference to the European Court of Justice, that the refusal to pay a university maintenance grant to a student of dual British and French nationality who was born and had lived most of his life with his parents in France did not violate the principle of equal treatment of Community nationals. In a number of judicial review applications in the field of planning, consistency in decision making has been found to be a material consideration in determining both the fairness of proceedings and the reasonableness of the decision.

1. See Barrs v British Wool Marketing Board 1957 SC 72 per Lord President Clyde at 82 and McDonnell, Ptr 1987 SLT 486, OH per Lord Jauncey.
2. 1989 SLT 402.
3. See Asda Stores Ltd v Secretary of State for Scotland 1997 SLT 1286, OH, (reversed on appeal to Inner House by decision reported at 1998 SCLR 246) for a recent review and discussion of the requirements of procedural fairness.
4. See eg James Aiken & Sons v City of Edinburgh District Council and Link Housing Association 1990 SLT 241; and Trusthouse Forte (UK) Ltd v Perth and Kinross District Council and Flicks (Scotland) Ltd 1990 SLT 737.

2.65 In the English courts, there is growing evidence of a willingness on the part of judges to hold that it is an independent principle of administrative law that decision-makers should act in a consistent manner and that their failure to do so constitutes grounds for judicial review. Thus, in R v Director General of Electricity Supply, ex parte Scottish Power plc, the English Court of Appeal considered an application by Scottish Power for judicial review of the refusal by the Director General of Electricity Supply to amend the licence controls placed on their electricity supply and distribution prices to bring them into line with the licence conditions which applied to Hydro-Electric plc. Although this was a matter concerning electricity distribution and sale in Scotland, the applicants decided to proceed before the English rather than the Scottish courts, founding jurisdiction on the Birmingham headquarters of the Electricity Supply directorate.

2.66 In reversing the judge at first instance, the Court of Appeal held that there was to be implied into the statute an over-riding duty on the electricity regulator arising from the principle of equal treatment to treat Scottish Power in the same way as he had treated Hydro-Electric's licence, which had been amended following a reference by them to the Monopolies and Mergers Commission. This decision of the English court resulted in prices for electricity supply to franchise customers in Scotland falling by less than they would otherwise have done, and resulted in a net annual revenue gain to Scottish Power at the expense of their customers of some £10 million. It is interesting to speculate whether or not there might have been a different result had the regulator chosen to contest jurisdiction on the grounds, say, of forum non conveniens and have the case brought before the courts in Scotland.

1 See A McHarg 'A duty to be consistent R v Director General of Electricity Supply, ex p Scottish Power plc' (1998) 61 Modern Law Review 93 for cogent criticism of the approach taken by the Court of Appeal.

The right to reasons for a decision

2.67 In Heylens² the European Court of Justice found that a national administrative authority owes a duty to the individual under Community law to inform him of the reasons upon which their final decision affecting his Community rights was based. Failure to give such reasons is a contravention of Community law. The duty to national authorities to give reasons for their decision only applies in relation to particular executive or administrative decision concerning individuals to allow those individuals the possibility of seeking some remedy of a judicial nature against the decision. The Community law duty to give reasons does not yet go as far as to require national legislatures to give reasons when they enact legislative measures of general application within the ambit of Community law³.

3 See Case C-70/97 Sodemare SA v Regione Lombardia [1997] CMLR 591, EC.

2.68 Although the relevant European case law appears not to have been cited to the court, this European line of argumentation that reasons for administrative decisions are necessary in order to allow an effective judicial remedy against them is strikingly paralleled in the approach of the English Court of Appeal in R v Civil Service Appeal Board, ex p Cunningham where Leggat L] stated:

"[F]or the same reason of fairness that an applicant is entitled to know the case he has to meet, so should he be entitled to know the reasons for an award of compensation, so that in the event of error he may be equipped to apply to the court for judicial review. For it is only by judicial review that the Board's award can be challenged".

1 R v Civil Service Appeal Board, ex p Cunningham [1991] IRLR 297 at 304. The approach of the Court of Appeal was expressly approved of by the House of Lords in R v Secretary of State, ex p Doody [1994] 1 AC 531.
2.69 The extent to which there can be implied a free standing duty to give reasons for a decision remains, however, a matter of particular controversy within United Kingdom administrative law\(^1\). In non-Community law cases it appears still to be accepted as a general rule that in the absence of a specific statutory requirement or customary practice there is no general obligation on a decision-making body to give reasons for its decision\(^2\). A failure or refusal to give reasons may be considered, in certain circumstances, to point to a finding of irrationality\(^3\). But as Lord Sutherland stated in *Bass Taverns Ltd v Clydebank District Licensing Board*:

'The absence of reasons for a decision when there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker who has given no reasons cannot complain if the court draws the inference that he had no rational reason for his decision'\(^4\).


2 See eg Purdon v City of Glasgow District Licensing Board 1989 SLT 201, OH.

3 See Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, HL and Lonrho v Secretary of State for Trade and Industry [1989] 2 All ER 609, HL.

4 1995 SLT 1275, OH.

2.70 In England and Wales, the courts have become more ready to imply a requirement to provide reasons arising from the requirements of natural justice or general fairness. Thus in *R v Civil Service Appeal Board, ex p Cunningham*\(^1\) the ex facie aberrant decision of the Civil Service Appeal board in awarding the applicant less than half the sum of compensation which would have been awarded by an industrial tribunal was held to require the giving of reasons. In *R v Secretary of State, ex p Doody*\(^2\) the House of Lords found that there was a duty of fairness to give mandatory life prisoners the same information which all other prisoners in England and Wales received as a matter of course, namely the reasons for fixing the tariff or penal element of sentence to be served. In *R v Secretary of State for the Home Department, ex p Lillycrop*\(^3\) it was held that the Parole Board should in the interests of natural justice provide in a decision letter to an unsuccessful applicant their reasons for refusing his application for release on licence; and in *R v Ministry of Defence, ex p Murray*\(^4\) it was held that fairness demanded that reasons be given by a court martial both for its decision to reject certain evidence led before it and for its decision to pass a sentence of imprisonment, with automatic dismissal from the armed forces.


3 [1996] Times Law Reports 724, QBD.

2.71 To date, however, the courts in Scotland appear to be lagging behind the English courts in the carving out of circumstances in which reasons for a decision will be required by the court even in the absence of any statutory requirement to that effect. Thus, in Lawrie v Commission for Local Authority Accounts in Scotland Lord Prosser distinguished the Court of Appeal decision in Cunningham as concerned with a quasi-judicial body and held mere silence as to reasons did not of itself support a suggestion of irrationality. Further he considered that in recommending that a council official be surcharged in respect of his conduct in relation to the involvement of the Westerns Isles Island Council with the Bank of Credit and Commerce International, the Commission for Local Authority Accounts in Scotland were acting in an administrative rather than a judicial capacity. In any event, it was held that there was no uncertainty as to the issue or the facts to which they addressed themselves, and accordingly there was no duty to state reasons.

1 See eg Thompson, Ptr 1989 SLT 343, OH where Lord Der Vallard denied that the prison administration was under any duty to make known to prisoners the reasons for its decisions as to the transfer of prisoners between prisons and the re-grading of individual prisoner’s security categorisations.
2 1994 SLT 1185.
3 See also the following decisions: of Lord Dunpark in Carr v UK Central Council for Nursing, Midwifery and Health Visiting 1989 SLT 580; of Lord Cullen in JAE (Glasgow) Ltd v City of Glasgow District Licensing Board, 1994 SC 290, OH and of Lord Nimmo Smith in Asda Stores Ltd v Secretary of State for Scotland 1997 SLT 1286, OH.

2.72 Where, however, a decision making body has chosen to give reasons, whether or not under an specific duty to do so, the courts have been willing to examine whether these reasons were adequate in the sense set out by Lord President Emslie in Wordie Property Co Ltd v Secretary of State for Scotland:

"In order to comply with the statutory duty imposed upon him the Secretary of State must give proper and adequate reasons for his decision which deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."

1 1984 SLT 345H at 347.

2.73 This has been taken by the courts in Scotland as a dictum of general application and has been cited in support of, among others, the following decisions: the setting aside of a decision by a housing benefit review board to authorise a reduction in housing benefit; the quashing of a decision by a local authority that an individual was intentionally homeless; the overturning of the refusal of a licensing board to grant a regular extension of permitted hours as applied for; and the reduction of a decision by a Special Adjudicator confirming a refusal of asylum by the Secretary of State.

1 Malcolm v Tweeddale District Housing Benefit Review Board 1994 SLT 1212, OH.
The protection of legitimate expectations

2.74 The concept of the courts protecting legitimate expectation is another importation from continental administrative law systems, and in particular from European Court of Human Rights and the European Court of Justice. The protection of legitimate expectations has been said to be 'one of the fundamental principles of European Community law'. The jurisprudence of the European Court of Justice regards a legitimate expectation to be treated in a certain way by the administration as something less than an enforceable acquired right. It may arise where, for example, a particular course of action has regularly been followed by the administration; the Court of Justice may then protect the expectation that such conduct will continue. The Court of Justice may also uphold legitimate expectations against otherwise binding obligations. In particular, in the absence of any change in objective circumstances or of circumstances in which the relevant change might properly have been anticipated, the past conduct of the executive or the administration has been held to fetter their discretion at least in relation to individual cases, particularly where the individuals in question have relied on the administration's established position and have entered into financial and commercial commitments accordingly.

4 See R v Inland Revenue Commissioners, ex p Unilever plc [1996] STC 681, CA for an example where national courts have taken a similar approach. The English Court of Appeal held that past conduct of the Inland Revenue in consistently accepting late submission of tax computation was such as to prevent them from relying on the statutory time limits to reject the applicants' claims for loss relief.
5 See eg Case 74/74 Comptoir National Technique Agricole (CNTA) v Commission [1975] ECR 533 at 550, para 42.

2.75 A prudent and well-informed operator should, however, expect measures which have to be imposed in view of market or policy developments, but on at least two occasions the European Court of Justice has overturned Commission decisions, which amounted to an 'unforeseeable shift of attitude'. The Court of First Instance has, however, held that an individual may not necessarily have an enforceable legitimate expectation that a situation which may be modified at the discretion of the Community institution in question will be maintained: the principle that legitimate expectations may be found to be unenforceable is said to exist particularly in the area of the common organisation of agricultural markets since these may require constant adjustments to meet changes in the economic situ-
ation. In this context, the principle of legitimate expectations cannot be extended to the point of preventing new rules from applying to the future effects of situations which arose under earlier rules. Thus, in O'Dwyer v Council the Court of First Instance dismissed a claim by Irish dairy farmers seeking reduction and compensation from the Council in respect of two Council regulations in 1992 and 1993 which, contrary to previous practice, reduced, without compensation to the individual farmers affected, the guaranteed total quantities of milk which could be produced in each member state.

1 See Case C-350/88 Delacre and others v Commission [1990] ECR 1-395

2.76 The case law of the European Court of Justice has been summarised as follows:

'For the principle of legitimate expectations to be applicable, an objective basis must exist for this principle in the shape of an expectation which is worthy of protection. Because of the broad freedom of action enjoyed by the legislature, the mere existence of a legal rule is not normally a suitable basis for a legitimate expectation which must be taken into account. Adequate grounds for a solid expectation can be provided on the one hand by having entered into certain obligations towards the authorities, or on the other hand by a course of conduct on the part of the authorities giving rise to specific expectations - which in certain circumstances may arise out of a commitment entered into by the authorities' 1.

1 J Schwarze European Administrative Law pp 1134–1135.

2.77 The Community law principle of the protection of legitimate expectation is, in some ways, analogous to the common law doctrines of personal bar and waiver or to the civilian principle known to Scots private law not only that agreements are to be respected (pacta sunt servanda) but also that promises are to be kept (pollicitatio), at least insofar as not in contravention of any statutory duty.

1 See Armia v Daegan Developments Ltd 1979 SC (HL) 56. For the application of the English law concept of equitable estoppel in a public law context, see R v Secretary of State for the Home Department, ex p Khan [1995] 1 All ER 40 at 46.
2 See James Howden and Co Ltd v Taylor Woodrow Property Co Ltd. 1998 SCLR 903 for a discussion of the requirements of waiver in Scots law. For a commentary, see E Reid 'Recognising Waiver' 1999 Edinburgh Law Review.
3 See Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629, HL per Lord Fraser at 638.

2.78 This principle of the protection of legitimate expectations has gradually been adopted by the courts in the United Kingdom in the context of administrative law. Legitimate expectations have been said to be constructs of public law, to be contrasted with rights protected under private law. At times, legitimate expectations as to procedure are expressed as being just another aspect of the duty to act fairly. The question of the enforceability or otherwise of what might be termed substantive legitimate expectations of a particular benefit, as opposed to procedural legitimate
expectations that, say, proper consultation process will be followed before any general change in policy, remains a matter of particular controversy however. In *R v British Coal Corporation and the Secretary of State for Trade and Industry, ex p Price* the procedural legitimate expectation of consultation was said to involve giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted and to express its views on the subject; and the consultor thereafter conscientiously considering the views expressed. There was, however, no obligation on the part of the consulting body to adopt any or all of the views expressed by the body consulted. In *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* Sedley J considered whether or not the doctrine of legitimate expectation could be used to claim not only procedural protection such as consultation but a substantive benefit or advantage, for example that the particular applicant should, in fairness, properly be excepted from a change in general policy. He noted:

'The real question is one of fairness in public administration. It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision-maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision-maker decides whether to take a particular step.

Legitimacy in this sense is not an absolute. It is a function of expectation induced by government and of policy considerations which militate against their fulfilment. The balance must be in the first instance for the policy maker to strike, but if the outcome is challenged by way of judicial review, I do not consider that the court's criterion is the bare rationality of the policy-maker's conclusion. While the policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectation which the policy will thwart remains the court's concern.'

1 Council for Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL per Lord Diplock at 408. See also the Australian High Court decision in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.

2 *R v Secretary of State for the Home Department, ex p the Fire Brigades Union* [1995] 2 WLR 464, HL.


4 For example, not to have one's telephone tapped except if falling within the government published criteria for such surveillance, on which, see *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 2 All ER 518, QBD.

5 See eg *R v British Coal Corporation and the Secretary of State for Trade and Industry, ex p Vardy* [1993] IRLR 104, QBD requiring proper consultation with affected employees and trade unions before the enforcement of compulsory pit closures.

6 [1994] IRLR 72, QB.

7 See *Scottish Hierarchy of the Roman Catholic Church v Highland Regional Council* 1987 SLT 708, HL and *Aberdeen City Council v Boundary Commission* 1998 SLT 613 OH for examples of Scottish cases on the requirements of proper consultation.

8 [1995] 2 All ER 714, QB at 724b-c and 731c-d.

2.79 It should be noted that the English Court of Appeal has since specifically over-ruled the decision of Sedley J in *Hamble (Offshore) (Fisheries)* insofar as it suggests that it is open to the court to conduct a balancing exercise in considering whether or not to uphold an individual's substan-
tive legitimate expectation against a general change in policy. In *R v Secretary of State for the Home Department, ex p Hargreaves* the Court of Appeal held that where an applicant has established that he has a substantive legitimate expectation, the court may reduce any decision which has the effect of over-turning that expectation only if it can be said that that decision was irrational or *Wednesbury* unreasonable.

1 [1997] 1 All ER 397, CA.


2.80 By contrast, in Scotland, the courts have, in general, upheld claims to enforceable legitimate expectations on the ground of fairness rather than on the basis of the high standard of *Wednesbury* unreasonableness. Thus, claims to enforceable legitimate expectations have been vindicated in the following circumstances: a police constable’s claim that he legitimately expected to be permitted to withdraw his offer of resignation from the police force as envisaged in the staff procedure manual was upheld; a neighbour’s claim that he legitimately expected to be given the opportunity to object to a grant of planning permission, notwithstanding that the original application was amended so that its boundaries no longer marched with his own land thereby avoiding the statutory requirement of notification of him as a co-terminous proprietor to the proposed development; a prisoner’s claim that he legitimately expected that the calculation of his rights to remission of his sentence would be dealt with in accordance with the practice in England, from where he had been transferred rather than under the more restrictive rules applicable in Scotland; and the claim by an applicant for planning permission for a superstore that they legitimately expected that the Secretary of State would call in a competing major planning application claim so that their own appeal against refusal of their planning application would not be rendered pointless by any prior grant of planning permission to their competitor by the local planning authority.

1 *Rooney v Chief Constable of Strathclyde Police* 1997 SLT 1261, OH. Cf *Connor v Strathclyde Regional Council* 1986 SLT 530, OH where a teacher’s claim to a legitimate expectation of reliance on a staff circular in relation to appointments was held to have an insufficient public law element to permit judicial review. Following the rejection in *West of the public/private distinction in judicial review in Scotland it would appear that this case was wrongly decided on the question of competency.*

2 *Lochore v Moray District Council* 1992 SLT 16, OH (Lord Cullen). Compare, however, with *Pollock v Secretary of State for Scotland* 1993 SLT 1173, OH (Lord Cameron of Lochbroom) where the failure of a co-terminous proprietor timeously to initiate statutory appeal procedure because he had not been notified of the application was held to preclude the remedy of judicial review.

3 *Walsh v Secretary of State for Scotland* 1990 SLT 780. But cf *Rex v Parole Board for Scotland* 1993 SLT 1074, OH where the notification of a release date from prison was not found to be the basis of a legitimate expectation that any change in that date would be effected only after a hearing into the matter at which the petitioner could appear and put his case.

4 *Lakin Ltd v Secretary of State for Scotland* 1988 SLT 780. See also *Asda Stores Ltd v Secretary of State for Scotland* 1997 SLT 1286, OH.
2.81 More recently, in McPhee v North Lanarkshire Council it was held by Lady Cosgrove sitting in the Outer House that while an authority providing an assurance as to a substantive right (in casu a traveller’s claim to an entitlement to a pitch on a site) may depart from it, any such departure will fall to be scrutinised under reference to the Wednesbury unreasonableness test. Such Wednesbury irrationality analysis should however, should however, take into account the fact that a specific promise had been made.
1 1998 SLT 1317, OH.

The right of access to the courts

2.82 Article 6.1 of the European Convention of Human Rights provides that ‘in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal’. This right of access to the courts has been successfully relied upon before the Strasbourg Court to challenge both English local authorities’ procedures in relation to welfare decisions on children in care and the proceedings of Scottish children’s panels. As a result of concerns as to whether or not children’s panels would be regarded in Strasbourg as ‘independent and impartial tribunals’ a right of substantive appeal against their decision to the sheriff was introduced by section 51 of the Children (Scotland) Act 1995 to ensure that individuals have ‘the right to court proceedings in the determination of their civil rights’.


2.83 In the context of European Community law, the European Court of Justice has stated that the conferral of a right under Community law on a natural or legal person necessarily implies that there also exists a right to a remedy of a judicial nature against any decision of a national authority withholding the benefit of that right. Thus in Johnston v Chief Constable of the Royal Ulster Constabulary the Court of Justice held that a provision of United Kingdom law which treated a certificate issued by the Secretary of State as ‘conclusive evidence’ that an act was done for the purpose of safeguarding national security was contrary to Community law since it had the effect of preventing individuals from pursuing their claims to Community rights by judicial process. The right to access to a proper judicial remedy in a Community law context may also include the right, if so desired, to be represented by an independent lawyer and for any communications between lawyer and client to be respected as confidential.

2.84 The fundamental nature of the right of access to the courts has been implicitly recognised in national administrative law in the manner in which the United Kingdom courts have treated attempts by the executive to exclude the possibility of review of their decisions by the courts. Absolute ‘ouster clauses’ which seek to prevent the court’s questioning any decision of an administration have been interpreted by the courts restrictively so as to continue to allow judicial review of such decision on classic ultra vires grounds, it being reasoned that a decision made in error of law outwith the powers of the deciding body is no decision at all. The courts in both Scotland and England have, however, upheld the validity of time limited ouster clauses which seek to prevent the validity of any action on the part of the decision maker from being questioned in any legal proceedings whatsoever unless raised within a specified period (sometimes as short as six weeks) after the taking of the decision, on the basis that such time limited ouster clauses are not seeking to exclude the jurisdiction of the courts but simply to limit the time within which it can be invoked. It may be that in a suitable case the validity of time-limited ouster clauses may be subject to challenge on the basis of the principle derived from European Community law that statutory provisions should not be interpreted and applied in such a way as to make the exercise of a fundamental right (namely access to the courts) ‘virtually impossible’ in practice.

1 See Anisminic v Foreign Compensation Commission [1969] 2 AC 147, HL.
2 See eg Martin v Beardsen and Milngavie District Council 1987 SLT 300, OH and Hamilton v Secretary of State for Scotland 1972 SC 72, OH.

2.85 Somewhat surprisingly, in Pollock v Secretary of State for Scotland it was held that the Secretary of State was entitled to rely upon such a time-limited ouster clause in a case where the petitioners (who had a notifiable interest as neighbouring proprietors) were deprived of the opportunity both to make their objections to a planning application heard and timeously to initiate a court challenge to the decision of the reporter in accordance with the relevant provisions of the Town and Country Planning (Scotland) Act 1972 because of a failure to notify them of the original application and of the inquiry, all as the statute required. It may be that this interpretation of the efficacy of time-limited ouster clauses will not survive the domestic incorporation of the European Convention on Human Rights, since it seems not fully to recognise the fundamental nature of the article 6.1 right of access to the courts.

1 1993 SLT 1173, OH.
2 Compare this decision with that of Lord Clyde in Ryrie (Blingery) Wick v Secretary of State for Scotland 1988 SLT 806, OH where the failure on the part of the Secretary of State to supply the recipient of an agricultural with a copy of the report on the basis of which he proposed to revoke the grant all as required by the Agriculture Act 1970, s 29(4) constituted a failure on the part of the Secretary of State to comply with a mandatory (rather than directory) statutory requirement such as to justify reduction of his decision.
2.86 An example of the changing tide is seen in *R v Lord Chancellor, ex p Witham*¹ where the fundamental 'constitutional' aspect of the right of access to the courts was specifically acknowledged in the context of a challenge to the validity of the decision of the Lord Chancellor to impose charges on litigants for their use of the courts and judicial time².

¹ [1997] 2 All ER 779, QB per Laws J. Compare however with the later decision of Laws J in *R v Lord Chancellor, ex p Lightfoot* [1998] 4 All ER 764, QB where it was held that access to the courts for an impecunious individual to petition for their own bankruptcy was not covered by the fundamental right of access to the courts to resolve disputes.


THE PRINCIPLE OF RATIONALITY

2.87 It is always the duty of the administration to exercise such powers as they are granted by Parliament in a reasonable manner, or rather not to exercise their powers in a wholly unreasonable or irrational manner. The definition of what constitutes unreasonable, and hence unlawful, conduct is pitched at a very high level by the courts so that they are not seen to be intervening in the normal executive or administrative process. An administrative decision is said to be tainted by 'irrationality' if the decision which was so outrageous as to be outwith the bounds of the rational.

2.88 The test of irrationality or 'Wednesbury unreasonableness'¹ checks only 'abuse or misuse of power' and 'excesses in the exercise of discretion'. It is not a general mode for reviewing the merits of a decision but comes into play only in exceptional circumstances when a decision can only be described as utterly unreasonable, despite seeming to have been taken in accordance with the applicable procedures and without violating the relevant regulations². It has been repeatedly emphasised by the courts that judicial review should not be seen as an appeal to the judges to consider the substantive merits of a decision anew³. It is decidedly not a *carte blanche* for the judiciary to substitute their own opinion for that of the decision maker if they should happen to disagree with him or her⁴. For the courts to go beyond their general supervisory jurisdiction of ensuring that the law was respected by decision makers would be to usurp the functions of public authorities. The question is, when may conduct by a decision maker be considered so unreasonable as to justify intervention by the courts?

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

² For examples of successful challenges on Wednesbury grounds, see *Woods v Secretary of State for Scotland* 1991 SLT 197 regarding the award of student grants and *James Atten & Sons v City of Edinburgh District Council and Link Housing Association* 1990 SLT 241 in relation to an unreasonable grant of planning permission.

³ *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1115, 1173 per Lord Brightman.

⁴ *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720, 737-738 per Lord Lowry.
2.89 In relation to the lawfulness or reviewability of a decision which has apparently proceeded on a mistake of fact essential to that decision, the following observation was made by Lord Johnston in *Shetland Line (1984) Ltd v Secretary of State for Scotland*:

‘Lord Diplock’s categorisations of the elements of a successful challenge to a ministerial decision in the GCHQ case are not set in stone to the extent that they may not overlap. Thus, irrationality may well involve an error of fact but in my opinion that error must relate to facts material to the decision in circumstances where the opportunity to appreciate the true situation was before the minister, whether personally or in the minds of his officials at the time the decisions was taken… [I]t is not sufficient simply to point, with the benefit of hindsight, to the existence of a mistake in the mind of the decision maker at the time the decision was made’.

1 1996 SLT 653, OH at 658.

2.90 As might be expected, given the high level of the test, the courts in Scotland have relatively rarely granted judicial review on the grounds purely of *Wednesbury* unreasonableness or the irrationality of the decision in question. In *Woods v Secretary of State for Scotland* Lord Morton of Shuna held that the Scottish Education Department refusal to pay out a student grant which had been budgeted for on the grounds that they had no record of his application form having been received by them before the non-statutory departmental closing date was unreasonable. It was noted by the court that it would be irrational for the department to reject the application on the basis of the alleged injustice to others whose application had been rejected in the past on these same grounds.

1 1991 SLT 197 at 199J-K.

2.91 In *James Aitken & Sons v City of Edinburgh District Council* Lord Dervaird held that the respondent local authority had acted unreasonably in granting a second application for planning permission for housing development on land next to that occupied by a meat producing company while an earlier identical application was still under appeal before a reporter appointed by the Secretary if State. It was held by the court that the outcome of the appeal in the first application was a material factor which the respondents were obliged to take into account in considering the second application, and that no reasonable authority would have acted in this way, notwithstanding that there was no specific prohibition in the planning legislation against such a course.

1 1990 SLT 241, OH.
2 See also *Trusthouse Forte (UK) Ltd v Perth and Kinross District Council*, 1990 SLT 737.

2.92 In *Imperial Chemical Industries plc v Central Region Valuation Appeal Committee* Lord Jauncey quashed as unreasonable a decision of the valuation appeal committee to refuse the petitioners’ motion to refer their appeal to the Lands Tribunal for Scotland. The assessor had advised the committee that the appeal seemed to be of the type that the legislature had intended to be considered suitable for referral to the Lands Tribunal and
that the interpretation of the applicable law was uncertain and difficult to apply. Lord Jauncey held that a reasonable committee would at the very least have called for more information as to the complexity or uncertainty of the law before refusing the petitioners' motion for referral to the Lands Tribunal. Their failure to do so rendered their decision irrational.

1 1988 SLT 106, OH. See also the decision of Lord Davidson in Civil Aviation Authority v Argyll & Bute Valuation Appeal Committee 1988 SLT 119.

2.93 And in Kelly v Monklands District Council¹ Lord Ross reduced as unreasonable a decision of the local authority that the petitioner, a 16 year old girl who had left home as a result of assaults by her father and had no capital, had no priority need for accommodation in terms of section 2(1) of the Housing (Homeless Persons) Act 1977 because they did not regard her as 'vulnerable'. Further, given that there was no suggestion that the petitioner was intentionally homeless the court made a positive order to the respondents to secure that accommodation be made available to her.

1 Kelly v Monklands District Council 1986 SLT 169, OH. Cf Hoolaghan v Motherwell District Council 1997 Housing Law Reports 27, OH where the court upheld the decision of the local authority that a drug abuser undergoing rehabilitation who had been the victim of homophobic activity did not have priority need under the 1977 Act.

2.94 It is sometimes claimed in academic writing that the test of 'Wednesbury unreasonableness' is not really suitable for the task of reviewing the merits of a decision, because it is unrealistically high, imprecise and self-referential¹. It has been said to be not so much an objective test of the decision itself as a test which looks to the subjective reactions of the judges to the decision. If the judges describe a decision as 'so absurd that no sensible person could ever dream that it lay within the powers of the authority" or 'so wrong that no reasonable person could sensibly take that view" or 'so outrageous in defiance of logic or of accepted moral standards that no sensible person ... could have arrived at it" they are doing no more than stating their strong disapproval of the decisions in question, without giving reasons for this. Words like 'absurd', 'outrageous' appear to be no more than emotive words of disapproval as contrasted with the approbation expressed in the use of the words 'reasonable' and 'sensible'. The emotivism of 'Wednesbury unreasonableness' is contrasted with the apparently cool and dispassionate objectivity of determining the suitability of means to ends, implicit in the test of Community law test of proportionality.

2 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 at 229 per Lord Greene MR.
3 Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, 1026 per Lord Denning MR.
4 Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 410 per Lord Diplock.
Proportionality

2.95 Proportionality was defined by Lord Diplock as the general principle ‘that a steam hammer should not be used to crack a nut’, and by an English Advocate-General as meaning that ‘the use of a cannonball to kill a fly cannot be defended on the ground that a nuclear missile might have been used instead’. Jowell and Lester have described it as the ‘characteristically English’ requirement ‘the means employed by the decision maker must be no more than is reasonably necessary to achieve his legitimate ends’. It has been suggested that the idea that proportionality is already implicit within the doctrine of ‘Wednesbury unreasonableness’ is accepted and while lack of proportionality would not of itself render a decision unlawful, extreme disproportionality might be one factor pointing to the decision being so perverse as not to have been taken by any reasonable authority.

4 R v General Medical Council, ex p Colman [1990] 1 All ER 489, 509 per Lord Donaldson MR.

2.96 In comparison to ‘Wednesbury unreasonableness’, proportionality, it has been argued, actually renders the judiciary more democratically accountable, given that it involves them in an explicit process of comparison of means and ends, of weighing and balancing of different objectives. No longer would decisions be struck down on the basis of non-articulated judicial prejudices, hidden in such catch-all phrases ‘absurd’ or ‘outrageous’. Ultimately, this comes down to a constitutional question. How closely do we wish our judges to scrutinise executive and administrative action? When does judicial review become simply a revolutionary form of government by judges?

2.97 Proportionality is a general principle of both European Community law and the law of the European Convention of Human Rights and requires that administrative authorities should use proportionate or non-excessive means in seeking to achieve some permissible end. In R v Secretary of State for the Home Department, ex p Brind the doctrine of proportionality was rejected by the House of Lords as a principle of English administrative law in cases where there is no such European law element.

1 See Walkingshaw v Marshall 1992 SLT 1167 for an example of its consideration in a Scottish context.
2 R v Secretary of State for the Home Department, ex p Brind [1991] 2 WLR 588 at 609.

2.98 It is arguable, however, that a form of the doctrine of proportionality has been statutorily introduced into the judicial consideration of the validity of Scottish legislation under the Scotland Act 1998. Paragraph 3 of the Schedule 4 to the 1998 Act provides that an act of the Scottish Parliament may modify, or confer power by subordinate legislation or modify the law in matters reserved to the Westminster Parliament where such modifi-
cation is both ‘incidental to, or consequential on, provision made (whether by virtue of the act in question or another enactment) which does not relate to reserved matters’ and it does not have a ‘greater effect on reserved matters than is necessary’, having regard only to the Scottish Parliament’s power to make law, to give effect to the purpose of the provision.

Proportionality and European Community law

2.99 As we have seen, judicial involvement in everyday administrative decision making may be thought to be highly inappropriate within the context of purely national administrative law, given the judges’ lack of time, of experience and expertise, and of democratic accountability. Where matters of Community law are concerned, however, the proper protection of Community law rights may require just such ‘undemocratic’ behaviour on the part of the judiciary, in particular as a result of the application by them of the Community law standard of ‘rationality’ embodied in the principle of proportionality. Proportionality, a principle originating in German administrative law, entails that there should be a proper relationship between means and ends in administrative and legislative measures. The principle has been applied by the Court of Justice to assess the compatibility with Community law of Member States’ legislation intended to limit and provide penalties in relation to the free movement throughout the Community of goods, services, workers and capital as guaranteed under the Treaty of Rome. In the words of the Court of Justice:

‘By virtue of that principle [of proportionality], the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued’.


2.100 Proportionality is, then, a complex doctrine and involves the application of three distinct tests:

- the measure should be shown to be appropriately and effectively aimed at a legitimate end, in the sense that the relationship between means and ends is neither impossible or unlawful;
- the measure should be demonstrated to be a necessary one, in the sense that there are no less restrictive means which might achieve the same purpose;
the measure should be seen to be proportionate or balanced, in the sense that any injury or restriction on the individual caused by the act should be offset by the gain to the general public or the community as a whole.

2.101 Thus, for a decision or administrative act within the field of Community law to be lawful, it must be shown not only to be aimed at a legitimate objective permitted by Community law, but also to be the least burdensome measure appropriate to that task and should not, in any event, disproportionately affect any of the general objectives of the Community. The application of the test of proportionality requires the judge to engage in a complex assessment of competing legislative policies. The European Court of Justice has emphasised the importance of the principle of the co-operation of national courts to ensure the full and effective protection of rights acquired under Community law in each member state. In emphasising the superiority of Community law over national law, however, the Court of Justice has insisted that national courts apply Community principles in assessing the validity of national legislative and administrative measures in the light of Community law.


2.102 It should be always be borne in mind that under the preliminary reference procedure under article 234 (formerly 177) of the post-Amsterdam Treaty of Rome to the European Court of Justice, the Luxembourg court is empowered only to decide on questions regarding the validity or interpretation of Community law. Direct questions as to the compatibility of national administrative decisions and laws with the requirements of Community law formally remain under this procedure for the national courts to decide, in the light of the guidance on Community law matters given them by the Court of Justice. In particular, the decision on whether or not the national measure in question does or does not satisfy the Community law tests of proportionality remains a matter for the national courts. As Advocate General Van Gerven stated:

'With regard to the assessment of proportionality it is in my view for the Court [of Justice] and for the Court [of Justice] alone, clearly and imperatively to indicate in its case law the criteria to be used in that assessment. It is then the joint task of the Court [of Justice] and the national court to apply those criteria drawn from existing case law to the concrete legal and factual context. ... If it appear from the findings of the national court and the arguments submitted to the Court [of Justice] that there is no room for any doubt, the Court [of Justice] itself ... will state the results of the assessment under Community law ... If the Court [of Justice] has not itself made an assessment on the basis of the information provided to it ... then the national court, where necessary after further examination of the legislative and factual context, and in the light of the Court [of Justice]'s reply to the preliminary question, must arrive at its own decision regarding the application of the proportionality requirement'.
2.103 In some cases the national courts in the United Kingdom have been willing to apply the test of proportionality without seeking the guidance or imprimatur of the European Court of Justice. Thus in *R v Minister of Agriculture, Fisheries and Food, ex p Bell Lines Ltd*\(^1\) a ministerial decision to restrict the import of milk into the United Kingdom to certain specified ports was challenged in an action for judicial review on the grounds that it introduced an unreasonable and disproportionate restriction on intra-Community trade. The application was granted by the English High Court which held that if it were plain to the court that the decision constituted, under Community law criteria, an impermissible (which is to say, disproportionate) restriction on Community trade it therefore contravened one party’s rights arising from Community law, and it was open to the court to substitute its decision for that of the minister.

\(^1\) [1984] 2 CMLR 502.

2.104 More radically still, in *R v Secretary of State for Employment, ex p the Equal Opportunities Commission*\(^1\) the House of Lords applied the Community law test of proportionality to determine whether or not the distinction then made in the United Kingdom employment legislation between the statutory protection accorded to full time workers and part-time workers contravened the requirements of Community law, in particular the prohibition on indirect sex discrimination.

\(^1\) [1995] 1 AC 1, HL.

2.105 The challenge by the Equal Opportunities Commission to the validity of the primary employment protection legislation was found by the House of Lords to be well-founded, without the need for a reference to the European Court of Justice. Their Lordships found that the admitted indirectly discriminatory effect of the legislation could not be justified in accordance with the requirements of proportionality.

2.106 By contrast, in *Walkingshaw v Marshall*\(^1\) a challenge to the proportionality of secondary legislation in Scotland was found by the High Court of Justiciary to require a reference to the European Court of Justice. The question at issue before the sheriff in this summary criminal prosecution was the compatibility with the principles of Community law, among them the doctrine of proportionality, of a national measure, namely the Inshore Fishing (Prohibition of Carriage of Monofilament Gill Nets (Scotland) Order\(^3\) which sought to ban the carrying of monofilament gill nets in Scottish inshore waters. On behalf of the accused, it was argued among other grounds that the order offended against the principle of proportionality because it prohibited the carriage of nets when all that was necessary was a prohibition on using such nets. The sheriff at first sustained the objections to the validity of the order and dismissed the com-
plaint. This decision was appealed against by the procurator fiscal to the High Court of Justiciary which referred the matter to the European Court of Justice to rule on the cogency of the various objection to the validity of the order. The European Court of Justice held both that the 1986 order was objectively justifiable and was not in breach of article 40 (3) of the Treaty of Rome (since salmon had to cross Scottish inshore waters to reach the waters in which they spawned) and that it did not infringe the principle of proportionality in prohibiting carrying and not simply using of the nets (since checks were particularly difficult to carry out in the area of the sea in question). When the whole matter was remitted to the sheriff to proceed to trial, however, he still found the regulations to have been made ultra vires of the Secretary of State because the Crown did not prove to his satisfaction that they had been validly made after due consultation with affected parties. In reaching his decision the sheriff relied upon the following dictum of Webster J:

'IIn any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be given by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party' .

1 1992 SLT 1167 following an article 177 reference to the European Court of Justice reported as Case C-370/88 Procurator Fiscal, Stranraer v Marshall [1990] ECR I-4071.
2 The English Sunday Trading cases produced a spate of references to the European Court of Justice seeking guidance on the compatibility and proportionality of the Sunday Trading restrictions in the Shops Act 1950 with the Community law principle of the free movement of goods. See for example B & Q v Shrewsbury and Atcham Borough Council [1990] 3 CMLR 535.
3 SI 1986/60.
4 R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities [1986] 1 WLR 1 per Webster J at 4.

Proportionality and the European Convention of Human Rights

2.107 The European Convention of Human Rights is not, for the most part, a list of absolute or unconditional rights. Aside from the article 3 prohibition on torture and inhuman or degrading treatment or punishment and the article 4.1 proscription of slavery, the other rights set out in the Convention are subject to varying degrees of regulation and control by the contracting states. In particular, while article 8.1 of the Convention states that everyone has the right to respect for his private and family life, home and correspondence, article 8.2 provides that there shall be no interference with the exercise of these rights except 'such as are in accordance with the law and are necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others'.

2.107  The Principles of Judicial Review

2  See eg Malone v United Kingdom (Ser A No 82, Judgment 2 August 1984) (1985) 7 EHRR 14 on the unlawfulness of telephone tapping and secret surveillance in the absence of a clear regulatory framework to guide and limit the authorities discretion on this matter.
3  See eg Gillow v United Kingdom, (Ser A No 109, Judgment 24 November 1986) (1989) 11 EHRR 355 on the disproportionate applications of the laws regulating the right to residence and housing in Guernsey.

2.108  And while article 9.1 guarantees the right to freedom of thought, conscience and religion, article 9.2 allows the freedom to manifest one religion or beliefs to be subject 'only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. One may note that while the article 8 right to privacy may be limited having regard to, among other matters, national security, the economic well-being of the country and the prevention of disorder or crime, these ends do not of themselves justify limitations on the article 9.2 freedom to manifest one's religion and beliefs, although common elements may be present in the concept of the protection of public order which is listed among the Article 9.2 legitimate ends.

2.109  Freedom of expression under article 10 is similarly subject to democratic limitations. Article 10.2 explicitly sets out a number of legitimate ends in respect of which freedom of expression might be restricted by the national authorities. Thus, the right to free expression may still lawfully be restricted 'for the protection of the reputation and rights of others' (for example, defamation laws) and 'for preventing the disclosure of information received in confidence' (confidentiality and privacy rights). National authorities are also empowered to restrict freedom of expression 'in the interests of national security, territorial integrity or public safety (official secrets)', for the prevention of disorder or crime (for example, incitement and race hate crimes), for the protection of health and morals (obscenity) and 'for maintaining the authority and impartiality of the judiciary' (murmuring the judges). The right to peaceful assembly, free association and to join trade unions embodied in article 11.1 may be specifically limited in the case of members of the armed forces, the police and those involved in 'the administration of the State'.

1  See the German Probationary Teachers cases Kosiek v Germany (1986) 9 EHRR 328 concerning a physics teacher who was also a member of the neo-Nazi German National Democratic Party (NPD) and Glasenapp v Germany (1987) 9 EHRR 25. See more recently Vogt v Germany [1995] 21 EHRR 205.

2.110  The use of the concept of restrictions on these rights being lawful insofar as they are prescribed by law, necessary in a democratic society and aimed at particular goals has been interpreted by the Strasbourg Court of Human Rights as incorporating into the body of the Convention the substantive administrative principle of proportionality. This means that in
deciding whether or not the state action in question is in accordance with the requirements of the Convention, the courts have to apply the proportionality test to the State action in question which as we have seen requires three questions to be asked: is the action aimed at a legitimate or lawful end as provided for in the Article in question?; will the action in fact achieve that end?; is the action the least restrictive alternative to achieve that end compatible with the requirements of a democratic society?

Proportionality and the decline of Wednesbury unreasonableness

2.111 As we have seen the doctrine of proportionality in both Community law and in European Convention law is qualitatively different from the tests set out in Associated Provincial Picture Houses v Wednesbury. The proportionality test requires judges to decide whether or not there existed any reasonable relation between a decision, its objectives and the circumstances in which the decision was applied in the particular case. It also requires judges to consider whether or not there were any significant alternative courses of action which might achieve the same end less oppressively. Accordingly, it would appear that the application of the proportionality test would appear to mean that the judges applied their own standards of what they regarded as the reasonable thing to do in the circumstances and strike down any decision which did not accord with that, substituting their judgment of what is reasonable for that of the lawful decision-maker or, indeed, the legislature. As Laws J has noted:

"The difference between Wednesbury and European review is that in the former case the legal limits lie further back. I think there are two factors. First the limits of domestic review are not, as the law presently stands, constrained by the doctrine of proportionality. Secondly, at least as regards a requirement such as that of objective justification in an equal treatment case, the European rule requires that decision-maker to provide a fully reasoned case. It is not enough merely to set out the problem, and assert that within his jurisdiction the minister choose this or that solution, constrained only by the requirement that his decision must have been one which a reasonable minister might make. Rather the court will test the solution arrived at, and pass it only if substantial factual considerations are put forward in its justification: considerations which are relevant, reasonable and proportionate to the aim in view. But as I understand the jurisprudence the court is not concerned to agree or disagree with the decision: that would be to travel beyond the boundaries of proper judicial authority, and usurp the primary decision-maker's function. Thus Wednesbury and European review are different models – one looser, one tighter – of the same judicial concept, which is the imposition of compulsory standards on decisions makers so as to secure the repudiation of arbitrary power."

1 [1948] 1 KB 223.
2 See Case C-167/97 R v Secretary of State for Employment, ex p Seymour Smith [1999] All ER (EC) 97, ECJ, for recent confirmation from the Court of Justice that the onus in indirect sex discrimination cases lies on the State to establish the proportionality of its restrictions.
2.112 The acceptance and application of the doctrine of proportionality as a test to be applied by the courts even in purely national administrative law matters would signal the final rejection or abandonment of the traditional deference which has characterised the relationship and attitude of judges to the acts of the national executive and administration over the past century. Perhaps for these very reasons, the doctrine of proportionality has, however, been rejected as a principle of English administrative law in cases where there is no European law element.

2.113 In *R v Secretary of State for the Home Department, ex p Brind* the House of Lords examined the validity of the British Government’s ban on the broadcasting of the voices of members of certain political organisations, in particular Sinn Fein. Arguments were presented to the effect that the use of executive power in this regard was disproportionate to its proclaimed objective of ‘starving the terrorist of the oxygen of publicity’. These arguments were given short shrift. Lord Ackner stated:

‘Unless and until Parliament incorporates the [European] convention [on Human Rights and Fundamental Freedoms] into domestic law… there appears to me to be at present no basis on which the proportionality doctrine applied by the European Court [of Human Rights] can be followed by the courts of this country’.

Lord Lowry declared:

‘In my opinion proportionality and the other phrases are simply intended to move the focus of discussion away from the hitherto accepted criteria for deciding whether the decision maker has abused his power and into an area in which the courts will feel more at liberty to interfere… There is no authority for saying that proportionality in the sense in which the appellants have used it is part of English common law and a great deal of authority the other way. This, so far as I am concerned, is not a cause for regret…’

1 [1991] 2 WLR 588 at 609 (emphasis added).

2.114 The idea of an organic absorption of the doctrine of proportionality into the administrative law of the United Kingdom seems to have been decisively rejected by the Lords in *Brind*. The rejection of proportionality appears to be based on constitutional grounds, in particular on a view of the separation of powers which requires judges to show restraint before the decisions of the executive. The principal concern of the judges in *Brind* appears to be proportionality requires national courts to substitute their own judgment of what is needed to achieve a particular objective for the judgment of the executive, or indeed the legislature. The spectre implicitly raised is that of the establishment of a ‘gouvernement des juges’ on the model of the United States Supreme Court. Such a development is seen not only as alien to the traditions of the United Kingdom Constitution, but also as politically and morally undesirable because undemocratic, or at least as contrary to the national legal and constitutional tradition within the United Kingdom as these have been described and understood to date.

1 For a history of the uses of this phrase, see Davis ‘A Government of Judges: an historical review’ (1987) 55 American Journal of Comparative Law 559.

2 See also *R v Secretary of State for the Environment, ex p National and Local Government Officers Association (NALGO)* (1993) 5 Administrative Law Reports 785, CA rejecting a challenge to
the validity of regulations which sought to restrict the political activities of officers and staff of local authorities on the grounds, among other of their lack of proportionality. In the event the restriction was ruled by the European Court of Human Rights to be proportionate: see Case A/966 Ahmed v United Kingdom A/966 [1999] IRLR 188 ECtHR.

2.115 With the incorporation of the European Convention on Human Rights and the growing acceptance by the courts of the application of the Community law doctrine of proportionality in the particularly sensitive constitutional area of the judicial review of legislation in the wake of Factortame\(^1\), however, the decision in Brind appears to become marooned in the incoming European law tide. If the House of Lords decision in Brind stands, it would appear that in the absence of any Community law element or claim to a breach of fundamental rights as protected by the European Convention, the reasonableness of decisions of the executive and of administrative authorities can still only be challenged on the basis of 'Wednesbury unreasonableness'.

1 C-213/89 Factortame Ltd v Secretary of State for Transport (No 2) [1990] ECR 2433; [1991] 1 AC 603, HL.

2.116 Acts of the Westminster Parliament against which a plausible 'European defence' can be stated will however be challengeable on the grounds among others that, they could have been drafted less restrictively, which is to say in a more reasonable way. The same test would apply in relation to acts of the Scottish Parliament against which a fundamental rights argument is run. This latter is arguably a much lower standard than 'Wednesbury irrationality' being closer to a general standard of 'ordinary reasonableness'. In the light of this apparent constitutional anomaly, it seems likely that pressure for the unequivocal acceptance of proportionality in the administrative law of the United Kingdom will continue.

2.117 There is growing awareness among practitioners and judges, however, that the stark choice between either high 'Wednesbury unreasonableness' as traditionally defined and the standards of ordinary reasonableness with judges substituting their views for those of the administrators is insufficient if judicial review is properly to be responsive to the requirements of the changing constitution. Accordingly there has been some suggestion that there to be different intensity of review in different circumstances.

2.118 In fundamental rights cases, a most anxious scrutiny may be made of the administration's actions applying the standards of rationality of action as set out in the classic European doctrine of proportionality to the effect that 'the more substantial the interference with human rights the more the court will require by way of justification before it is satisfied that the decision is reasonable' in the sense of actually falling within the range of responses open to a reasonable decision maker\(^1\).

1 See eg R v Ministry of Defence, ex p Smith and Grady; R v Admiralty Board of the Defence Council, ex p Lustig-Pream and Beckett [1996] IRLR 100, CA per Thorpe LJ at 106–107.
2.119 Indeed, the almost inviolable nature of the right to access to the courts (and the consequent lowering of the standard of what constitutes administrative irrationality in that context) has been emphasised by one judge both extra-judicially1 and in the relation to a challenge to the Wednesbury reasonableness of proposals by the Lord Chancellor, Lord Irvine of Lairg substantially to increase the court fees payable by prospective litigants. In R v Lord Chancellor, ex p Witham Laws J stated:

>The submission [that there is no available argument based on Wednesbury unreasonableness] would be good in a context which did not touch fundamental constitutional rights. But I do not think that it can run here. Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door. That has not been done in this case.2

2 [1997] 2 All ER 779 at 788.

2.120 In other circumstances, for example where the decisions in question dealing with matters of general macro-economic policy, a less demanding test may be required of the decision maker in order to pass the standards of rationality – this might be termed the 'super-Wednesbury test'. As Sir Thomas Bingham MR has stated:

>The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding the decision to be irrational. That is good law and, like most good law, common-sense. Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test, but the test [of Wednesbury unreasonableness] is sufficiently flexible to cover all situations.3

2 R v Ministry of Defence, ex p Smith and Grady; R v Admiralty Board of the Defence Council, ex p Lustig-Pream and Beckett [1996] IRLR 100, CA at 103.

2.121 In R v Chief Constable of Sussex, ex p International Traders Ferry Limited4 the House of Lords considered a judicial review brought by a cross-channel haulier of the policing decisions of the Chief Constable of Sussex who when faced with large scale demonstrations against the live export of animals to the continent, decided on grounds of cost, limited police resources as well as public safety to scale down the limit the police operations needed to force the transports through to four days in a fortnight and allegedly also ordered the turning back of lorries seeking to break the protestors cordon to reach the channel ferries to turn back so as to avoid possible breaches of the peace occurring. It was argued that hauliers rights under Community law (in particular articles 34 to 36 (now 29 and 30) of the Treaty of Rome) to engage in cross-border trade were being contravened by the actions of the protestors and in that the operational decisions of the Chief Constable were unlawful in failing adequately and proportionately to protect those Community law rights5. In moving for dismissal of the judicial review application, Lord Slynn noted as follows:
'In *ex parte Brind* the House treated *Wednesbury* unreasonableness and proportionality as being different. So in some ways they are, though the distinction between the two tests in practice is in any event much less than is sometimes suggested. The cautious way in which the European Court usually applies this test, recognising the importance of respecting the national authority's margin of appreciation, may mean that whichever test is adopted, and even allowing for a difference in onus, the result is the same'.

1 *R v Chief Constable of Sussex, ex p International Traders Ferry Limited* [1999] 1 All ER 129, HL.

2 Compare with the decision of the Court of Justice in relation to France's failure to ensure free movement of goods from the other side of the Channel in *Case C-265/95 Commission v France* [1997] ECR I-6959, ECJ at para 56:

'It is for the Member State concerned, unless it can show that action on its part would have consequences for public order with which it could not cope by using the means at its disposal, to adopt all appropriate measures to guarantee the full scope and effect of Community law so as to ensure its proper implementation in the interests of all economic operators.'

3 [1999] 1 All ER 129 at 145 H.

2.122 In his judgment in *International Traders* Lord Cook of Thorndon went further yet in seeking to move beyond the tautologies of the *Wednesbury* test, stating:

'I agree with the proposition of Lord Lester of Herne Hill QC that on the particular facts of this case, the European concepts of proportionality and margin of appreciation produce the same result as what are commonly called the *Wednesbury* principles. Indeed in many cases that it likely to be so. It seems to me unfortunate that *Wednesbury* and some *Wednesbury* phrases have become established incantations in the courts of the United Kingdom and beyond. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 2323, an apparently briefly-considered case, might well not be decided in the same way today; and the judgment of Lord Greene MR, twice uses (at 230 and 234) the tautologous formula 'so unreasonable that no reasonable authority could ever have come to it' Yet judge are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do no need to be warned off the course by admonitory circumlocutions. When, in *Secretary State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, the precise meaning of 'unreasonably' in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgment in the Court of Appeal and the two judgment in the Divisional Court all succeeded in avoiding needless complexity. The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock (at 1064) as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers'.

1 *R v Chief Constable of Sussex, ex p International Traders Ferry Ltd* [1999] 1 All ER 129 per Lord Cooke at 157a-e.

2.123 Interestingly, the European Court of Justice appears to apply the proportionality test in the same flexible way. Thus, challenges to the proportionality of Community acts within, for example, the context of common agricultural policy have to be meet a more exacting standard than ordinary reasonableness in order to have any prospects of success. As the Luxembourg court has stated:
When implementation by the Council of the Community's agricultural policy necessitates the evaluation of a complex economic situation, its discretion is not limited solely to the nature and scope of the measures to be taken but also, to some extent, to the finding of basic facts inasmuch as, in particular, it is open to the Council to rely if necessary on general findings. In reviewing the exercise of such a power the court must confine itself to examining whether there has been a manifest error or misuse of power or whether the authority in question has clearly exceeded the bounds of its discretion (Case C-122/94 Commission v Council [1996] ECR I-881 at paragraph 18).\(^1\)

1 See also Case C-4/96 Northern Ireland Fish Producers' Organization Ltd v Department of Agriculture for Northern Ireland [1998] ECR I-681.

2.124 A recent survey of the use of the proportionality principle by the Court of Justice\(^1\) has noted that the court has afforded a broad margin of appreciation to the decision maker, whether the Community institutions or emanations of the member states, in a wide range of issues including: Community legislation in the area of social policy\(^2\); consumer protection\(^3\); and the Common Agricultural Policy\(^4\); decisions involving complex economic assessments in the field of anti-dumping\(^5\); and member state measures on such topics and customs and excise implementation\(^6\); public health\(^7\); education\(^8\); abortion\(^9\); and the preservation of the 'traditional Sunday'.\(^10\)

3 Case C-233/94 Germany v European Parliament ECR I-2405 at para 55.
10 Case C-312/89 Conforama [1991] ECR I-997 at paras 7 to 12.

2.125 The signs would appear to be that the European and domestic criteria of assessing the 'rationality' of a decision are coming ever closer with the intensity of both proportionality and Wednesbury review varying on the particular facts and circumstances. What remains in dispute, however, is the degree to which the national courts in the United Kingdom are properly bound to apply the European Court of Justice's general principles of Community law such as proportionality to measures of national law, it having been suggested by Laws J in R v Minister of Agriculture, Fisheries and Food, ex p First City Trading\(^1\), unsupported by any reference to specific national or European authority\(^2\), that the full force of these general principles, derived as they are from a court in Luxembourg which is of only limited jurisdiction\(^3\), need only be applied in cases where national law directly applies or specifically derogates from provisions of Community law and need not be applied in cases where a national measure while having (potential) effects within the scope of the Treaty arises solely by virtue of an exercise of domestic power and national sovereignty. This
question which has profound constitutional resonances and implications, awaits further development and consideration by the courts in both England and Wales and Scotland.

3 For similar remarks see the so-called 'Maastricht-Urteil', the decision of the German Constitutional Court Bundesverfassungsgericht) on the compatibility of the Maastricht Treaty with the German Constitution which was reported and translated into English in the form Brunner v European Union Treaty [1994] 1 CMLR 57.
Chapter 3

Human Rights and Judicial Review

HUMAN RIGHTS BEFORE THE HUMAN RIGHTS ACT 1998

3.01 Prior to the incorporation into domestic law by the Human Rights Act 1998 of specified rights contained in the European Convention on Human Rights, the extent to which an alleged breach of the Convention could be said to constitute a substantive basis for judicial review of administrative action was a matter of some controversy in Scotland. In Kaur v Lord Advocate¹ Lord Ross sitting as a Lord Ordinary held that the Convention had no effect on Scottish municipal law unless the legislature had passed an law for that purpose. Lord Ross’s views on the ineffectiveness of the pre-incorporation European Convention were specifically approved by the Inner House in Moore v Secretary of State for Scotland², which is discussed in more detail below.

1 1981 SLT 322, OH.
2 1985 SLT 38 at 41.

3.02 However, in Budh Singh v Secretary of State for the Home Department Lord Morison sitting in the Outer House stated:

'I regard it as unnecessary for me to determine whether the court is bound by this article [8 of the European Convention on Human Rights enshrining respect for family life]: if the policy of the Home Office is one which ignores the obvious humanitarian principle of respect for family life, it would in my view be unreasonable and subject to the court's review'.

1 1988 SC 349, OH at 352.

3.03 By 1997, Lord President Hope felt that the growing disparity in approach as between Scotland and England³ with regard to the extent to which the unincorporated Convention might be relied upon was unjustified and he expressed the view that Lord Ross’s observations set out in Kaur should no longer be followed, stating:

‘Lord Ross’s opinion ... has been looking increasingly outdated in the light of subsequent development, and in my opinion, with respect, it is time that it was expressly departed from.... In my opinion the courts in Scotland should apply the same presumption as that described by Lord Bridge [in R v Secretary of State for the Home Department, ex p Brind¹] namely that when legislation which is found to be ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it³.'
And, as we saw in Chapter 2, in *Salah Abdadou v Secretary of State for the Home Department*\(^1\) it was accepted by Lord Eassie sitting in the Outer House that reference could properly be made to the terms of the European Convention and to the case law of the Strasbourg institutions as a check on the rationality of an administrative decision of the Home Secretary in the enforcement of national immigration controls and that a 'more anxious scrutiny' might be given by the courts to decisions of the executive which impinged upon the fundamental rights of the individual as protected under the Convention\(^2\).

1. 1998 SC 504, OH per Lord Eassie at 518.
2. See *R v Ministry of Defence, ex p Smith* [1996] 1 WLR 305, [1996] QB 517, CA for English authority for the view that the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is substantively reasonable.

Some use of the European Convention was also made in the criminal courts. In *Alistair McLeod v HM Advocate*\(^3\) an attempt was made to challenge the practice of the courts and of the Crown Office in relation to the production of documents to the defence. It was argued that the requirement that an accused person specify particular documents in the hands of the Crown, explain the basis on which he wishes sight of these and satisfy the court that the recovery of these documents would serve the interests of justice by being of material assistance to the proper preparation of the accused's defence set too many hurdles in the way of the accused seeking to establish and recover all material evidence both for and against his case, contrary to the fair trial requirements of the Convention\(^4\). The argument was rejected, it being observed by the Lord Justice General that in his view the disclosure requirements imposed in Scots law were compatible with the rights guaranteed under the Convention.

1. 19 December 1997, unreported HJC.

While in *John O'Neill v HM Advocate*\(^5\) the High Court considered an appeal against a discretionary sentence of life imprisonment where the trial judge had specified the punitive period of seven years before which the prisoner would be entitled, under section 2(6) of the Prisoners' and Criminal Proceedings (Scotland) Act 1993, to require the Secretary of State to refer his case to the Parole Board. The sentence was imposed in respect of an admitted assault to severe injury arising from an out of the blue and apparently motiveless stabbing of an individual unknown to the assailant.
In its judgment in the appeal, substituting a period of three years for the seven years imposed by the trial judge, reference was made by the criminal appeal court to certain case-law of the European Court of Human Rights, although the court noted that it had not been referred in the course of the appeal to any of the relevant Convention cases by either counsel for the appellant or the Advocate Depute for the Crown and observed that an earlier decision in the matter in which the purpose of the statutory provisions in question had been discussed without reference to this Strasbourg case law had been made per incuriam in a case where the point was not fully argued. The decision of the High Court in O'Neill illustrates the growing importance of the European Convention of Human Rights even prior to its incorporation, where failure to make reference to it and its associated case law has actually led to a misunderstanding and misapplication of a provision of national law. The case is a harbinger of the radically changed approach to statutory interpretation which will be effected by the coming into force of the Human Rights Act 1998.

1 9 March 1999, unreported.
2 See in particular Thynne, Wilson and Gunnell v United Kingdom (Ser A/190, Judgment 25 October 1990) 13 EHRR 666; Van Droogenbroeck v Belgium (Ser A/50, Judgment 24 June 1982) 4 EHRR 443; and Weeks v United Kingdom (Ser A/114, Judgment 2 March 1987) 10 EHRR 293.
3 Robertson v HM Advocate 1997 SCCR 534 at 541C-541D. Cf the decision of the English Court of Appeal Criminal Division in R v Marklew and Lambert [1999] 1 Cr App R (D) 6.

**EUROPEAN COMMUNITY LAW AND HUMAN RIGHTS**

3.07 Article 6 (formerly article F) of the post Amsterdam Consolidated Treaty on European Union provides as follows:

1. The [European] Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states.

2. The [European] Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community law.

3. The Union shall respect the national identities of its member states.

3.08 Article 46(d) (formerly article L) of the post Amsterdam European Union Treaty gives the Court of Justice specific jurisdiction in relation to article 6(2) 'with regard to actions of the [central Community] institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty'. On application of the principle of construction expressio unius est exclusio alterius, particular in relation to a court of specific attribution and limited jurisdiction as the Court of Justice of the European Communities, one might reasonably assume that the intent and effect of article 46(d) is to exclude by implication any jurisdiction the court might have for human rights review of member state action. Given the history of the court's past jurisprudence on the
matter of fundamental rights review which is examined below it is unlikely that the court will feel itself constrained to this conclusion, perhaps privileging instead its duty under article 220 (formerly article 164) of the Treaty of Rome to 'ensure that in the interpretation and application of this Treaty the law is observed'.

3.09 The Court of Justice of the European Communities has held that, under Community law as it presently stands, the European Union cannot as a body formally accede to the European Convention on Human Rights. The effect of any such accession would be to place the central institutions of the Community within the jurisdiction of the Strasbourg European Court of Human Rights and displace the Court of Justice from its position as the court of final reference for the European Union. The corollary of the non-accession has been that the Strasbourg institutions have declined to accept complaints from applicants that a particular Community measures, even when implemented by a contracting state to the Convention, contravenes their Convention rights. Notwithstanding the inability of the European Union as a body to accede to the European Convention, the Court of Justice has repeatedly emphasised the crucial importance to Community law of respect for human rights, stating in its ECHR Accession Opinion:

'It is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court [of Justice] ensures. For that purpose, the court draws inspiration from the constitutional traditions common to the member states and from the guidelines supplied by international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories. In that regard the court has stated that the [European] Convention has special significance (see in particular the judgement in Case C-260/89 ERT [1991] ECR I-2925, paragraph 41).

Respect for human rights is therefore a condition of the lawfulness of Community acts.'

1 See Application No 13258/97 CM & Co v Germany (1990) 64 D&R 138.

3.10 In Kremzow v Austria, a case concerning the compatibility of national measures of criminal procedural law with the European Convention, the Court of Justice subtly altered the last of the above quoted propositions so that it now reads as follows, applying not only to Community acts but also to member states' acts:

'As the court has also held, it follows that measures are not acceptable in the Community which are incompatible with observance of the human rights thus recognised and guaranteed'.


3.11 The claim that the provisions of the European Convention on Human Rights, at least as mediated through European Community law, were directly applicable and could be relied upon by individuals before the
courts in Scotland appears first to have been made by a party litigant, a life prisoner in HM Prison Peterhead who made use of such free time as he had there by studying legal textbooks. In Moore v Secretary of State for Scotland\(^1\), the pursuer sought a declarator of ‘erroneous conviction’ and damages against the Secretary of State in respect of his alleged wrongful incarceration. The pursuer averred: firstly, that his trial for murder had been conducted in a manner contrary to provisions of the European Convention on Human Rights, namely articles 6(1), 6(3)(b), 6(3)(d) guaranteeing a fair trial; and secondly, that the failure by the Secretary of State to implement a statutory provision allowing for a reference of his case back to the High Court for reconsideration contravened article 13 of the Convention which required that there be an effective remedy before a national authority notwithstanding that a violation of rights had been committed by a person acting in an official capacity.

1 1985 SLT 38.

3.12 The action was dismissed by the sheriff at first instance, and his decision was affirmed by the sheriff principal. The matter was then taken by the pursuer to the Inner House on appeal where it came before the Second Division, then chaired by Lord Justice Clerk Wheatley. The pursuer’s submissions on the European Convention on Human Rights were recorded as follows:

‘Acknowledging that this Convention [on Human Rights] had not been brought into the law of Scotland by legislation, he submitted that nonetheless it had accepted into European Community law by the European Communities Act 1972. As the United Kingdom is a member of the European Community then via the said Act the Convention has become part of the municipal law of Scotland. Faced with the decision of Lord Ross in Kaur v Lord Advocate\(^2\) that the Convention had no effect on Scottish municipal law unless the legislature had passed a law for that purpose, which the legislature had not done, the pursuer swept that decision aside by saying that he did not agree with it. As a layman his summary dismissal of an authority in such a manner is understandable, however unsound it may be, but such a luxury cannot be afforded to the court. In our view Lord Ross was perfectly correct in holding that the [European] Convention plays no part in our municipal law so long as it has not been introduced into it by legislation’\(^2\).

1 1981 SLT 322, OH.
2 Moore v Secretary of State for Scotland 1985 SLT 38 at 41 (emphasis added).

3.13 Ironically it would appear in the light of case law of the European Court of Justice which was not cited to or by the court in Moore, that the pursuer’s submissions, at least on the inter-relationship of European Community law and the European Convention on Human Rights, were substantially correct. As the Inner House pointed out in Moore, however:

‘[T]he pursuer seemed to be unaware that if Community law is introduced into the municipal law it is because the subject matter has a Community content, and there is no such content here’\(^1\).

1 See Moore, above [emphasis added]. See also Jardine v Procurator Fiscal (13 November 1998, unreported) for remarks to like effect in response to similar arguments as in Moore made in a case which had no discernible connection with European Community law, namely an
appeal against the competency of a criminal charge under the Road Traffic Act 1988 of failure to inform the police as to the identity of the driver of a vehicle of which the accused was the registered keeper.

3.14 Fundamental rights arguments have been considered by the European Court of Justice in the following situations: in striking down a conviction for illegal fishing on the grounds that the Community measure relied upon purported to have retro-active effect; concerning a claimed right to property and to exercise a chosen trade or profession, namely that of wine-maker; concerning the confidentiality of lawyer-client communications; regarding the compatibility of the principle of respect for family life in challenges to the enforced separation, under German immigration law, of families of Turkish Gastarbeiter; in reviewing a decision of a German administrative authority, apparently in accordance with German naming laws, to insist on a particular official transliteration of the name of a self-employed Greek masseur working in Germany; in considering whether the Commission breached the individuals right to privacy in requiring AIDS tests of its employees; in contemplating the compatibility with the fundamental Community right to free movement to take up employment with the system requiring payment of a transfer fee even on the expiry of a contract before a footballer could sign for another club; and in determining whether the right not to be discriminated against in employment on grounds of sex applied to proscribe the dismissal of an individual on the grounds of having undergone a sex change operation.

1 Case No 63/83 R v Kirk [1984] ECR 2689.

3.15 As we have seen, the European Court of Justice proclaims that one of its duties is to ensure that fundamental human rights, as set out in particular in the European Convention on Human Rights, are duly protected in all areas which are covered by Community law. National courts, too, by virtue of their duties under article 10 of the Treaty of Rome wholly and faithfully to apply Community law, will be obliged to ensure the protection of fundamental rights in all cases where, as the Second Division, put it ‘the subject matter has a Community content’.

1 See eg Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727.
2 Article 10 (formerly 5) of the post-Amsterdam Treaty of Rome is in the following terms: ‘[i] member states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.
[iii] They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.’
Conversely, where the national legislation in question does not fall within the field of application of Community law, the Court of Justice has confirmed that it has no power or jurisdiction to give any interpretative guidance for determining whether or not national legislation was in conformity with the Convention for the Protection of Human Rights and Fundamental Freedoms (the 'European Convention').


The crucial question then becomes, when does a case have a subject matter with a Community content? Clearly where one is dealing with directly applicable Community measures, such as Community regulations in the sphere of Agriculture and Fisheries, or Commission decisions in the field of Competition, the courts, both European and national, may have regard to fundamental rights provisions as part of the general principles of Community law. Since the mid-1980s the Court of Justice has held that fundamental rights protection was not a principle confined to acts of the Community institutions, but could be extended even to the actions of the member states when seeking positively to implement a Community provision. The Court of Justice went on to hold in a 1991 decision that as soon as any national administrative decision or indeed primary legislation of the member state sought to derogate from Community law, the member state's action was then 'within the scope of Community law' and fundamental rights considerations could be used by the court to consider and test the validity of the legislative and administrative actions of the member state. It would appear, then, that it is only where the member states have exclusive jurisdiction, and do not share competences with the Communities, that they will be exempt from fundamental rights supervision by either the European Court of Justice or by the national courts acting as Community courts. Rules of national law in areas which are also subject to Community regulation should therefore incorporate respect for human rights.

1 Case C-2/92 R v Minister of Agriculture, Fisheries and Food, ex p Bostock [1994] ECR I-955, in particular the comments of Advocate General Gulmann at 971.

Thus, national legislation which seeks to implement Community law, or to derogate from Community law must be subject to review on human rights grounds. National courts therefore have a duty to ensure that national legislation falling within the field of operation of Community law accords with respect for human rights, as this is understood and applied by the Court of Justice.

3.19 The competencies of the Community and so the scope of Community law are, then, broad indeed. Matters such as health and safety, product liability, sex discrimination, employment protection and company transfers now have a European dimension, regardless of any cross-border element. Fundamental rights considerations will be applicable to national measures where the national or European court is considering a provision by a member state which seeks, whether in whole or in part, to implement a Community measure, such as a directive. The following examples of implementing measures from United Kingdom law may give some idea of the potential scope for fundamental rights arguments within the sphere of Community law:

- the Sex Discrimination Act 1975 and the Transfer of Undertakings (Protection of Employment) Regulations 1981 in the field of employment law;
- the 1992 six pack of Health and Safety at Work Regulations which now largely replace the Factories Acts as the basis for a statutory case in workers' compensation claims;
- the Trade Marks Act 1994 and the software protection provisions of the Copyright Design and Patents Act 1988 in the field of intellectual property;
- the Consumer Protection Act 1987 and the Unfair Terms in Consumer Contracts Regulations 1994 in the area of consumer safety; and
- in the field of criminal law, money laundering and the importing of excisable goods from another Member State ('bootlegging') are all covered by and now derived from provisions of European Community law.

1 The 1975 Act is to be interpreted as a measure implementing the Equal Opportunities Directive 76/207/EEC.
2 Implementing the Acquired Rights Directive 77/187/EEC.
3 Passed in implementation of the 1993 Series of daughter directives produced under and in terms of the Second Framework Directive in Health and Safety Matters 89/391/EEC.
4 Implementing, in part, the First Trade Marks Directive 89/104/EEC.
5 Introduced in implementation of the Computer Software Copyright Protection Directive 91/250/EEC.
7 Implementing the Unfair Contract Terms Directive 93/13/EEC.
8 Implementing, in part, the Environmental Impact Assessment Directive 85/337/EEC (as amended by Directive 89/428/EEC) which requires consideration to be given to the effects on the environment of both public and private development projects before
planning or development consent may be granted. The appropriate authority with responsibility for development control must consider the environmental impact assessments produced together with any representations from environmental bodies and the general public before determining whether or not consent should be given to the project in question.

9 Implementing among other provisions, the Drinking Water Directive 80/778/EEC.
10 Implementing various daughter Directives produced under and in terms of the First Framework Waste Directive 75/442/EEC as amended by Directive 91/156/EEC.
11 In Lopez Ostra v Spain [1995] 20 EHRR 277, the Court of Human Rights awarded compensation to an individual who claimed that the operation of an unlicensed waste treatment plant which resulted in the giving off fumes and smells causing health problems for local inhabitants was a contravention of his right under article 8 of the Convention to respect for private and family life.

3.20 In 1993 the Department of Trade and Industry estimated that over a third of existing United Kingdom legislation at that date arose from an obligation to implement EC law and suggested that that proportion was likely to increase, given that almost seventy percent of future business law was likely to be derived from the European Community¹. It would appear from these statistics that the Commercial court would be the most likely national court in Scotland within which arguments based on the direct effect of the protection of fundamental rights found in the European Convention might be developed.


3.21 As we have noted, in the case of directly applicable Community regulations, or national law which implements Community provisions, there is no need for there to be any cross-border element before the full panoply of arguments derived from the Community law, including the principle of fundamental rights protection, may be prayed in aid. Where there is a cross-border element, however, the directly effective articles of the Treaty, and the general principles of the free movement of goods, persons, capital and services derived therefrom, may also come into play in legal argument before the national court.

THE SCOPE OF HUMAN RIGHTS PROTECTION UNDER COMMUNITY LAW

3.22 In certain cases, the European Court of Justice has appeared to go even further in its proclaimed zeal for the improved protection of fundamental rights within the Europe Union. The Luxembourg court has claimed that the over-arching principle of respect for fundamental rights as set out in the European Convention may be used to check member states action, not simply in areas in which they seek to act in implementation of Community law, but even where the national authorities seeks to derogate, that is lawfully to take advantage of a member state exception or opt-out, from general Community law¹ or where their actions can be said to have general effects in areas also covered by Community law².
3.23 It should be borne in mind that, in any event, standing the fact that the protection of human rights is one of the fundamental general principles of Community law, in cases within the field of application of Community law the national courts will be required to ensure the full protection of human rights, regardless of the question as to status of the alleged offending party as an 'emanation of the state'. As the then Advocate General and subsequently, Judge Mancini noted:

'The general principles elicited by the court from the primary and secondary provisions of Community law, and in particular from those fundamental values which are common to the legal systems of the member states, form part of the Community legal order and may therefore be relied upon by individuals before the national court which, as is well known is also a Community court... The general principles of law... have direct effect. Accordingly they must be applied by national courts if the circumstances in relation to which they are relied upon display a connection with the Community system'.

1 In Case 237/82 Jongeneel Kaas v Netherlands [1984] ECR 483 at 520, 52.
2 See also C-249/96 Grant v South West Train [1998] ECR I-449, ECJ in which the court proceeded on the assumption of the applicability of the general principle of respect for fundamental rights, without first looking at the question of whether or not the defenders, a privatized rail company, fulfilled the requirements for constituting an emanation of the State.

3.24 One commentator has written in relation to this development of human scrutiny of member state action by the (national courts acting as) Community courts as follows:

'By this extension of the court's fundamental rights jurisdiction, the ECJ had not only arrogated to itself a constitutional jurisdiction over the actions of member states which was nowhere contemplated in the founding Treaties, but it had given the domestic courts in those states (indeed required them to exercise) a jurisdiction which they otherwise lacked, albeit one confined to the sphere of Community law'.


3.25 Where some, however tenuous, connection with Community law can be found, then the national authorities are to be subject to judicial review and scrutiny on fundamental rights grounds, as these are understood by the European Court of Justice. Thus, the restricted availability of abortion within Ireland and the ban on homosexuality within the Armed Forces in the United Kingdom have been found by national courts to raise sufficient connection with Community law to require a ruling from the European Court of Justice as to the respective national provisions compatibility, on human rights grounds, with European Community law.

1 See Case C-348/96 Criminal Proceedings against Donatella Calìfa (21 January 1999, unreported) where the fact that an Italian national convicted of minor drugs offences in Greece was
expelled for life from Greek territory was found to be sufficient to establish the necessary connection with Community law to allow review of the sentence by the European Court of Justice.

2 See SPUC v Grogan [1990] 1 CMLR 669 for a decision of the Irish Supreme Court considering an appeal against this reference to the ECJ by a lower court

3 R v Ministry of Defence, ex p Smith and Grady [1996] 1 All ER 257, CA; R v Secretary of State for Defence, ex p Perkins [1997] IRLR 297, QBD per Lightman J; and R v Secretary of State for Defence, ex p Perkins (No 2) [1998] IRLR 508, QBD per Lightman J.

3.26 In the case of P v S¹, the European Court of Justice appeared to hold that the court had a general duty to uphold human dignity and freedom. The court stated that the prohibition on grounds of sex contained in the Equal Treatment Directive 76/207 embodied ‘a fundamental right whose observance the court has a duty to ensure’ and held that it extended to transsexuals or those undergoing ‘gender re-assignment’. To tolerate employment discrimination against transsexuals would, in the words of the court:

‘be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court [of Justice] has a duty to safeguard’.


3.27 Article 6 of the post - Amsterdam Treaty on European Union effectively adopts the European Convention as the Bill of Rights for the European Union. Even in the absence of any explicit enumeration of fundamental rights in the Treaty of Rome, however, as a result of the repeated claims over the years by the European Court to be the guardians of a supra-national constitutional order founded on the ‘rule of law’, national courts now have a duty to ensure that national law falling within the field of operation of Community law accords with respect for human rights, as this is understood and applied by the Court of Justice².

1 See Case 294/83 Parti Ecologiste ‘Les verts’ v European Parliament [1986] ECR 1339 at 1365: ‘[The Community] is based on the rule of law, inasmuch as neither the member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’.


2 The formula adopted by the Court of Justice is seen in Case 177/94 Re Gianfranco Perfilli [1996] ECR I-161 at para 20 (emphasis added):

‘According to settled case law, where national legislation falls within the field of application of Community law, the court, when requested to give a preliminary ruling, must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights – as laid down in particular in the European Convention of Human Rights – the observance of which the court ensures’

3.28 Thus, even before the formal incorporation of the European Convention of Human Rights into the domestic law in the United Kingdom, it was and remains fully effective in courts in Scotland even outwith the confines of the Human Rights Act 1998 where questions arise which may be said broadly, to fall within the scope or sphere of European Community. In
practice, this means that the Scottish courts must, in cases involving a
Community law element, refuse to apply any national implementing or
derogating legislative provisions in either the civil or criminal field which
cannot be interpreted consistently with the requirements of human rights
protection as embodied in various international documents. The courts
must also be willing, in such Community law cases, to strike down as
invalid any national administrative action or decision contrary to the
requirements of fundamental rights protection.

3.29 Finally, while as we noted article 6.1 of the post-Amsterdam Treaty
on European Union provides that '[t]he Union is founded on the principles
of liberty, democracy, respect for human rights and fundamental freedoms
and the rule of law, principles which are common to the member states',
article 7 of the European Union Treaty also now provides the machinery for
sanctions to be taken by the Council against a member state, including loss
of voting rights where it has been duly established that there is a serious
and persistent breach by that member state of any of the aforementioned
principles, including respect for human rights.

THE EUROPEAN COURT OF JUSTICE AND THE
EUROPEAN COURT OF HUMAN RIGHTS

3.30 It should be noted that where fundamental rights arguments are
raised before a national court in a case in which 'the subject matter has a
Community content', it is the duty of the national court, as a matter of
Community law to apply the interpretation of the fundamental rights
provision, even where this is derived from the European Convention on
Human Rights, as that provision has been understood and interpreted by
the Luxembourg European Court of Justice, rather than as it has been
construed by the Strasbourg European Court of Human Rights. One com-
mentator has drawn the following contrasts between the two European
courts approaches to the interpretation of what might constitute lawful
restrictions on claims to fundamental rights:

'The import of the Court [of Justice]'s approach is that any restriction which is
convenient for the purpose of achieving a worthy objective is acceptable. Also
the rule [of the Court of Justice] that a restriction must not infringe the very
substance of the right concerned falls some way short of the Convention's
insistence that a restriction upon a fundamental right must go no further than
is necessary to achieve its objectives. The ECJ's apparently less stringent
approach to the fundamental rights guarantees set out in the Convention has
resulted in only a handful of successes for individuals seeking to rely upon
their Convention rights in opposition to rules and regulations in the EC law
sphere. Not surprisingly, it has also given rise to inconsistencies between the
level of protection for those rights which is offered by the ECJ and that
guaranteed by the Court of Human Rights'.
3.31 The inter-relationship between the requirements of Community law and Convention rights is not a matter which has been addressed in the Human Rights Act 1998. Section 3 of the 1998 Act envisages that provisions of secondary legislation which are found to be incompatible with the Convention rights may in effect be set aside by the courts. What if the provisions of secondary legislation in question are produced under and in terms of section 2(2) of the European Communities Act 1972 because in implementation of requirements of Community law? There is nothing in the 1972 Act which explicitly prevents the courts from removing the incompatibility in question. On the face of it then, the requirements of the European Convention are being given a higher status by the Human Rights Act 1998 than are the requirements of Community law.

3.32 To accord supremacy to Convention rights over Community law would be a breach of one of the most basic principles of Community law. The precise relationship between national law and the law of the Community was not spelled out in the provisions of the 1957 Treaty of Rome. This whole topic of the relationship between national and Community law was first addressed by the Court of Justice in 1964. In Costa v ENEL1 the Luxembourg Court held that obligations undertaken by member states under the Treaty of Rome could not be called into question by subsequent legislative acts of those member states. If this were the case Community obligations would be contingent, rather than unconditional; the law stemming from the Treaty would accordingly be deprived of its character as Community law; and the legal basis of the Community would therefore be called into question. The Court stated that in entering the Community, member states had permanently limited their sovereignty to the extent that their subsequent unilateral legislative acts could not prevail against Community obligations. Community law is to be regarded as having supremacy over national law. Consequently, conflicts between the rules of the Community and national laws must be resolved by the national court applying the Community law principle that Community law takes precedence.


3.33 The precedence of Community law even over the fundamental rights provision recognised in the Constitutions of various member states, notably Germany and Italy, was subsequently emphasised by the Court of Justice in Internationale Handelsgesellschaft:

'Recourse to the legal concepts of national law in order to judge the validity of measures adopted by institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without
being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measures or its effect within a Member State cannot be affected by allegations that it runs counter either to fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.


3.34 The case law of the Luxembourg court on supremacy would seem to present United Kingdom judges with the possibility of a direct constitutional conflict as regards the fundamental nature to be accorded to the Convention rights. The judges can resolve their dilemma in either of two ways: either by following the plain words of the Human Rights Act 1998 and according supremacy to Convention rights over all, even Community law derived secondary legislation, and thereby place themselves in breach of Community law; or by re-writing the provisions of the 1998 Act so that it contains a clause recognising the supremacy of Community law even over Convention rights. While in Litster v Forth Dry Dock, the House of Lords showed themselves willing to re-write provisions of a national statutory instrument so as to ensure that it fully and accurately reflected the provisions of the European legislation which it was purporting to implement, for the courts to take upon themselves the re-writing of piece of primary legislation which does not bear to implement any requirements of Community law, would be a step of major constitutional significance.


3.35 A related matter which arises from the consideration of the establishment of a hierarchy of norms as between Community law and Convention rights, is the matter of the weight to be accorded to the judgments of the Strasbourg European Court of Human Rights vis-à-vis the judgments of the Luxembourg European Court of Justice in fundamental rights cases. There have already been instances of divergences between these two courts. In Hoechst the Luxembourg court held that the right to privacy of the individual’s ‘privacy, family life, home and correspondence’ guaranteed under article 8(1) of the European Convention did not extend to business premises and so upheld the legality of ‘dawn raids’ by the European Commission seeking evidence for anti-competitive practices; by contrast, the Strasbourg Court has held in Niemitz that the purpose of article 8 was to protect the individual against arbitrary interference by public authorities and so its protection extended to the individual’s professional or business activities or premises. Similarly in Orkem the Luxembourg Court, although ruling that the Commission could not compel a company to provide it with answers which might involve an admission of a breach of Community law which it was incumbent upon the Commission to prove, opined that article 6 of the European Convention did not confer a right not to give evidence against oneself; by contrast, the Strasbourg Court in Funke stated that article 6 of the European Convention did indeed
protect the right to remain silent and not to contribute to incriminating oneself. And while in **SPUC v Grogan** the European Court of Justice held that national restrictions on the dissemination by a students' organisation in Ireland of details about the availability of abortion in Great Britain did not amount to a breach of Community law and the fundamental rights protected therein, since there was no economic link between the information provider and the abortion service provider, the self-same restrictions on Irish abortion counselling services were found by the European Court of Human Rights to constitute a breach of the applicants' rights to free expression.

2 **Niemitz v Germany** (Ser A No 251, Judgment 16 December 1992) 16 EHRR 97.
6 See **Open Door Counselling and Dublin Well Woman Clinic v Ireland** (1993) 15 EHRR 244.

3.36 It is not clear how divergences between the two European Courts on the proper interpretation of fundamental rights provisions might be resolved as a matter of strict law. In **Al-Jubail** Advocate General Darmon stated that, as a matter of prudence, to maintain the position taken by the European Commission of Human Rights that complaints made under the European Convention against national decisions enacted pursuant to a Community Act were inadmissible before the machinery of the Council of Europe, the Court of Justice should seek to avoid 'conspicuous discrepancies' between the construction placed by the Luxembourg Court of Justice on the rights to a fair trial and the requirements as laid down by the Strasbourg European Court of Human Rights.

1 Case **C-49/88 Al-Jubail Fertiliser Co and Saudi Arabian Fertiliser Co v Council** [1991] ECR I-3187 at 3230-1
2 See Application No 13528/87 **CM & Co v Germany** (1990) 64 D&R 138 where it was held that (emphasis added):

   'The transfer of powers to an international organization [pace the European Community] is not incompatible with the Convention [on Human Rights] provided that with the organization fundamental rights receive an equivalent protection'.

3.37 The European Court of Justice, however, jealously guards its own sovereignty as the Supreme Court of the European Union. The Luxembourg Court has gone so far as to suggest that article 164 of the Treaty provides the basis for an unalterable fundamental constitutional principle of European Community law to the effect that the European Court of Justice cannot be subordinated to any other court system. As we have seen, the Court of Justice is clear that Community law takes precedence over other agreements, such as the European Convention on Human Rights, concluded within the framework of the Council of Europe, certainly insofar as Community law is more favourable to individuals and, in any
event, in all cases involving a conflict over fundamental rights guaranteed under national law, whatever the degree of protection to individuals conferred thereunder.  


3.38 Certain commentators on the work of the Court of Justice have noted a tendency on its part, perhaps understandably as the Supreme Court of a Common Market and Economic Community based on Free Trade, to translate fundamental rights arguments into economic arguments, with a consequent tendency to distort the substance of those rights into questions of money or money's worth, equating them with rights to trade in the free market: the Irish abortion case was the prime exemplar of this phenomenon. The underlying suggestion was that it would be better to leave the development of human rights to courts specifically designed to protect them, particularly the Strasbourg based European Court of Human Rights.


3.39 In adopting the language of the protection of fundamental rights protection the European Court of Justice has placed itself in a critical dilemma. If it interprets those rights in the context of the overall aims of the Treaty of Rome to promote an ever closer union of the peoples of Europe by establishing a single market, it is accused of down-grading real concern for individual human rights, both by subordinating them to the political aim of further European integration favoured by the central Community institutions, and by equating rights of respect and dignity owed to all human beings with the economic freedoms accorded to and exercised only by the commercially active and useful.

1 For such a critique, see Phelan 'Right to Life of the Unborn v Promotion of Trade in Services: the European Court of Justice and the Normative Shaping of the European Union' (1992) 55 Modern Law Review 670.

3.40 If the Court of Justice takes a broader view of the protection of fundamental rights divorced from any specific economic context, however, and presents itself as the protector of the rights of the individual European citizen against the excesses or failings of the member states it is accused of 'running wild' and usurping a role which was never intended for it. This is particularly the case where the member states' constitutions embody values which are not wholly or accurately reflected in the European Convention on Human Rights or other international instruments for human rights protection from which the European Court of Justice draws its inspiration.
3.40 Human Rights and Judicial Review

1 See the claims of Advocate General Jacobs in Case C-168/91 Konstantinidis v Stadt Altensteig Standesamt [1993] ECR 1-1191 at para 46 of his opinion:

'[A Community national] is in addition entitled to assume that, wherever he goest to earn his living in the European Community, he will be treated in accordance with the common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say 'civis europaeus sum' and to invoke that status in order to oppose any violation of his fundamental rights'.

2 See generally Rasmussen On Law and Policy in the European Court of Justice (1986) for a sustained attack on the policy choosing and making role of the European Court of Justice.


3.41 Whatever motives may be ascribed to the European Court of Justice in introducing the rhetoric of the protection of human rights into its judgments, firstly in relation to challenges to the validity of acts of the Community institutions and subsequently to the acts of member states, it is clear that the effect of this jurisprudential development has been to empower, and indeed require national courts to subject national laws and decisions which fall within an area covered by Community law, to scrutiny on human rights grounds.

3.42 In addition to these express European Convention rights the general principles of administrative law which have been developed in its case law by the European Court of Justice, independently of the provisions of the European Convention, may also be relied upon in cases involving a Community law element. These general principles include, as we saw in Chapter 2, the principle of proportionality; the protection of substantive legitimate expectation; the preservation of legal certainty; respect for the standard of formal equality; natural justice and due process including the right to legal representation, the protection from self-incrimination the preservation of the confidentiality of communications between lawyer and client, the right to a hearing on evidence, the right to reasons and the right to an effective judicial remedy by way of judicial review.

3.43 The Court of Justice gave lawyers the opportunity to invoke the provisions of the European Convention on Human Rights directly before the Scottish courts, without reference to the limitations on its use in purely domestic situation which were set down by the courts in both England¹ and Scotland² prior to the incorporation of the Convention into domestic law. The case law of the Court of Justice still requires national judges to ensure in cases involving a Community law element, that the rights specifically set out in the European Convention of Human Rights are protected against any contrary national legislation or administrative decision. Thus, even following the enactment of the Human Rights Act 1998, Westminster legislation within the field of Community law remains subject to assessment for its compatibility with human rights protection, and to dis-application by the courts should it fail this human rights scrutiny, regardless of the views, or considerations of the sovereignty of, the Westminster Parliament³.

¹ R v Home Secretary ex p Brind [1991] 1 All ER 720, HL.
The Human Rights Act 1998

3.44 Within the field of application of Community law, the opportunity is there to invoke all the provisions of the European Convention of Human Rights, regardless of the limitations imposed by the 1998 Act, against any contrary provisions of primary Westminster legislation, so as to ensure the protection and vindication of the fundamental rights recognised by the Luxembourg Court of Justice. The possibilities for novel argumentation, ground breaking decisions and swift legal development are clear. The scope for inventive legal argument is increased. The potential is also given to judges to expand the substantive protection of the individual against the organs of the State.

THE HUMAN RIGHTS ACT 1998

3.45 The Human Rights Act 1998 incorporates into the domestic law of the United Kingdom a number of the rights set out in the European Convention on Human Rights and its associated protocols. Section 1(1) of the Act specifies that the following rights, termed 'Convention rights', have been translated from the Convention into domestic law:

- article 2 guaranteeing the right to life;
- article 3 prohibiting torture;
- article 4 prohibiting slavery or forced labour;
- article 5 guaranteeing a right to liberty and security of the person;
- article 6 giving a right to a fair trial both in the determination of civil rights and obligations and in relation to criminal charges;
- article 7 which incorporates the principle that there should be no punishment without law and in particular no retrospectively in the definition of criminal offences;
- article 8 guaranteeing a right to respect for private and family life;
- article 9 upholding the right to freedom of thought, conscience and religion;
- article 10 protecting the right to freedom of expression;
- article 11 setting out the right to freedom of peaceful assembly and freedom of association including the right to form and join trade unions;
- article 12 giving men and women of marriageable age the right to marry and found a family;
- article 14 prohibiting discrimination in the enjoyment of the rights set out in the Convention 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status';
- article 1, protocol 1 guaranteeing the protection of property and the peaceful enjoyment of possessions;
3.45 Human Rights and Judicial Review

- article 2, protocol 1 guaranteeing the right to education by the state in accordance with the philosophical and religious beliefs of parents, insofar as this is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure;
- article 3, protocol 1 setting out the right to free elections in the choice of legislature; and
- articles 1 and 2 of protocol 6 prohibiting the use of the death penalty except in respect of acts committed in time of war or of imminent threat of war.

1 The 'Convention rights' are set out in Appendix 2.

3.46 Articles 2 (right to life), 3 (prohibition against torture), 4 (prohibition against slavery and forced labour) and 7 (no retrospective criminal offences) are absolute unqualified rights and by virtue of article 15(2) may not be derogated from by contracting states. The liberty and due process provisions of articles 5 and 6 may only be derogated from in time of war or public emergency by virtue of article 15(1). Articles 8 (privacy), 9 (freedom of religion) 10 (freedom of expression) and 11 (freedom of assembly), protocol 1, article 1 (right to property) and protocol 1, article 2 (right to education) are not absolute rights, but rather rights the exercise of which may lawfully be qualified or restricted by contracting states provided that these qualifications or restrictions are justified in the sense of being proportionate responses which are 'necessary in a democratic society'.

3.47 For reasons which are not entirely clear, article 13 of the Convention, which gives the right to an effective remedy before a national authority to everyone whose rights and freedoms as set forth in the Convention have been violated, notwithstanding that the violation has been committed by persons acting in an official capacity, has not been included among the Convention rights which have been incorporated by the 1998 Act into domestic law.

3.48 The incorporation of certain rights taken from the European Convention is intended to supplement the existing body of individual rights guaranteed under the law. This is made clear by section 11(a) of the 1998 Act which provides that a person's reliance on a Convention right does not restrict either his claim to the protection of any other right or freedom conferred on him by or under any other law in the United Kingdom.

PUBLIC/PRIVATE DISTINCTION UNDER THE HUMAN RIGHTS ACT 1998

3.49 Section 6(1) of the 1998 Act makes it unlawful for a 'public authority' to act in a way which is incompatible with a Convention right. 'Public authority' is defined in section 6(3) as including 'a court or tribunal' (specifically encompassing the House of Lords in its judicial capacity) and 'any person certain of whose functions are functions of a public nature'
except where the nature of the act or the failure by that person to act can be said to be ‘private’. In effect, this statutory definition of reviewability under the 1998 Act seems to be extending throughout the United Kingdom the public/private law test developed by the House of Lords as the basis for general judicial review in England and Wales.


3.50 The definition of ‘public authority’ excludes both Houses of the Westminster Parliament as well as persons ‘exercising functions in connection with proceedings’ in that Parliament. Section 6(6) provides that the failure to introduce or lay before the Westminster Parliament a proposal for legislation to make any primary legislation or remedial order will not constitute an act which, for the purposes of the 1998 Act at least, requires to be compatible with a Convention right.

3.51 The acts of a public body in breach of a Convention right following the implementation of the 1998 Act is no longer to be characterised in judicial review terms as a species of ‘irrationality’ and thus subject to the high hurdle of Wednesbury unreasonableness. Rather it will become a form of illegality and thereby made subject to strict scrutiny by the courts in judicial review procedure examining whether or not the decision maker has in fact acted in a manner which is compatible with Convention rights. Where as a result of a provision of primary Westminster legislation the authority in question could not have acted differently, or where it was acting to give effect to or to enforce a provision of or made under primary legislation which cannot be read in a manner compatible with Convention rights, the court cannot make a finding that the authority has acted illegally in breach of the requirements of the Convention.


3.52 In coming to their decisions on the compatibility of acts or omissions of public authorities with any of the Convention rights, the courts are enjoined to take into account all and any relevant decisions of the Strasbourg institutions established under the Council of Europe, namely the Court of Human Rights, the Commission on Human Rights and the Committee of Ministers. This means that the Strasbourg doctrine of proportionality rather than Wednesbury unreasonableness will be directly imported into domestic consideration of challenges to administrative action on Convention grounds. However the domestic courts would not appear to be formally bound to apply the decisions of the European Court of Human Rights to the facts of the case before them, leaving the way open for a national human rights jurisprudence to develop, less trammelled by the Strasbourg institutions’ deference to the contracting states’ ‘margin of
appreciation' which doctrine was explained in one case before the Court of Human Rights as follows:

'By reason of their direct and continuous contact with the vital forces of their countries, the national authorities [including national courts?] are in principle better placed than an international court to evaluate local needs and conditions'.

1 For an example of a more robust approach taken by national courts to the decisions of the national administration where human rights issues are raised, see Salah Abladou v Secretary of State for the Home Office, 1998 SC 504, 1999 SLT 229, OH per Lord Eassie. See also N Lavender The Problem of the Margin of Appreciation [1997] European Human Rights Law Review 380.

2 Buckley v United Kingdom (1997) 23 EHRR 101 at 129, para 75. See also Handyside v United Kingdom (Ser A No, Judgment 7 December 1976) 1 EHRR 737 at 754, para 48.

3.53 David Pannick QC has, however, suggested that it might be appropriate for there to be a local translation of this doctrine as follows:

'[A]lthough the doctrine of margin of appreciation will not apply (being concerned with the circumstances in which an international court should substitute its judgment for that of a national court), the courts applying the Human Rights Act should recognise an analogous doctrine which will accord a discretionary area of judgment in relation to policy decisions which the legislature, executive and public bodies are better placed than the judiciary to decide'.


3.54 Further in defining 'public authority' to include courts and tribunals, the 1998 Act requires them to discharge their functions and come to their decisions in a manner compatible with Convention rights. The implications of this statutory definition are potentially revolutionary: arguably the Act now requires courts to act in a manner compatible with the rights guaranteed under the Convention, regardless of the public or private nature of the parties appearing before it. What this means is that the Act is not simply incorporating the European Convention in the sense that it is making the existing international obligations of the state directly enforceable in the domestic courts (what in a Community law context is known as 'vertical direct effect'). It is in fact transposing, by virtue of an interpretative obligation, what were the international obligations of the state into obligations owed by every individual within the state to one another (what Community law writers refer to as 'horizontal indirect effect') and, in effect, making what were constitutional public law norms applicable and enforceable within the purely private sphere.


3.55 Further the general common law including, arguably, doctrines of precedent and of the binding nature of the judgments of higher courts, will itself now require to be subordinated to the requirement to ensure the full
protection of Human Rights. Thus, any court before which the question of the protection of a Convention right is properly raised will have the duty, if it considers the complaint to be well-founded, to over-rule any contrary prior authority, even if otherwise binding upon it.¹

1 Compare within the field of Community law the rejection of national doctrines of the binding nature of past precedent and higher courts implicit in the decision of the Court of Justice in Case 166/73 Rheinmühlen Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Füttermittel [1974] ECR 33.

3.56 Section 9(1) of the Act provides that any complaint that a court has acted in breach of a Convention right may only be brought by way of appeal against its decision or, if the court in question is otherwise subject to judicial review, by way of judicial review.

3.57 Section 12 of the Act makes particular provision in respect of the right to freedom of expression under the Convention. The courts should not grant any relief which might affect this Convention right in the absence of the respondent against whom the relief is sought unless satisfied either that all practicable steps have been taken to notify the respondent or that there are compelling reasons that no such notification should be made. In effect this section provides for a deemed statutory caveat in the case of challenges to free expression. Interim relief might only be granted where 'the court is satisfied that the applicant is likely to establish that publication should not be allowed' having particular regard in the case of journalistic, literary or artistic material, to public availability or public interest and any relevant privacy code.

3.58 It should be borne in mind that where the domestic courts have, despite incorporation, failed to give full and adequate protection of the right protected and guaranteed under the Convention, this may form the basis for an application to the Strasbourg court, once all domestic remedies have been exhausted. Incorporation does not, then, remove the potential or need of ultimately obtaining a final authoritative judgment from the European Court of Human Rights on the proper interpretation and application of the Convention.

THE INTERPRETATIVE OBLIGATION – THE INDIRECT EFFECT OF CONVENTION RIGHTS

3.59 Section 3 of the 1998 Act imposes a duty on all domestic courts and tribunals, so far as it is possible to do so, to read and give effect to all primary and subordinate legislation in a way which is compatible with those substantive provisions of the European Convention on Human Rights which have been incorporated into United Kingdom domestic law.

3.60 This provision would seem to be intended to parallel the strong interpretative obligation of national courts under article 5 of the Treaty of
Rome to interpret national law in accordance with the wording and purpose of the relevant Community provision, even where the domestic legislation was enacted prior to the Community law provision in question. Thus, national courts in the United Kingdom have power under Community law to add to, delete from or hold ineffective provisions of implementing national legislation in order to ensure that they give full and accurate effect to Community law. As Lord Oliver of Aylmerton stated in a seminal judgment in the House of Lords in a case which turned on the correct interpretation of the Transfer of Undertakings (Protection of Employment) 'TUPE' Regulations 1981 in the light of the Community directive which the national regulations purported to implement:

'[T]he greater flexibility available to the court in applying a purposive construction to legislation designed to give effect to the United Kingdom's Treaty obligations to the Community enables the court, where necessary, to supply by implication words appropriate to comply with those obligations. ... Having regard to the manifest purpose of the regulations I do not for my part feel inhibited from making such an implication in the instant case'.

3 See Pickstone v Freemans plc (1989) AC 66. The question as to how national courts should deal with non-implementing national legislation which conflicts with Community law will be dealt with below.
4 SI 1981/1794.
6 Litster v Forth Dry Dock Co Ltd (1990) 1 AC 547 at 577.

3.60 It should be noted that in Litster there was no ambiguity in the United Kingdom regulations. As Lord Slynن, formerly United Kingdom judge on the Court of Justice and now sitting in the House of Lords has noted extra-judicially:

'[I]t is necessary for the national court to take account of the terms of the directive where implemented by specific legislation at all times. It would not be consistent with the obligation for a national court to be subject to a precondition such as a requirement that it may not look behind the text of a national implementing measure unless it is found to be ambiguous. For a court to tie its hands in this way might lead to a 'wrecking' interpretation of national provisions which might needlessly bring them into conflict with Community law rules'.


3.61 The court in Litster was not confronted with two or more possible constructions and invited to choose the one which reflected the requirements of Community law. Rather, the national regulations were simply inadequately drafted in so far as they were intended to implement the Community directive. The court accordingly did not take the meaning from the text of the national regulation before them ('exegesis'), instead it read material into the text from its context and effectively re-drafted it to give it the meaning which it should have had ('eisegesis'). Not only does the national court or tribunal have the power to re-read national legislation in this radical, purposive way, but it has a duty to do so under Community
law. A purposive reading of national regulations may require the national court, even where there is no ambiguity in the plain wording of the regulations, to add or delete provisions with a view to achieving the objective of the directive. In the United Kingdom context, this does not involve contra legem interpretation or a usurpation of Parliamentary authority since Parliament’s avowed purpose in passing the national legislation was to implement fully the Community directive.

3.63 While the creative interpretation of national legislation implementing a Community law provision might be justified on the grounds that it was Parliament’s intention to implement fully Community law, it is less easy to take a liberal view in respect of other legislation where the specific intention to implement is not present. This notwithstanding, broader claims about the proper interpretation of national law in the context of Community law have been made by national judges. For example, in Garland v British Rail Engineering Lord Diplock stated that unless an Act of Parliament passed after the United Kingdom’s accession to the European Community expressly stated that it was passed with the intention of breaching Community obligations, then United Kingdom legislation should be construed in a manner consistent with Community law ‘however wide the departure from the prima facie meaning of the language of the provision might be needed to achieve consistency’.

1 [1983] 2 AC 751 at 770-771. See also Lord Oliver in Litster, [1990] 1 AC 547 at 563: ‘If your Lordships are in fact compelled to the conclusion [that the regulations are gravely defective and the Government of the United Kingdom has failed to comply with its mandatory obligations under the Directive], so be it; but it is not, I venture to think, a conclusion which any of your Lordships would willingly embrace in the absence of the most compulsive context rendering any other conclusion impossible’.

3.64 The argument that the Westminster Parliament intends to comply with Community law in all circumstances unless it expressly says otherwise would provide the courts with a general background intention upon which to fasten and so permit a purposive interpretation of all national legislation. It may be said that section 3 of the Human Rights Act 1998 imposes the same obligation on the courts in relation to Convention rights. It is after all Parliament’s intention that legislation be interpreted in accordance with the requirements of Convention rights so far as it is possible to do so however wide the departure required from the prima facie meaning of the provision in question, and notwithstanding that it might be said by the ordinary canons of construction to distort the plain meaning of the national legislation.

3.65 The current Lord Chancellor, Lord Irvine of Lairg, has expressly made the parallel with the interpretative obligation already imposed under Community law and has emphasised the breadth of the ‘possible’ interpretative obligation explicitly imposed on the courts by the 1998 Act as follows:

The [Human Rights] Act will require the courts to read and give effect to the legislation in a way which is compatible with Convention rights ‘so far as it is
possible to do so’. This goes far beyond the present rule. It will not be necessary to find an ambiguity. On the contrary the courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.

... The court will interpret as consistent with the Convention not only those provisions which are ambiguous in the sense that the language used is capable of two different meanings but also those provisions where there is no ambiguity in that sense unless a clear limitation is expressed. In the latter category of cases it will be ‘possible’ (to use the statutory language) to read the legislation in a conforming sense because there will be no clear indication that a limitation on the protected right was intended so as to make it ‘impossible’ to read it as conforming’.


3.66 There is of course an ambiguity about the word ‘ambiguity’. Strictly it means something capable of bearing two or more meanings. It is often used by the courts as if it meant that two possible meanings were, in the context of ordinary language use, equally possible or convincing. This is, however, arguably to confuse the ambiguous with the equivocal. Aside from the interpretative obligation imposed by section 3 of the 1998 Act, the meaning of the provision might be said to be clear or obvious, and in that sense unequivocal. This interpretative provision of the 1998 Act requires the courts to attempt, so far as possible, to interpret the national provision in accordance with Convention rights. The provision in question, then, has to be at least capable (but not necessarily reasonably capable) of bearing such a Convention compatible meaning as well as (but not more obviously than) another prima facie meaning. In that sense a possible reading in accordance with the Convention may be said to render the provision ambiguous.

3.67 In the United Kingdom there is a long-established presumption in the common law that Parliament intends to legislate in conformity with its international commitments and that where a statutory provision is susceptible of more than one interpretation the court should give it the construction which complies most closely with those commitments. However, a judicial power to read statutes contra legem, which arguably would go beyond even the widest view of interpretation, is difficult to reconcile with common law doctrine\(^1\). The resolution of the matter seems to be as follows:

- in the absence of any Community law or Convention rights element, the ordinary language canons of statutory construction should be applied to elucidate Parliamentary intention;
- where there is a Community law or Convention right element, a construction of the provision in question which accords with the requirements of this higher law should be favoured even over the ‘obvious’ or prima facie construction, however strained or artificial this may seem;
- it is only where the statutory language is so phrased as to make it impossible to construe the provision in accordance with the require-
ments of Community law or the protection of the Convention right, that the statute may be construed as in contravention of this higher law.


3.68 This kind of approach to statutory provision is, it is submitted, evident from the two decisions of the House of Lords in Webb v EMO Cargo concerning the question of whether or not the proper interpretation of the Sex Discrimination Act 1975 required a comparison to be made in cases alleging discrimination on grounds of pregnancy between a pregnant woman and a hypothetical sick man. When the matter first came before their Lordships they accepted that it was their duty, as national judges within the Community, to construe domestic legislation in any field covered by a Community directive so as to accord with the meaning of the directive as interpreted by the Court of Justice. This duty applied to domestic legislation regardless of whether it preceded or was subsequent to the directive. This duty was stressed to be one of interpretation rather than interstitial legislation. Where the national law was not intended to implement Community provision, they considered that the duty of the national court did not extend to distorting the otherwise plain meaning of the legislation. Rather, such a statute should only be read in conformity with Community law where it is open to divergent interpretations. On their first reading of the national statute it seemed plain to their Lordships that such a comparison between pregnancy and illness was indeed required. Nevertheless, an article 177 reference was made by them to the European Court of Justice to ascertain what the position was as regards the interpretation of the Equal Treatment Directive 76/207 which post-dated the national legislation by one year. The Court of Justice held that the Equal Treatment Directive did not require any such comparison. Pregnancy is not an illness. The very fact of taking pregnancy into account in making an employment decision was said to constitute sex discrimination since only women can become pregnant. Pregnancy is thus given a protected status from discrimination, notwithstanding the lack of any specific ‘pregnancy protection’ provision in either the 1976 Directive or the 1975 Act. This decision by the Court of Justice placed the House of Lords in a dilemma when the matter was referred back to them. On the one hand they could find that the national statute law did indeed require the comparator approach equating pregnant woman with sick man, in which case the United Kingdom sex discrimination was out of step with and contrary to Community law, opening up the possibility of Francovich damages claims against the government by women whose pregnant status was not given the special protection under national that it required under Community law. On the other hand they could re-consider their first interpretation of the Sex Discrimination Act, and hold that, notwithstanding its wording, the national statute could be interpreted in line with Community law to give pregnancy a protected status without the need for any hypothetical comparator of the opposite sex. The House of Lords with some reluctance chose the latter course, reading the Sex Discrimination Act 1975 second time round in a manner which they had dismissed on their first consider-
ation as artificial, strained and unwarranted by the wording of the statutory provision\(^3\).

1 [1993] 1 CMLR 259, HL.
3 Webb v EMO [1995] 4 All ER 577, HL.

3.69 In summary, in contrast to clear and precise provisions of Community law, the rights incorporated from the European Convention by the Human Rights Act 1998 do not have 'direct effect' against contrary Westminster legislation in the way that that term is understood in Community law as allowing the suspension or dis-application of contrary provisions of national law\(^3\). Direct effect involves the assertion of rights which have been conferred by Community law but which, by definition, national law does not adequately reflect. It requires the national court to displace, rather than to uphold, the terms of national law.

1 See eg Case C-213/89 R v Secretary of State for Transport, ex p Factortame Ltd (No 2) [1990] ECR 2433.

3.70 Sympathetic interpretation or indirect effect, on the other hand, is available in the case of both Community law and Convention rights under national law which seeks to assert the protection of Convention rights under national legislation. The argument for sympathetic interpretation asserts that national legislation does indeed fully reflect the demands of the incorporated Convention rights if only the national court would interpret it in the manner required. It is the court which may be in breach of its obligations under section 6 of the 1998 Act if such an interpretation is not given.

INCOMPATIBLE WESTMINSTER LEGISLATION AND THE HUMAN RIGHTS ACT 1998

3.71 Where it is not possible to read Westminster primary legislation in a manner compatible with Convention rights, section 3(2) of the Act provides that the legislative provisions in question remain fully valid, operative and enforceable. In contrast to the situation where there is an incompatibility with Community law, national courts are not empowered, even after incorporation of the Convention, to 'dis-apply' or suspend primary statutory provisions which contravene human rights.

3.72 Questions as to the compatibility or otherwise of national legislation with the requirements of the Convention itself raise new problems of interpretation for the courts. This is notably the case where the court is required to determine the justifiability of a national provision as a lawful and proportionate restriction ('necessary in a democratic society') in relation to such non-absolute Convention rights as those set out in article 8(2) (privacy and respect for family life), article 9(2) (manifestation of religious beliefs), article 10 (freedom of expression) and article 11 (freedom
of peaceful assembly and association including the right to form trade unions). As has been noted:

The determination of whether a legislative provision is compatible with a Convention right will require a court to interpret the allegedly incompatible provision as well as determining the meaning of the right that gives rise to the allegation of incompatibility. Moreover a court may be required to determine whether the interests served by an allegedly incompatible piece of legislation justify the restriction or interference with the Convention right, thus rendering the piece of legislation compatible. Where a court is required to determine the interests served or protected by the allegedly incompatible legislative instrument, thereby determining whether the purpose of the instrument is compatible with the values protected and upheld by the Convention, it will be required to grapple with what are known as "legislative facts".1


3.73 In contrast to the position in relation to primary Westminster legislation, subordinate legislation which is incompatible with the Convention whether emanating from Westminster, Holyrood or Cardiff would seem, by contrast, to be impliedly repealed to the extent of its incompatibility, except where there is a provision of primary legislation which prevents such a reading of the secondary provision in question. It should be noted that section 21 of the 1998 Act specifically includes acts of the Scottish Parliament within the definition of subordinate legislation.

3.74 Where legislation emanating from the Westminster Parliament cannot be read and given effect to in accordance with the requirements of the Convention, and there is therefore an unavoidable conflict between the Convention rights and a specific legislative provision, section 4 of the Act gives the higher domestic courts (in Scotland, the Court of Session or the High Court of Justiciary sitting as a court of criminal appeal) the power to make a declaration as to the incompatibility of this provision with the Convention as incorporated. In the case of a provision of secondary legislation, such a declaration of incompatibility is appropriate only where this is itself protected from amendment by primary legislation of the Westminster Parliament. The principle of ultimate Westminster Parliamentary sovereignty is said thereby to be maintained. As Lord Irvine of Lairg has stated:

'This innovative technique will provide the right balance between the judiciary and [the Westminster] Parliament. [The Westminster] Parliament is the democratically elected representative of the people and must remain sovereign. The judiciary will be able to exercise to the full the power to scrutinise legislation rigorously against the fundamental freedoms guaranteed by the Convention but without becoming politicised. The ultimate decision to amend [primary Westminster] legislation to bring it into line with the Convention, however, will rest with [the Westminster] Parliament. The ultimate responsibility for compliance with the Convention must be [the Westminster] Parliament's alone'.2

1 The other 'higher courts' for the purposes of the power to make 'declarations of incompatibility' are the House of Lords, the Judicial Committee of the Privy Council the Courts-
3.74  Human Rights and Judicial Review

Military Appeal Court and in England and Wales or Northern Ireland, the High Court of the
Court of Appeal.

2 Lord Irvine of Lairg 'The Development of Human Rights in Britain under an incorporated

3.75 Where a higher court is considering whether or not to make a
declaration of incompatibility, section 5 of the Act gives the Crown the
right to be notified of this and under section 5(2) allows a minister of the
Crown or his nominee, as well as a member of the Scottish Executive, a
Northern Ireland minister or a Northern Ireland Department to intervene
in any such case as parties to the proceedings after giving due notice to the
court.

3.76 Such a declaration of incompatibility by the courts will, by virtue of
section 4(6)(a) of the Act, have no effect on the validity, continuing oper-
ation or enforceability of the offending legislative provision. Further, sec-
tion 4(6)(b) provides that any declaration of incompatibility is not binding
on the parties to the proceedings in which it is made. The obtaining of a
declaration of incompatibility will therefore be a Pyrrhic victory for the
party in whose favour it is granted unless the applicable law is changed
with retrospective effect in his case.

1 See generally N Bamforth 'Parliamentary Sovereignty and the Human Rights Act 1998'

3.77 Any final declaration of incompatibility, that is one against which no
right of appeal exists or is being exercised, gives ministers of the Crown the
power to order under section 10 such amendment to, or repeal of, the
primary or secondary legislation in question as they think is appropriate to
remove the incompatibility. A remedial order may also be pronounced by a
minister if it appears to him or her that a finding of the European Court
of Human Rights produces an incompatibility with the United Kingdom’s
Convention obligations. Any such remedial order will require the
approval of Parliament under the affirmative resolution procedure, all as
set out in Schedule 2 to the Act. In cases of urgency, however, such
approval may be made ex post facto up to forty days.

3.78 It is to be assumed that the decision as to whether or not to grant any
such remedial orders, and whether or not to grant any such order with or
without retrospective effect, will itself be subject to judicial review by the
courts. The effect of section 6(6) of the Act is simply to prevent such review
being made on human rights grounds, and on that point at least avoid the
possibility of a unending spiral of litigation.

STANDING AND 'VICTIM STATUS' UNDER THE
EUROPEAN CONVENTION

3.79 Section 7 of the 1998 Act provides that it is only those who would be
defined by the European Court of Human Rights (under reference to
article 34 of the Convention) as ‘victims’, who have the necessary title and interest either to bring a case of breach of the Convention against an offending public authority before the appropriate court within one year of the act complained of (section 7(5)(a)), or who might rely on the relevant Convention Right or rights in any legal proceedings to which they are party. Article 34 of the post protocol 11 Convention (previously article 25) is in the following terms:

The Court [of Human Rights] may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention and the Protocols thereto. The High Contracting Parties undertake not to hinder the effective exercise of this right.

1 See also the parallel provision in the Scotland Act 1998, s 100(1) which similarly restricts the class of those who might complain about a breach of Convention rights by the Scottish Parliament of Executive to ‘victims’ for the purposes of article 34 of the Convention.


3.80 The effect of section 7(7) of the 1998 Act is that a party can only complain before the national courts of a breach of the rights incorporated within the Convention, if he or she was recognised by the Court of Human Rights as having sufficient locus, title and interest, or standing as to permit them to take a case before the Strasbourg court alleging breach of the Convention. Legal persons or corporate bodies may bring applications in so far as the claim is that there has been a violation of the rights actually conferred on them by the Convention, for example the right to a fair trial (article 6), the right to privacy of correspondence (article 8), or the right to property (article 1, protocol 1). It is clear from the Strasbourg jurisprudence that governmental bodies governed by and acting under public law cannot bring an application to the Court. Unincorporated associations which can point to specific individuals within their membership who, they claim, have suffered violation of their Convention rights have been permitted by the Commission to bring applications to the Court.


2 See Application No 13252/87 Rothenthurm Commune v Switzerland (1989) 59 DR 251.

3.81 The standing of churches to bring actions in their own right alleging breach of their Convention rights has also been accepted by the Strasbourg institutions, and indeed it has been held to constitute a violation of the Convention for a state to deny the separate legal personality of churches established within it. Interestingly, the Human Rights Act 1998 itself makes provision for a special status to be accorded to, or at least formal recognition of the particular interests of, religious organisations. By virtue of section 13 where a court’s determination of any question arising under
the Act might affect the exercise by a religious organisation and/or its collective membership of the Convention right to freedom of thought, conscience and religion, the court is required to have particular regard to the importance of that right.


3.82 'Victim' in the context of the Convention has also been held to encompass a potential victim in that the Commission on Human Rights has recognised the right of persons who can show that they run the future risk of being directly affected by the legal situation complained of to bring applications before the court; for example, married persons denied the possibility of divorce. Representative actions seeking to challenge the law in the abstract will not, however, be accepted from associations or campaigning groups by way of an actio popularis. As the Commission has stated:

'The applicant cannot complain as a representative for people in general, because the Convention does not permit such an actio popularis. The Commission is only required to examine the applicant's complaints that he himself is a victim of a violation.'

1 See Application No 9697/82 J v Ireland (1983) 34 DR 131.

3.83 Concern has been expressed that the imposition of the 'victim test' in relation to challenges made under the Human Rights Act 1998 will in effect restrict the class of individuals or other bodies who currently have been permitted to bring general judicial review challenges before the courts in England and Wales. Standing the Scottish courts' continued insistence that an applicant for judicial review must be able to show both title and interest to sue, it is unlikely that the statutory importation of the Strasbourg 'victim test' as this is presently understood by the courts will make much difference to Scottish practice on standing in judicial review, since the Scottish and Strasbourg tests appear to be similar in their impact.


COMPENSATION FOR DAMAGES FOR BREACH OF A CONVENTION RIGHT

3.84 Section 8 of the 1998 Act allows the court to grant such relief or remedy against a (proposed) act contrary to the incorporated Convention rights as it considers just and appropriate including, if such is already within its jurisdiction, making an award of damages or compensation.

3.85 Damages in respect of a judicial act done in good faith may only be awarded, as required by article 5(5) of the Convention to individuals who
have been the victims of unlawful arrest or detention. Such awards fall to be made against the Crown, but may only be pronounced if the minister responsible has been conjoined as a party in the proceedings.

3.86 In general claims to breach of a convention right, damages should only be awarded if the court is satisfied that in all the circumstances of the case such an award is necessary in order to afford ‘just satisfaction’ to the injured person. In deciding whether and how much to award, the national courts are required by section 8(4) of the Act to take into account the principles applied by the Strasbourg court in relation to the award of compensation under article 41 of the Convention as amended by protocol 11 (previously article 50)\(^1\), which provides that:

‘If the court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the court shall, if necessary, afford just satisfaction to the injured party’.

1 See the Scotland Act 1998, s 100(3) which similarly restricts the national courts to Strasbourg damages in relation to claims of breaches of Convention rights by the Scottish Parliament or Scottish Executive.

3.87 The purpose of a just satisfaction award is compensatory rather than punitive\(^1\), so that ‘the applicant should as far as possible be put in the position he would have been in had the requirements [of the Convention] not been disregarded’\(^2\). The Strasbourg court has refused to award aggravated or exemplary damages\(^3\). The just satisfaction award will normally include a sum in respect of costs and expenses actually, necessarily and reasonably incurred by the applicant in bringing the case\(^4\) together with, if equitable in all the circumstances of the case including questions as to the severity of the breach and the ready quantifiability of the loss, an award covering pecuniary and non-pecuniary loss to achieve ‘a situation as close to restitutio in integrum as was possible in the nature of things’\(^5\).

2 Piersack v Belgium (Ser A 53) (1983) 5 EHRR 169.
5 Windisch v Austria (Ser A No 255-D, Judgment of 28 June 1993) at para 14.

3.88 Included under the head of pecuniary damage are loss of past and future earnings\(^1\), reduction in the value of property\(^2\) and loss of opportunity\(^3\). Awards in respect of non-pecuniary or moral damage have been made by the Strasbourg court to cover such non-quantifiable matters as ‘anxiety, distress, loss of employment prospects, feelings of injustice, deterioration of way of life and other varieties of harm and suffering’\(^4\). Since October 1991 the Strasbourg court has set out in the operative provisions of the judgment, a period of three months from the date of the decision within which the applicant must be paid. Since January 1996 it has provided for interest to be paid in the event of failure to comply with this time-limit.
3.89 Section 7(9) of the 1998 Act provides for rules to be made by the Secretary of State as to the procedure to be followed in proceedings brought under the Act against a public authority alleging breach of Convention rights. At the time of writing, no such rules had yet been made. In any event, as is made clear in section 11(b), a person's reliance on a Convention right does not restrict his right to make any claim or bring any proceedings which he could make apart from the provisions of the Act. Thus, for example, judicial review of delegated legislation on grounds other than breach of an incorporated convention right remains a possibility.

DIRECT APPLICATIONS TO THE EUROPEAN COURT OF HUMAN RIGHTS

3.90 It is a basic principle of the Convention, set out in article 35 of the post-protocol 11 Convention, that direct recourse to the Strasbourg court is only possible once all domestic judicial remedies have been exhausted, otherwise it will not be possible to show that the state is in violation of the Convention. Such an application must be made within a period of six months from the date upon which the final decision complained of was made, that is when all available domestic remedies have been exhausted.

3.91 The state must have been given the opportunity of remedying the alleged violation or redressing the damage by domestic measures. Accordingly the substance of the matter on which an alleged breach of the Convention is based should, if possible, be raised in the course of the domestic proceedings. Failure to cite the provisions of the Convention by way of defence to a criminal trial in the United Kingdom will not, however, bar the applicant from subsequently making an application to Strasbourg.

1 Arrowsmith v United Kingdom DR 8/123; (1981) 3 EHRR 218.

3.92 In cases where the applicant has been reliably and properly advised by counsel that there is no prospect of an appeal or other judicial procedure being successful or effective in remedying the alleged breach, the Commission may deem the domestic remedies to have been exhausted. The onus is on the contracting state, if it wishes to take the point, to show that there was an effective domestic remedy which the applicant had failed to pursue.
Interim measures under the Convention

3.93 There is no specific article within the European Convention allowing for interim or provisional measure of protection to be pronounced by either the European Court of Human Rights pending a final adjudication. The Rules of the European Court of Human Rights, which are purely internal regulations, give the court and its President jurisdiction to indicate to a party or an applicant any interim measures which it deems advisable to adopt.

1 The Court's rule (39) is as follows:
‘Before the constitution of a Chamber, the President of the Court may, at the request of a party, or the Commission, of the applicant or of any other person concerned, or ex proprio motu, indicate to any party and, where appropriate, the applicant, any interim measure which it is advisable for them to adopt’.

3.94 An indication under rule 39(1) will only be given by the court where it satisfied that irreparable damage would result from the implementation of the measure complained of. The pre-Protocol 11 rule 36 of the Commission was only used in cases where the expulsion or extradition of asylum seekers was imminent and the applicant alleged that he would, and the Commission was satisfied that he might be killed or suffer ill-treatment or torture in the receiving state, contrary to articles 2 and/or 3 of the Convention. When rule 36 is invoked by the Strasbourg institutions, all parties are informed by phone and fax of this decision. The governments of the contracting states have, in general, complied with the indicated interim measures, at least in expulsion cases.

3.95 Under article 34 of the Convention each contracting state which recognises the right of individuals to petition the European Commission of Human Rights in respect of alleged violations of their rights under the Convention undertakes 'not to hinder in any way the effective exercise of the right'. Moreover article 27 of the Vienna Convention on the Law of Treaties provides that a State may not invoke the provisions of its internal law as justification for its failure to perform or comply with its obligations under a treaty.

3.96 In the much criticised decision of Cruz Varas v Sweden¹, however, the European Court of Human Rights has held, by a narrow majority (10 against 9), that the pre-Protocol 11 article 25(1) (now article 34) undertaking to comply with the Convention did not imply a general duty on the state to suspend measures at the domestic level or not to enforce domestic decision when an individual had lodged an application with the Commission. Further, the Court held that a rule 36 indication by the Commission constituted only a non-binding recommendation by the Commission and...
does not bind the authorities of the Contracting State in law. The court stated in *Cruz Varas v Sweden*:

'It lies within the appreciation of the contracting parties to decide whether it is expedient to remedy this situation by adopting a new provision, notwithstanding the wide practice of good faith compliance'.


2 (1992) 14 EHRR 1 at 43 paragraph 102 (emphasis added).

3.97 Protocol 11, which amended the European Convention by merging the Commission and the Court into one permanent Court of Human Rights with effect from November 1998, made the right of individual petition to the court compulsory upon ratification of the Convention by the Contracting States. Protocol 11 did not, however, provide specifically for the court to have the power to order interim measures in cases where the individual application could be frustrated by measures of the Government. It is possible that the newly constituted court could take the opportunity to re-consider its decision in *Cruz Varas*, now that all signatory states are obliged to provide for individual petition to the court, and hold that the contracting states’ obligations not to hinder in any way the effective exercise of rights under the Convention thereby give legal force to interim indications from the court.

Chapter 4

Judicial Review and Westminster Legislation

INTRODUCTION

4.01 In 1906 the Danish master of a Norwegian registered trawler was convicted in Dornoch Sheriff Court of illegal fishing within an area of the Moray Firth contrary to bye-laws made under the Herring Fishery (Scotland) Act 1889, and was fined in accordance with penalties laid down in the Sea Fisheries Regulation (Scotland) Act 1895. He appealed against conviction and sentence on the grounds, among others, that he was neither a British subject nor within the three mile limit of British territorial waters at the time of the alleged offence, he could not be subject to the jurisdiction of the Scottish courts. The appeal was considered by a full bench of the High Court of Justiciary consisting of twelve judges. In dismissing the appeal and upholding the conviction and sentence imposed on the appellant the Lord Justice-General observed:

'This court we have nothing to do with the question of whether the legislature has or has not done what foreign powers may consider a usurpation in a question between them. Neither are we a tribunal sitting to decide an act of the legislature is ultra vires as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by the Lords and Commons and assented to by the King is supreme and we are bound to give effect to its terms.'

2 Mortensen v Peters 1906 14 SLT 227 at 230 (emphasis added).

4.02 This is a classic re-statement by the Lord Justice-General, giving the leading judgment in a unanimous decision of the full bench, of the constitutional doctrine of the legislative supremacy of the post-1707 Westminster Parliament. It is this doctrine which has, to date, inhibited the courts of Scotland and England from developing a jurisprudence allowing for the full blown judicial review of primary legislation emanating from the national legislature.

1 Compare with the oft-quoted remarks of Lord President Cooper in MacCormick v Lord Advocate 1953 SC 396, 411-412:

'The principle of unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origins from Coke and Blackstone and was widely popularized during the 19th century by Bagehot and Dicey, the latter having stated the doctrines in its classic form in his Law of the Constitution. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it
should be supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. This was not what was done'.

SOVEREIGNTY AND THE WESTMINSTER PARLIAMENT

4.03 The Westminster Parliament was not always recognised by the English courts as sovereign, in the sense of its Acts being immune from judicial review. In 1610 in Dr Bonham's case the Chief Justice Coke felt able to make the following assertion:

'[The courts at common law may] controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void''.

1 77 Eng Rep 646, 652 (CP 1610).

4.04 These claims of Coke CJ in Dr Bonham's case that the courts of England had jurisdiction to judicially review Acts of the Westminster Parliament did not survive the seventeenth century constitutional upheavals which culminated in victory for the partisans of the English Parliament's absolute supremacy and sovereignty. The prevailing constitutional orthodoxy in the United Kingdom, as most clearly put in Dicey's The Law of the Constitution was that the doctrine of Parliamentary supremacy, which had been established in the constitutional settlement which followed the expulsion of James II and VII in 1688-89, meant that there were and could be no legal limits (in contrast to political or practical ones) on the power of the Westminster Parliament to pass whatever laws it wished.

1 For a critical-historical account of the rise in the doctrine of the sole sovereignty of Parliament and an eloquent plea on the need now to counter-balance this with a doctrine of a second sovereignty, that of the courts mandated to apply the rule of law to all areas of executive action, see Sir Stephen Sedley 'The Sound of Silence: constitutional law without a constitution' [1994] Law Quarterly Review 270.
3 For a critical account of this orthodoxy, see P P Craig 'Sovereignty of the United Kingdom Parliament after Factortame' (1991) 11 Year-book of European Law 221.

4.05 More recently, a number of English judges have written extra-judicially apparently reviving Coke CJ's claims as to the existence of limits on Westminster's legislative competence and the possibility of judicial review thereof. Thus Lord Woolf has stated that 'ultimately there are... limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold'. Sir John Laws has observed that 'the doctrine of Parliamentary sovereignty cannot be vouched by Parliamentary legislation; a high law confers it and must of necessity limit it' and Sir Stephen Sedley has asserted that:
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"[W]e have today... a new and still emerging constitutional paradigm, no longer Dicey's supreme Parliament... but a bi-polar sovereignty of the Crown in Parliament and the Crown in the courts, to each of which the Crown ministers are answerable - politically to Parliament and legally to the courts.".

1 Lord Woolf 'Droit Public English Style' [1995] Public Law 57 at 59.
2 Sir John Laws 'Law and Democracy' [1995] Public Law 72 at 87. See also his 'Judicial Remedies and the Constitution' [1994] Modern Law Review 213 at 227 (emphasis added): 'There remains the possibility that the sovereign Parliament may pass a law which unquestionably denies a fundamental freedom and authorizes a public body to give effect to that denial.... [If] the courts develop with sufficient energy a jurisprudence which sets firmly in place a set of norms which chime with those of the European Convention, and elaborate principles of statutory construction which will precisely facilitate that task, the sovereignty of Parliament will rest in its proper place, which is to scrutinize and, as it sees fit, to vouchsafe the policies of the government which the people have elected without infringing their inalienable rights.'

4.06 Such radical extra-judicial re-interpretation of the relationship between the judiciary and Parliament and talk of a paradigm shift in the constitution has been subject to academic and political criticism, with Lord Irvine of Lairg noting that such analyses were 'contrary to the established laws of this country'. Instead the orthodoxy that it is the duty of the courts simply to apply the laws passed by Parliament is re-iterated. There can be no possibility of any development of the higher constitutional review of legislation because there exists no higher legal standard against which such legislation might be judged. Thus the orthodox constitutional position, at least prior to the entry of the United Kingdom into the European Economic Community, was summarised by one English judge as follows:

'What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known in this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law of this country, is illegal'.

2 See Hansard 572 House of Lords Debates 98, June 1996.

4.07 Moreover in 1974, very shortly after the accession of the United Kingdom to the Common Market but before the legal constitutional implications of membership of the Community had perhaps sunk in, Lord Reid was able to re-affirm the accepted constitutional orthodoxy on the imposibility of judicial scrutiny of Acts of the Westminster Parliament in the following terms:

'The idea that a court is entitled to disregard a provision of an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution'.

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4.08 This approach to the supremacy of the Westminster Parliament remains representative of the dominant English consensus notwithstanding certain academic arguments, advanced by writers sensitive to the possibility of a different constitutional tradition north of the Border, to the effect that the Acts of Union of 1707 between England and Scotland had created a new basic law of the United Kingdom and had set limits on the power of the new Parliamentary body created on the abolition of the separate Parliaments of England and Scotland.


4.09 No Scottish judge has, however, ever struck down any provisions of a post-Union Act of Parliament on the grounds of its contravention of articles of the Acts of Union, but judges in Scotland have, to date, studiously avoided giving an unequivocal answer to the question as to whether or not they indeed have any such power. Arguments regarding the possible development of the Acts of Union as instrument of judicial review are dealt with in a later section of this chapter.

1 See eg: MacCormick v Lord Advocate, 1953 SC 396; Gibson v Lord Advocate 1975 SLT 134; [1975] 1 CMLR 563; Pringle 1991 SLT 330; Murray v Rogers 1992 SLT 221.

4.10 The dominant English judges’ views of the United Kingdom’s constitutional balance in the late 1980s and early 1990s is clearly set out in the following two quotations from decisions of Lord Donaldson, then holding the office of Master of the Rolls, head of the English Court of Appeal

‘[I]t is fundamental to our Constitution that it is for Parliament to legislate and for the judiciary to interpret and apply the fruits of Parliament’s labour. Any attempt to interfere with primary legislation would be wholly unconstitutional’.

and

‘Our unwritten constitution rests upon a separation of powers. It also rests upon a mutual recognition of those powers. It is for [the Westminster] Parliament to make new laws and to amend old laws, including the common law. It is for the courts to interpret and enforce the law. It is for the government to govern within the law. Each within its own sphere is supreme. Ultimate supremacy lies with Parliament, but only to the extent that it can control the government by its votes and that it can control the courts by using the full legislative procedure for changing the law, either generally or with a view to reversing a particular decision by the courts’.

1 R v Secretary of State for Transport, ex p Factortame [1989] 2 CMLR 353, CA at 397.
JUDICIAL REVIEW OF DELEGATED WESTMINSTER LEGISLATION

4.11 Respect for the doctrine of the sovereignty of the legislature accounts for the noted deference by the courts in relation to primary legislation emanating from the Westminster Parliament. It is not, however, incompatible with Parliamentary sovereignty for the courts to weigh subordinate legislation in the balance of judicial review and if it be found wanting, to strike it down. Judicial review has been said by some writers to have its basis in the very acceptance and enforcement by the courts for the sovereignty of Parliament. On this analysis, the reviewing by the courts of an administrative act or executive decision on the basis that it is said to be ultra vires may be understood as 'policing action' by the courts acting in accord with Parliament's intention and wishes to ensure that the administration and others acting on the basis of authority granted by Parliament act and remain within the limits of those powers. For a body to be permitted by the courts to act outwith the limits of the powers or authority granted or permitted it by Parliament would be itself contrary to the principle of Parliamentary sovereignty.


4.12 In the case of delegated legislation, whether statutory instruments implemented by the Secretary of State or bye-laws enacted by a local authority, or Acts of a devolved Parliament or Assembly, the general principle set out in West would seem to apply: namely that recourse to the Court of Session by way of judicial review application would be appropriate to ensure that the person or body to whom jurisdiction, authority or power had been entrusted by statute did not exceed, abuse or fail properly to exercise that authority.

1 West v Scottish Prison Service 1992 SLT 636.

4.13 The complicating factor in the case of judicial review of statutory instruments emanating from the Westminster Parliament and Executive is whether or not the traditional deference which has been shown by the courts to primary Westminster legislation in fields not covered by Community law will also be exhibited in relation to its secondary legislation which, although drafted by the Secretary of State, has been duly laid before the Westminster Parliament and either a vote has been taken approving the regulations (affirmative resolution procedure) or no vote has been taken to annul the regulations (negative resolution procedure). As Fordham states:

'As to the balance in respect of the judicial review of delegated legislation, there is a fundamental tension... between (a) the (deferential) insight that the courts are dealing with delegated legislation and (b) the (vigilant) insight that they are dealing with delegated legislation'.

The limits on the judicial review of statutory instruments

4.14 In Hoffman-La Roche and Co v Secretary of State for Industry the Secretary of State sought an interim injunction requiring the Company to reduce the price of certain drugs in accordance with an order made by the Secretary of State under section 3(4) of the Monopolies and Mergers Act 1965, pending the outcome of the drugs company’s challenge to the validity of the order on the grounds that the Secretary of State had no power to make it. The House of Lords accepted that such an attack on the validity of a statutory instrument was competent notwithstanding that the instrument had been laid before and approved by both House of Parliament. Lord Diplock noted:

‘My Lords, in constitutional law a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of both Houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubts that the courts have jurisdiction to declare it to be invalid if they are satisfied that it making it the minister who did so acted outwith the legislative powers conferred upon him by the pervious Act of Parliament under which the order is ultra vires by reason of its contents (patent defects) or by reason of the defects in the procedure followed prior to its being made (latent defects)’.

1 [1975] AC 295, HL.

4.15 It remained clear from the decision of the House of Lords in Hoffman that questions of the rightness of policy lying behind any statutory instrument remained matters for the relevant minister alone and were to be regarded as subject to the control of Parliament rather than of the courts. The only questions for the courts in considering challenges to the validity of statutory instruments are those based on the claim that the minister acted unlawfully either because he exceeded his powers or he acted without the requisite powers.

4.16 Thus, in R v Secretary of State for the Environment, ex p Nottinghamshire County Council the House of Lords considered a challenge by an English local authority to the House of Commons of approved spending ‘guidance’ given them by the Secretary of State under and in terms of section 59 of the Local Government Planning and Land Act 1980. Lord Scarman held that, since questions as to the proper limits of public expenditure by local authorities were primarily matters of policy or political judgment, it would only be in exceptional circumstances, for example where the extremes of manifest absurdity, bad faith or improper motive amounting to abuse of power on the part of the minister responsible can be shown, that the courts should then intervene.

2 For an example of such judicial intervention to quash a direction of the Secretary of State to a local authority, see R v Secretary of State for Transport, ex p Greater London Council [1986] QB 556, DC.
4.17 And in *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council*¹ the House of Lords dismissed applications for judicial review of the Secretary of State’s decisions under the charge capping powers set out in section 100 of the Local Government Finance Act 1988 to designate some 21 local authorities as having set excessive budgets. Lord Bridge held, following *Nottinghamshire* and that once the courts have first determined that the ministerial action in question did not contravene the requirements of statute, it was not then open to them in this politically sensitive area of national economic policy to consider whether or not the Secretary of State’s decision was irrational. The House of Lords also held that it was not open to them to import procedural protections (such as a duty on the Secretary of State to consult authorities on the principles to be used in reaching the decision, to give reasons for the proposed cap and to disclose the sources of all information considered in reaching the decision) additional to those specifically provided for under the Act.

¹ [1991] 1 AC 521, HL per Lord Bridge at 594.

4.18 It should be noted that the judicial restraint by the House of Lords which is being expressed is not in relation to the class of delegated legislation as a whole, but rather in relation to those instruments and ministerial decisions which concern the implementation of national economic policy (for example the rate-capping of local authorities as a way of reducing overall public expenditure) and which have been approved by Parliament.

4.19 In relation to decisions falling within the latter category, judicial review would seem to be available only where questions of the actual legality of the decisions may be raised. In relation to statutory instruments and ministerial decisions which, although approved by Parliament, do not concern the implementation of aspects of national economic policy, the full panoply of bases for judicial review, including irrationality and procedural impropriety such as lack of consultation, would appear to be available to those unhappy about the decision and who are recognised by the courts as having sufficient title and interest (or standing) to challenge them¹.

¹ On the duty to consult affected bodies before making a change in delegated legislation, see *R v Secretary of State for the Environment, ex p Brent London Borough Council* [1982] QB 593 and *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 WLR 1, QBD.

The Scottish reaction to Hoffman-La Roche

4.20 In *City of Edinburgh District Council v Secretary of State for Scotland*¹ a challenge was made by the district council to the validity of an order made by the Secretary of State under section 23A of the Housing (Financial Provisions) (Scotland) Act 1972 (as amended) which purported to limit the powers of Scottish local authorities to meet any deficit in their spending on council houses out of the general rate fund. The statutory instrument in question, the Housing Revenue Account Rate Fund Contribution Limits
4.20 Judicial Review and Westminster Legislation

(Scotland) Order 1985, SI 1985/3 had been laid before Parliament on 11 January 1985. On 23 January 1985 the Order was debated but a prayer to annul the order was not moved. The Order accordingly came into effect on 2 February 1985.

1 1985 SLT 551.

4.21 Lord Jauncey, sitting in the Outer House, interpreted Lord Diplock's dictum in Hoffman-La Roche narrowly and held that a statutory instrument which had been laid before Parliament could only be held to be ultra vires on grounds of its illegality, that is to say that the statutory instrument in question purported to do something which was not authorised by the enabling statute, or that instrument had been made contrary to the required procedures laid down in the enabling statute. The Lord Ordinary was of the view that it was not open to parties, however, to challenge the validity of a statutory instrument approved by Parliament on the grounds of the alleged Wednesbury unreasonableness of its contents, or on more general grounds of breach of the common law requirements of natural justice or procedural fairness, for example failure to consult.

4.22 When the matter was reclaimed by the council to the Inner House, the Second Division considered all three of the council's bases of challenge to the validity of the instrument, namely illegality, irrationality and procedural impropriety but found them all, as a matter of fact, to be unfounded. The decision of the Lord Ordinary to dismiss the action was accordingly upheld as 'the right conclusion for the right reasons'.

1 See Himsworth 'Defining the Boundaries of Judicial Review: City of Edinburgh District Council v Secretary of State for Scotland' 1985 SLT (News) 369 for a critical commentary on this decision. See also Campbell 'Approval and Statutory Instruments' 1996 SLT (News) 101.

4.23 In East Kilbride District Council v Secretary of State for Scotland Lord Penrose considered an application for judicial review of a decision of the Secretary of State to make an order by statutory instrument under and in terms of section 17 of the Local Government (Scotland) Act 1973 to transfer an area of the village of Busby from East Kilbride District to Eastwood District. The statutory instrument mandating this transfer had been laid before Parliament under the negative resolution procedure. The complaint of the petitioners as presented to the court was not, however, in relation to the substance of the statutory instrument but, rather, as to its timing. It was claimed by the petitioners that the decision to go ahead with this administrative change shortly before the overall re-organisation of local government throughout Scotland was Wednesbury unreasonable in that it involved the council incurring unnecessary expense and loss of revenue.

1 1995 SLT 1238, OH.

4.24 The Lord Ordinary accepted the competency of seeking, in Scotland, judicial review and reduction of a statutory instrument which had become final upon the expiry of the statutory time limit for a negative resolution in
Parliament. He observed (at 1247F) that analysed strictly, Lord Jauncey's views in *City of Edinburgh District Council* might be thought to be too narrow if they excluded the possibility of review of a statutory instrument on grounds of the minister's bad faith or improper purpose or the instruments' manifest absurdity. Such circumstances were said, however, unlikely to be met with in practice. On the facts before him, however, the Lord Ordinary found that the Secretary of State's decision fell squarely within the four corners of the statute.

1 For similar observations, see Lord Caplan in *Leech v Secretary of State for Scotland* 1991 SLT 910, OH, affirmed 1993 SLT 365.

4.25 The Scottish cases on judicial review of delegated legislation show that there seems to be a more restrictive approach to the possibility of a challenge to the validity of statutory instruments than the trend which is evident in England. Scottish judges would seem to be applying the House of Lords restraint on judicial review of instruments implementing national economic policy to all examples of Parliamentary approved delegated legislation and ministerial decisions whatever their content and effect on general economic policy. Whether this more restrictive approach can be justified after the statement by Lord President Hope in *West* that the same substantive principles of law apply in judicial review both north and south of the Border is something which only further litigation will prove.

THE IMPACT OF COMMUNITY LAW ON WESTMINSTER SOVEREIGNTY

4.26 The accession of the United Kingdom to the European Communities in 1972 resulted in the incorporation of the legal systems of the United Kingdom into the Community legal order. By sections 2 and 3 of the 1972 Act the courts of the United Kingdom were required to apply Community law in the United Kingdom as interpreted by the European Court of Justice sitting in Luxembourg. Thus, when Royal Assent was given to the 1972 Act, the legal systems of Northern Ireland, Scotland and England and Wales became constituent elements of a supra-national legal system governing the activities of both the central institutions and the member states of the European Communities.


4.27 The European Community legal system had been in existence for some twenty years before the accession of the United Kingdom. It already was 'a new legal order' capable of creating individual rights directly, without the need for any specific national implementing measures, and which proclaimed its supremacy over national laws and bound national courts to uphold and protect the rights granted under Community law.
against the provisions of any contrary national laws\(^2\). As the European Court of Justice stated in 1969:

> The EEC Treaty has established its own system of law, integrated in the legal systems of the member states and which must be applied by their courts\(^3\).


4.28 In 1978, some six years after the accession of the United Kingdom to the Common Market, the European Court of Justice made the following claims for Community law:

> [Directly applicable provisions of Community law] not only by their entry into force render automatically inapplicable any conflicting provision of current national law but... also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.

...[E]very national court must, in a case within its jurisdiction, apply Community law in its entirety and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule\(^4\).


4.29 Writing in 1989, Mauro Cappeletti stated:

> If... the United Kingdom accepts the doctrine [of the supremacy of European Community law], a novel form of judicial review of legislation will have been adopted by a nation which, even more rigorously than France, has purported to reject all forms of judicial review since, at least, its Glorious Revolution of 1688\(^5\).


4.30 The superiority of Community law and the competence of the European Court of Justice definitively to expound the requirements of Community law in relation to national laws was generally accepted in obiter remarks by United Kingdom judges from the time of the accession of the United Kingdom to the European Communities. Thus Lord Denning noted in 1981:

> It is important now to declare, and it must be made plain that the provisions of article 119 of the EEC Treaty take priority over anything in our English statute. That priority is given in our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law; and whenever there is any inconsistency, Community law has priority\(^6\).

1. *Macarthys Ltd v Smith* [1981] 1 All ER 11, CA per Lord Denning MR at 120:

4.31 There has, however, been a considerable time lag between the expression of European constitutional theory by the European Court of
Justice and its application in a national context by courts in the United Kingdom. The centuries' long tradition of deference to the Westminster Parliament, and latterly to the Executive, has resulted in some reluctance on the part of the courts to substitute their judgment for that of the democratically elected legislature, even when this appears to be required of them under Community law. Such deference has meant that, in point of fact, the courts rarely dis-applied provisions of Acts of Parliament on their own initiative. Indeed a presumption developed that Acts of Parliament were to be regarded as valid and compatible with Community law, unless and until that matter had been finally and unequivocally ruled upon by the European Court of Justice. Thus the first judgment of the House of Lords in Factortame, prior to the ruling of the European Court, was interpreted by the Inner House as wholly confirming the proposition that:

'a statute passed by the United Kingdom Parliament must be presumed to be valid, until such time as the Act has been declared to be invalid by a court of competent jurisdiction'.

It is not clear from the judgment which national courts, if any, they considered to be competent to declare an Act of Parliament invalid.

2 R v Secretary of State for Transport, ex p Factortame [1990] 2 AC 85, HL.
3 See Murray v Rogers, 1992 SLT 221 at 225, 228.

4.32 The defining constitutional moment came however, with the decision of the European Court of Justice of 19 June 1990 in Factortame in which the Luxembourg Court advised the House of Lords that constitutional doctrines preventing the interim suspension of Acts of Parliament and/or the pronouncement of prohibitory orders (injunctions and interdicts) against ministers of the Crown had to be swept aside when matters concerning the proper judicial protection of individual Community law rights were raised before the national courts. It appears that the implications for Parliamentary sovereignty of the principle of the supremacy of Community law over national law were largely unappreciated in the United Kingdom until the decision of the House of Lords in Factortame. The Factortame litigation involved a challenge before the English courts as to the validity of the Merchant Shipping Act 1988, together with any regulations and administrative acts issued under it. The 1988 Act had been passed by the United Kingdom Parliament to put an end to the practice of 'quota-hopping' whereby non-United Kingdom nationals were able to benefit from the fishing quota allocated to the United Kingdom under the Common Fisheries Policy by registering their vessels in the British Register of Shipping.

1 Case C-213/89 R v Secretary of State for Transport, ex p Factortame (No 2) [1990] ECR 1-2433.
2 See generally A O'Neill Decisions of the European Court of Justice and their Constitutional Implications (1994), in particular Chapter 3 'Simmental and Factortame; a sea-change in the British Constitution' and Chapter 4 'Factortame's Wake: the direct reception of Community law'.
3 For a survey of European Court decisions on the problem of quota-hopping, see Churchill in (1992) 29 Common Market Law Review 405.
4.33 The legal basis for the Factortame judicial review application was that the 1988 Act itself (and the regulations and administrative acts issued under it) contravened both article 7 (now 6) of the Treaty of Rome which prohibited discrimination on grounds of nationality and article 52 which guaranteed the freedom of the nationals of one member state to pursue their trade in another member state. This claim was ultimately held to be well-founded and a Francovich damages action against the United Kingdom for its failure to respect the Community law rights of Spanish fishermen was raised by individuals who had been barred from fishing by the operation of the Act.

1 R v Secretary of State for Transport, ex p Factortame Ltd [1989] 2 CMLR 353, QBD.
2 Case C-221/89 R v Secretary of State for Transport ex p Factortame Ltd (No 3) [1991] ECR I-3905, EC.

4.34 While the substance of the case was being considered by the European Court of Justice, an application was made by the Spanish fishermen involved for 'interim dis-application' of the Act by the national courts. When this matter first came before the House of Lords, Lord Bridge stated in the leading judgment:

If the applicants fail to establish the rights they claim before the European Court of Justice the effect of the interim relief granted would be to have conferred upon them rights directly contrary to Parliament's sovereign will.

... I am clearly of the opinion that as a matter of English law, the court has no power to make an order which has these consequences'.

1 R v Secretary of State for Transport ex p Factortame Ltd [1990] 2 AC 85 at 143, HL (emphasis added).

4.35 The question as to whether Community law gave the national courts power to order interim suspension of Acts of Parliament was, however, referred by the House of Lords to the European Court of Justice. Relying on the principle of co-operation of national courts to ensure the full and effective protection of rights acquired under Community law in every member state, the Court of Justice instructed the House of Lords as follows:

'Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which prevents it from granting interim relief is a rule of national law must set aside that rule'.

1 Case 213/89 R v Secretary of State for Transport ex p Factortame Ltd (No 2) [1990] ECR I-2433 (emphasis added).

4.36 On receiving this ruling back from the European Court of Justice, the House of Lords granted an order restraining the Secretary of State 'from withholding or withdrawing registration in the register of British fishing vessels maintained by him pursuant to the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988.' Lord Bridge now stated:

'Under the terms of the [European Communities] Act of 1972 it has always been clear that it was the duty of a United Kingdom Court, when delivering
The Impact of Community Law on Westminster Sovereignty 4.39

final judgement, to override any rule of national law found to be in conflict with any directly enforceable rule of law... Thus there is nothing in any way novel in according supremacy to [Community] rules of law in those areas in which they apply and to insist that, in the protection of rights under [Community] law, national courts should not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy1.

1 See R v Secretary of State for Transport, ex p Factortame (No 2) [1991] 1 AC 603, HL (emphasis added).

Judicial review of primary Westminster legislation after Factortame

4.37 The legal and constitutional implications of the United Kingdom's membership of the European Union are still being worked through, but in general terms it may be said that, standing the growing acceptance by at least the English judiciary of the primacy of the law derived from the Treaty of Rome, the judicial review by the domestic courts of Acts of the Westminster Parliament is now possible in those areas which are also covered by Community law1.


4.38 The effect of the judgment in Factortame has been to encourage the bringing of cases before the courts seeking the judicial review of United Kingdom legislation for its compatibility with Community law. For example, a concerted campaign of cases brought to review the compatibility with principles of European law of the restrictions on Sunday trading contained in the Shops Act 1950 was launched by large retailing organisations in the late 1980s1. The legal campaign ended only when Parliament changed the law to allow a more permissive Sunday trading regime.


4.39 Similarly, the Equal Opportunities Commission embarked on direct actions for judicial review of national legislation which it considered contravened Community law principles on indirect sex discrimination2. In a separate case which was referred by the House of Lords to the European Court of Justice, two individual employees of private sector employers who each had more than one but less than two year's service were able to seek judicial review in England and Wales of the change made by statutory instrument in 1986 whereby workers were required to have two years full-time employment, rather than as previously one year, before they
came within the national statutory employment protection regime. It was argued that this change contravened the Community law principle of indirect sex discrimination in their case and was, accordingly, unlawful.

2 Case C-167/97 R v Secretary of State for Employment, ex p Seymour-Smith and Perez [1999] IRLR 253, [1999] All ER (EC) 97, ECJ.

4.40 An attempt was made in Scotland to review the validity of the Transfer of Undertakings (Protection of Employment) Regulations 1981 on the grounds of their alleged failure properly to implement the Community Acquired Rights Directive 76/207. The United Kingdom's implementation of the Community public procurement directives in the field of telecommunications was also made subject to challenge before the national courts as was the government's attempt to restrict the television reception of hard-core pornography broadcast by satellite from Denmark to the United Kingdom.

1 National Union of Public Employees v Lord Advocate [1993] Times Law Reports 250, OH. See also the judgment of the Court of Justice in the article 169 action brought on this matter, Joined Cases 382,383/93 Commission v United Kingdom [1994] ECR I-2435, 2479, ECJ.

4.41 In the light of this case law it is clear that it is now generally accepted by judges in the United Kingdom that 'the Treaty of Rome is the supreme law of this country, taking precedence over Acts of Parliament'. In accordance with this principle, national courts in the United Kingdom are obliged, in any area in which Community law is applicable, to secure the full and effective protection of Community law rights over and against national law. This full and effective protection of Community law rights has been achieved in the following ways:

- by the national court interpreting existing national law, so far as it is in its power to do so, in the light of the Community law, even where such interpretation means a departure from the plain and unambiguous wording of the relevant Act of Parliament;
- by the national court suspending any rules of national law, including Acts of Parliament, where these contravene 'directly effective' provisions of Community law.

1 Stoke-on-Trent City Council v B & Q plc [1990] 3 CMLR 31 per Hoffman J at 34.
4 Case 213/89 R v Secretary of State for Transport ex p Factortame Ltd (No 2) [1990] ECR I-2433; R v Secretary of State for Transport, ex p Factortame [1991] AC 603, HL.

4.42 Further in Inter-Environment Wallonie ASBL v Région Wallonne, the Court of Justice has held that although member states are only required to
have implemented a directive by the transposition date set out in the instrument, between the date of the adoption of the directive at Community level and its implementation into national law, member states have an obligation to refrain from taking measures which are liable ‘seriously to compromise the result prescribed’ by the Community provision in question. The provisions of Community directives can therefore be brought to bear upon national law from the date of the directives’ adoption.


Francovich damages and state sovereignty

4.43 The remedies of direct effect and sympathetic interpretation of national law will be sufficient to protect rights under Community law in the great majority of cases. The principle of indirect effect does not operate in all circumstances and reliance on direct effect, too, is precluded where the relevant provision is not sufficiently clear, precise and unconditional, or, in the case of provisions of directives, where the other party to the case is a private party¹ and cannot be characterised as ‘an emanation of the State’ however broadly this concept is understood.²

1 See, in particular, its decision in Case C-334/92 Dori v Recreb [1994] ECR I-3325.
2 In Foster v British Gas [1991] 2 AC 306 pre-privatisation nationalised utilities were held to be emanations of the State for the purposes of Community law. In Griffin v South West Water services Ltd [1995] IRLR 15, Ch, post-privatisation water companies were held to fall within the definition: and in National Union of Teachers v Governing Body of St. Mary’s Church of England (Aided) Junior School [1997] ICR 265 it was held to cover the governing body of a voluntary aided school.

4.44 Where neither direct effect or indirect effect could be pled in aid, the individual was left with a bare Community law right but no remedy by which to enforce it. In Francovich (No 1) the Court of Justice sought to close this disjunction between individuals’ rights and individuals’ remedies by ruling that, under Community law, an individual may claim damages against a member state for loss caused by its failure properly to implement Community law.³ The court held that Community law itself contained a general principle to the effect that a member state is obliged to make good the damage to individuals caused by a breach of Community law for which that member state was responsible. This obligation was said to arise out of article 10 (formerly article 5) of the Treaty of Rome which places a general duty on member states to take all appropriate measures to ensure fulfilment of their obligations under Community law.


4.45 Having made its general statement of principle, the Court has, in subsequent cases, laid down more specific criteria for state liability in damages for breach of Community law. In particular, in Brasserie du Pecheur/Factortame III the court confirmed that member states incurred liability for loss and damage caused to individuals as a result of breaches of Community law, whether or not the breach has been committed by national legislatures or by national administrations.

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4.45 Judicial Review and Westminster Legislation

4.46 The Court of Justice has also held that where the Community law rule in question conferred individual rights, and the disregard of these rights had directly resulted in loss to those individuals, member states would only incur liability to make good that loss if the action of their national legislatures which was contrary to Community law was sufficiently serious such as to show a ‘manifest and grave disregard of the limits of its discretion’ in so legislating in a field also covered by Community law. Thus, where a member state incorrectly transposes the provisions of a directive into national law it could defend itself against a claim for damages suffered by individuals. The implementation into national law of an imprecisely worded directive in a manner which might reasonably be construed or interpreted as having been done in good faith need not result in state liability for any damages resulting.


4.47 By contrast, in the case of decisions made by national authorities in situations where Community law grants, at most, a limited ‘margin of appreciation’ in the application and/or interpretation of the law (for example the granting of licences for the export of live animals for slaughter in another member state) the Court of Justice has stated:

‘Where, at the time when it has committed the infringement [of Community law], the member state in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach [to support a Francovich damages claim].’


4.48 In summary, potential liability for Francovich damages may be said to exist when three factors are present:

- the rule of Community law infringed must be intended to confer rights on individuals;
- there must be a direct causal link between the breach of the obligation resting on the member state and the damage suffered by the injured parties; and
- the breach of Community law in question must be regarded by the Court of Justice as of sufficient seriousness to warrant a damages action. Complete failure to transpose a directive is regarded as sufficiently serious in this regard, whereas in the case of the incorrect transposition of Community law obligations there has to be shown to be a manifest and grave disregard by the member state as to the limits
of its powers, having regard to, among other factors, the clarity and precision of the Community law rule breached.  

1 See R v Secretary of State for the Home Department, ex p Gallagher [1996] 2 CMLR 951, CA for an unsuccessful attempt to show any causal link between a breach of Community law on free movement of persons and loss claimed to have been suffered by the individual so affected.  


4.49 In the case of a complete failure by a member state to implement a directive by the due date, this would, in the absence of pre-existing laws reflecting the requirements of the directive, constitute a sufficiently serious disregard of Community law as to attract the possibility of claims for Francovich damages. This is confirmed by the decision of the European Court of Justice in Dillenkofer v Germany in which the court stated:

'[F]ailure to take any measure to transpose a directive in order to achieve the result it prescribes in the period laid down for that purpose constitutes per se a serious breach of Community law and consequently gives rise to a right of reparation for individuals suffering injury if the result prescribed by the directive entails the grant to individuals of rights whose content is identifiable and a causal link exists between the breach of the State’s obligation and the loss and damage suffered'.  


Judicial review and Francovich damages

4.50 The English Court of Appeal has held that Francovich claims cannot be brought before the Employment Tribunal system. The appropriate forum for complaint in England and Wales, was said to be an ordinary damages action brought against the Attorney General in the High Court. In England some applicants have sought, by way of judicial review procedure, declarations that the existing United Kingdom law is incompatible with European Community law as an avowed preliminary to raising a separate Francovich damages action, although this practice has been disapproved of on the basis that the issues raised in the two action would not necessarily be the same.  

1 Potter v Secretary of State for Employment, [1997] IRLR 2 [1997] ICR 209, CA, upholding the decision of the Employment Appeal Tribunal on this point, reported sub nom Secretary of State for Employment v Mann [1996] IRLR 4, EAT. This case is at the time of writing under appeal to the House of Lords.  

2 See eg R v Secretary of State for Employment, ex p Seymour Smith and Pérez, [1997] 1 WLR 473, HL per Lord Hoffman. See also R v Secretary of State for Employment, ex p Equal Opportunities Commission [1995] 1 AC 1, HL per Lord Keith of Kinkel at 32.

4.51 In Scotland, a damages action against the Lord Advocate in matters which are the responsibility of the Scottish Parliament and against the Advocate General in those areas of responsibility retained by the Westminster Parliament would arguably be the appropriate method of bringing such a claim assuming that the English line of authority, which emphasises the limited jurisdiction of the lower courts and statutorily established tribunals, were followed. It has not yet been decided, however, whether
such an action would be an appeal to the supervisory jurisdiction of the court, in which case the only appropriate forum would be by way of judicial review procedure to the Court of Session. As we have seen, there has only been one case to date in Scotland in which an attempt has been made to review primary legislation on grounds of its incompatibility with European law. It should also be noted that in Scotland judicial review petitions rarely consider questions such as the quantification of damages, although an award of damages is competent under this procedure.

1 National Union of Public Employees v Lord Advocate [1993] Times Law Reports 250, OH.
2 See Kelly v Monklands District Council 1986 SLT 169 at 173. See also R v Secretary of State for Transport, ex p Factorrime (No 5) [1997] EuLR 475, QBD, the reference back to the English High Court from the Court of Justice’s decision in C-48/93, affirmed by the Court of Appeal on 8 April 1998 reported at [1998] Eu LR 456, CA.

4.52 The first Francovich case against the United Kingdom government which appears to have reached a conclusion in favour of the plaintiff was raised in Northern Ireland by a Mrs Porter against the Attorney General for Northern Ireland. The case law of the European Court of Justice had made it clear that a policy of enforcing different retirement ages for men and women was contrary to the Equal Treatment Directive 76/207. Mrs Porter sought damages against the state, following her compulsory retirement by her private sector employer, in respect of the United Kingdom’s failure properly to transpose the Equal Treatment directive into national law by prohibiting employers from insisting on different retirement ages for their male and female employees. The case was eventually settled for a sum in excess of £34,000 (representing five years loss of earnings plus interest) and her costs.

1 The Northern Ireland Court of Appeal had held in an earlier case brought by Mrs Porter against her employer’s, Porter v Cannon Hygiene [1993] IRLR 329, that neither the Sex Discrimination Act 1975 nor the Equal Pay Act 1970 made it unlawful for a private company to insist on compulsory retirement for their women employees at age 60 while allowing men to continue working with them until they were 65.

4.53 In R v Attorney General for Northern Ireland, ex p Shirley Burns, a declaration was granted in the course of a Northern Irish judicial application that the United Kingdom was in breach of its obligations under Community law in failing timeously to implement the Working Time Directive. The applicant, who claimed that her health had suffered as a result of being required regularly to work night shift, also sought Francovich damages for loss and damage arising out of the failure to implement the directive.

1 [1998] IRLR 315, QB.

Conclusion on Westminster Sovereignty and Community Law

4.54 All of these methods of ensuring full and effective protection of Community law rights, namely indirect sympathetic interpretation, direct
effect disapplying contrary provisions of national law and *Francovich* damages in respect of ‘unlawful’ legislative and administrative choices by the member state authorities involve an infringement of or derogations from the principle of the sovereignty of Parliament as that doctrine has traditionally been understood in the United Kingdom. As the European Court of Justice stated in 1964:

>'The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights against which a subsequent unilateral act incompatible with the Treaty cannot prevail'.


4.55 The national judges now accept that, so long as the United Kingdom remains a signatory of the Treaty of Rome and hence a member state of the European Union, the duty of the courts is to ensure the full and effective protection of Community law rights, even against the clear and unequivocal provisions of Acts of Parliament. The Westminster Parliament has, as a matter of law and legal practice, limited its absolute sovereignty and the Treaty of Rome has become for the courts a written constitution against which national legislation may be measured and found wanting.

JUDICIAL REVIEW OF WESTMINSTER LEGISLATION AND THE TREATY OF UNION

4.56 The provisions of the Treaty or Acts of Union between Scotland and England have rarely been the subject of any judicial consideration, particularly south of the border. In *R v Commissioner of the Metropolitan Police, ex p Bennett*1 the English High Court was faced with an application for an injunction against the police in England executing a warrant which had been issued in Scotland for the arrest of the applicant who had been forcibly returned to England from South Africa against his will and without recourse to lawful extradition proceedings. It was argued that any execution of the warrant would constitute an abuse of process and that, in any event, the courts in England had power by virtue of article 19 of the Union with Scotland Act 1706 to interfere with the execution in England of Scottish processes. The application was dismissed by the English court on the grounds that it had jurisdiction to deal only with questions regarding the abuse of its own trial process and could not concern itself with questions of possible abuse of process in Scotland, which would be a matter for Scots law and the Scottish courts.

1. [1995] 3 All ER 248, DC.

4.57 It is on one view surprising that there has not been greater use in litigation, particularly in Scotland, of the provisions of the Union legislation. Article 18 of the Treaty of Union between Scotland and England is in the following terms (emphasis added):

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(1) That the laws concerning regulation of trade, customs and such excises to which Scotland is by virtue of this Treaty liable be the same in Scotland, from and after the union, as in England; and

(2) That all other laws in use within the Kingdom of Scotland do after the union and notwithstanding thereof remain in the same force as before (except such as are contrary to or inconsistent with this Treaty) but alterable by the Parliament of Great Britain, with this difference between the laws concerning public right, policy and civil government and those which concern private right:
   (i) That the laws concerning public right, policy and civil government may be made the same throughout the whole United Kingdom; but
   (ii) That no alteration may be made in the laws which concern private right except for evident utility of the subjects within Scotland.

4.58 A plain reading of this article of the Treaty of Union seems to envisage the following legal consequences:

(1) an automatic and complete harmonisation of customs, excise and trade law as between Scotland and England from the date when the Treaty comes into force;

(2) the preservation of all other existing laws not concerned with the regulation of trade, customs and excise;

(3) the granting of a power in the new legislature created by the Treaty to harmonise as between Scotland and England the public law applying in the two countries; and

(4) the granting of a power in the new legislature to make (not necessarily harmonising) alterations in the private law applicable in Scotland, but only where such changes can be said to be for the evident utility of the subjects in Scotland.

4.59 Further article 25 of the Treaty of Union states that:

'All laws and statutes in either Kingdom [of Scotland or England], so far as they are contrary to or inconsistent with the terms of these articles, or any one of them, shall from and after the Union cease and become void, and shall be so declared by the respective Parliaments of the said kingdoms'.

4.60 If one reads articles 18 and 25 as straightforward enforceable legal provisions, without immediate regard to their provenance or to the 'history and law of our constitution', it would seem to follow from their wording that an individual could rely upon these articles in the following ways:

- article 18[1] might be used either as a shield to challenge the enforcement against him of any rules of Scots law, both pre-and post-Union, which regulated trade, custom or excise and which differed from the rules applicable in England, or as a sword to insist on the direct enforcement in Scotland of the applicable English law concerning such trade, custom and excise;

- article 18[2][i] might be used to challenge the validity of any post-Union legislation in the area of public law which did not have the effect of making public law the same throughout the United Kingdom;
article 18(2)[ii] might be used to challenge the validity of any post-Union legislation which affected private law in Scotland, on the grounds that the proposed legal change in private rights was not for the evident utility of the subjects in Scotland.

4.61 If these propositions were correct, one would expect to find a case law replete with examples of legal challenges, not all successful yet not all unsuccessful, to the validity of Westminster legislation on the basis of its contravention of the fundamental principles set out in article 18 of the Treaty of Union. Instead, the judicial review of primary legislation is a subject which has yet to be properly developed in Scots law.

4.62 It is often stated by commentators on Scottish constitutional law, that the English doctrine of the absolute supremacy of Parliament was never fully accepted into Scottish constitutional theory. In MacCormick v Lord Advocate Lord President Cooper observed that the United Kingdom Parliament might not have unlimited sovereignty so as to be able to alter the fundamental provisions of the 1707 Treaty of Union between Scotland and England. He stated:

The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. . . . The Treaty and the associated legislation by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of like effect . . .

I have not found in the Union legislation any provision that the Parliament of Great Britain should be 'absolutely sovereign' in the sense that that Parliament should be free to alter the Treaty at will.

2 1953 SC 396 at 411-412.

4.63 However if there is to be any substance in this observation then arguably any attempt by the Westminster Parliament to alter the Treaty might be challengeable before the Scottish courts as an ultra vires act. If the Acts of Union constitute a fundamental law, a Grundgesetz, then under Scots law at least the Westminster Parliament would appear to be a body to which prescribed powers have been delegated. It is noteworthy, however, that all attempts to date to have the courts in Scotland strike down United Kingdom legislation on the grounds of its failure to conform to the requirements of the Treaty of Union have failed. While the English doctrine of the absolute sovereignty of Parliament may not have been accepted in theory, it certainly seems to have been accepted by Scots lawyers in practice.

(1992) 37 JLS 484-485 which puts forward the proposition that the 1991 Act should not be given effect to in Scotland because it contravened the Anglo-Scottish Union.
2 See C Munro ‘Was Parliament born free?’ in Studies in Constitutional Law (1987) for a survey of United Kingdom case law in which this issue has been raised.
3 See D N MacCormick ‘Does the United Kingdom have a constitution? Reflections on MacCormick v Lord Advocate’ (1978) 29 Northern Ireland Legal Quarterly 1 for a discussion of the issues in legal theory which arise from considering the Treaty of Union as a constitutional document.

Fishing rights

4.64 In Gibson v Lord Advocate¹ an in-shore fisherman from Banff challenged the validity of section 2(1) of the European Communities Act 1972 in so far as it had the effect of applying, within the United Kingdom, article 2(1) of Council Regulation 2141/70/EEC. This Community law provision when read with article 100 of the Treaty of Accession of the United Kingdom to the European Communities, required that from 31 December 1982 equal access and fishing rights be given to fishing vessels from other member states to the maritime waters coming within United Kingdom territorial jurisdiction. It was argued before Lord Keith, sitting in the Outer House, that the opening of Scottish coastal waters to fishing vessels from outwith Scotland constituted ‘an alteration in the laws which concern private right’ which was not ‘for the evident utility of the subjects within Scotland’ and was consequently an act by the Westminster Parliament which contravened article 18 of the Treaty of Union.

1 1975 SLT 134, OH.

4.65 Lord Keith dismissed the application on a number of grounds of relevancy. Citing Stair² and Erskine³ he held, firstly, that the rights of navigation on the sea were public rights and the laws regulating sea fishing and trade fell within the field of public law. It was therefore open to the Westminster Parliament to harmonise these laws throughout the United Kingdom without reference to the evident utility of the subjects in Scotland. Lord Keith considered that the petition was in any event directed against the wrong statutory provisions since the question of foreign access to British territorial waters was in fact governed by the Fishing Boats (European Economic Community) Order 1972 made by the Secretary of State under and in terms of powers conferred by the Fishery Limits Act 1964.

1 Stair’s Institutions I i 23:
‘Rights in respect of the matter are divided into public and private rights. Public rights are those which concern the state of the commonwealth. Private rights are the rights of persons and particular incorporations’.
2 Erskine Institute I i 29:
‘Positive law may be divided into public or private. The public law is that which hath more immediately in view the public weal, and the preservation and good order of society; as laws concerning the constitution of the state, the administration of government, the police of the country, public revenues, trade and manufactures, the punishment of crimes etc. Private law is that which is chiefly intended for ascertaining the civil rights of individuals’.

4.66 Lord Keith also accepted the argument, put forward on behalf of the Lord Advocate, that the EEC regulations in questions imposed duties on
member states, rather than on individuals, and so did not affect any alteration in the private laws of Scotland. It is of interest that no reference was made by the court to the Community law doctrine of direct effect first set out by the Court of Justice in 1963 in Van Gend en Loos, although Lord Keith did refer to the principle of the direct applicability of Community regulations set out in article 189 of the Treaty of Rome. A Community regulation will be found to have direct effect, and may therefore be relied upon by individuals before the national courts, where it can be said that the provision in question is precisely expressed, unconditional and non-discretionary. Applying these criteria to the prohibition on nationality discrimination set out in article 2(1) of Council Regulation 2141/70/EEC there seems little doubt that the Court of Justice would have, and the national court should have, considered the Community law provision to be directly effective.

3 In Case 36/74 Walrave and Koch v Association Union Cycliste International [1975] ECR 1405 the Court of Justice found that the prohibition on discrimination on grounds of nationality set out in article 7 (now 6) of the Treaty of Rome was directly effective.

4.67 On the question of the competency of the application, Lord Keith observed that he did not consider that the question as to whether or not any legislative change in Scots private law was for the 'evident utility' of the subjects was a justiciable issue in the Court of Session. He stated:

'The making of decisions upon what must essentially be a political matter is no part of the function of the court, and it is highly undesirable that should be. The function of the court is to adjudicate upon the particular rights and obligations of individual persons, natural or corporate, in relation to other persons or, in certain circumstances, to the state. A general inquiry into the utility of certain legislative measures as regards the population generally is quite outside its competence'.

1 Gibson v Lord Advocate, 1975 SLT 134 OH at 137 (emphasis added). By contrast, in Laughland v Wansborough Paper Co Ltd 1921 1 SLT 341, OH at 345 Lord Ashmore apparently felt able to consider the 'evident utility' of a legal provision in rejecting a claim that an extension of the Rules of the Supreme Court of England which permitted service of English summons in cases concerning the making of a contract in England on person domiciled or ordinarily resident in Scotland was contrary to article 18[2] of the Treaty of Union.

The community charge and fundamental law

4.68 The campaign of resistance to the introduction of the community charge or poll tax in Scotland resulted in a number of challenges to the validity and/or application of the Abolition of Domestic Rates Etc (Scotland) Act 1987 on the grounds that the Act was not compatible with the Treaty of Union.


4.69 In Murray v Rogers it was argued that the staggered introduction of the community charge (applied in Scotland from 1 April 1989 and in
England and Wales from 1 April 1990) contravened the principal aim of article 18 of the Treaty of Union which was to equalise the taxes imposed in all parts of the United Kingdom. In any event, in constituting a tax which did not depend on ability to pay, the imposition of the community charge could not be said to be for the evident utility of the subjects in Scotland. Lord Kirkwood sitting in the Inner House rejected the submission that article 18 imposed an absolute duty on the Westminster Parliament to ensure that the laws concerning public rights were uniform throughout the United Kingdom and agreed with Lord Keith's views in Gibson on the non-justiciability of the question of the 'evident utility' of any change in the law concerning private rights.

1 1992 SLT 221.

4.70 In the related case of Fraser v MacCorquodale1 the court noted that these challenges to the validity of the community charge were raised in the context of an appeal to the sheriff under the 1987 Act against the imposition of a civil penalty for failure to provide information. Since the sheriff had no jurisdiction to entertain a challenge to the validity of the Act and no general powers of reduction neither did the Court of Session in exercising a statutory appellate function from the sheriff. In Pringle an attempt to invoke the nobile officium to challenge the validity of a claim for payment of the tax in Scotland in 1989–1990, on the grounds of alleged incompatibility with the single United Kingdom market provision of article 4 of the Treaty of Union, was also dismissed by the Inner House as incompetent on the basis that 'the nobile officium may never be invoked when to do so would involve over-riding the express provisions of a statute'.2

2 1991 SLT 330 at 332J.

The Skye Bridge toll

4.71 In Hingston v Anderson1 the prosecution, on summary complaint of individuals who refused to pay the toll over the Skye Bridge, was challenged before the Sheriff Court as incompetent on the ground, amongst others, that the charging of the toll was not compatible with two provisions of the Treaty of Union; in particular, article 4 establishing the subjects' freedom of trade and navigation between the ports of the United Kingdom and its dominions and plantations and article 18 on legal harmonisation between Scotland and England and the creation of a common customs and excise area within the United Kingdom. It was argued that the imposition of the toll was a new penalty placed upon travellers to and from Skye which adversely affected their private rights and could not be said to have been introduced for the evident utility of the subjects in Scotland.

1 7 March 1996, unreported, Dingwall Sh Ct. See also (1996) 232 SCOLAG 43-47.

4.72 The sheriff relied upon obiter dicta of Lord President Cooper in MacCormick v Lord Advocate4 to the effect that challenges to alterations in the
laws concerning 'public right, policy and civil government' would not be justiciable before the courts in Scotland. Lord Cooper had expressly reserved his opinion as to the competency of legal challenges to Parliamentary alterations in the laws of Scotland concerning private rights. The sheriff characterised the matter before him as a fiscal question and hence as concerning public rights. He therefore held that he had no jurisdiction or authority to consider whether the governmental act complained of was or was not in breach of any of the provisions of the Treaty of Union. The accused's pleas to the competency and relevancy of the complaint were accordingly dismissed and they were called upon to plead guilty or not guilty.

1 1953 SC 396 at 412-413.

2 The unsuccessful appeal against conviction is reported at 1997 SLT 844, HCJ.

4.73 Most recently in Robbie the Pict v Hingston¹ the High Court of Justiciary in considering an appeal against conviction for non-payment of bridge tolls over the Skye Bridge rejected the submission that the proceedings for non-payment were conducted in a manner contrary to the accused fundamental rights to a fair trial as set out in article 6(3) of the European Convention on Human Rights and held that the bridge toll in question did not constitute an 'excise' for the purposes of article 18 of the Treaty of Union of 1707. The court observed however that article 18 might in an appropriate case be prayed in aid to prohibit the different application of identical legislation in England and Scotland where the effect of such different treatment was to impose charges which could properly be called an excise.

1 Robbie the Pict v Hingston (No 2) 1998 SLT 1201.

What is a constitution? – the constitutionalisation of the Treaty of Rome

4.74 In MacCormick v Lord Advocate Lord President Cooper seemed to highlight the paradox that even if certain provisions of the Treaty of Union were to be regarded as fundamental law and hence as unalterable, as a matter of constitutional law, by the Westminster Parliament, there was no specific enforcement mechanism provided for within the Treaty whereby the courts could prevent Parliament acting unlawfully and unconstitutionally. He stated:

'To put the matter another way, it is of little avail to ask if the Parliament of Great Britain 'can' do this thing or that, without going on to inquire who can stop them if they do'¹.

¹ 1953 SC 396 at 412.

4.75 Certain writers¹ have suggested that the courts in Scotland should get round this problem of justiciability of the Treaty by taking inspiration from the Supreme Court of the United States which in Marbury v Madison stated:

'The Constitution is either a superior paramount law, unchallangeable by ordinary means, or it is on a level with ordinary legislative acts and, like other
acts, is alterable when the legislature shall be pleased to alters it. If the former part of the alternative is true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.\(^2\)

2 1 Cranch 103 (1803) at 177.

4.76 The Supreme Court of the United States thereby claimed the power of judicial review of congressional statutes, notwithstanding that there was no such express power given them in the constitution, on the grounds that otherwise the legislature would be able to act outwith the specific limits imposed upon it by the written constitution.

4.77 A more recent, and arguably a more directly apposite example of a court transforming an international treaty into a constitutional document is, however, available from the Court of Justice of the European Communities. The court has stated that the European Community Treaty is the 'constitutional charter of a Community based on the rule of law', which law is supreme over the law of member states and directly applicable to the nationals of the member states.\(^3\) The court notes that one objective of the European Community Treaty is 'to contribute together to making concrete progress towards European unity'. The court has accordingly defined its role as follows:

[T]o secure observance of a particular legal order and to foster its development with a view to achieving the objectives set out in articles 2 [establishment of a common market] 8a [creation of the single European internal market from 1992] and 102a [co-operation in economic and monetary policy] of the EEC Treaty and to attaining a European Union among member states.... [F]ree trade and competition are merely means of achieving these objectives.\(^1\)

2 Article 1 of the Single European Act.

4.78 Thus, although it was the Treaty of Rome which originally gave rise to the Community legal order, the articles of the Treaty are themselves interpreted in the light of what is required of a specific legal order. Where the Treaty appears to the Court of Justice to contain contradictions or gaps, as creator and guardian of this new legal order, it feels justified in removing these contradictions and filling in these gaps, even if this results in ignoring or adding to the original wording of the Treaty. As the then Advocate-General (now Judge) Mancini stated in his opinion in Les Verts:

'[T]he obligation to observe the law takes precedence over the strict terms of the written law. Whenever required in the interests of judicial protection, the
4.79 More radically still, the Court of Justice has suggested that the
independence and strength of the Community legal system is such that
certain provisions of the Treaty might be unalterable and entrenched
against any revision or amendment by member states. In its first opinion on
the draft Treaty for a European Economic Area the court stated:

‘Article 238 of the EEC Treaty does not provide any basis for setting up a
system of courts which conflicts with article 164 of the EEC Treaty and, more
generally, with the very foundations of Community law.

For the same reasons, an amendment of article 238 in the way indicated by the
Commission could not cure the incompatibility with Community law of the
system of courts to be set up by the agreement’.

1 Opinion 1/91 Re a draft Treaty on a European Economic Area [1991] ECR I-6079 at 6111-2
parags 71-72.

4.81 Once the assumption is made that the Treaty of Rome was always
intended to be a supranational constitution, and that the Court of Justice is
therefore simply fulfilling its role in drawing out the implications of that
unfinished Treaty, its approach becomes clear. The court presents itself as
the guardian of the vision of the original framers of the Treaty and pro-
motes that view over even the views of all the member states governments.
The court regards itself the promoter of the values of the (yet to be fully
realised) European polity. As one former President of the court has stated:

‘Once the idea of a court of arbitration was abandoned and a judge was
charged with ensuring the respect for the law which the Treaties were institu-
ting, that judge could not ignore the very aims of that law.... Thus, within the
Community, the judge is the repository of the will of the Treaties’ authors who
disappeared on the day the Treaties were signed, only re-appearing on the rare
occasions when new agreements are concluded. They have made the judge the
guardian of their joint work, which is to say of its objectives, its institutions and
of its law’.

1 Robert Lecourt in Le juge devant le Marche Commun 1970 at 64 (author’s translation).

4.82 This creative constitutionalising approach to the interpretation of its
foundational legal text is seen from the outset in the case law of the Court of
4.82 Judicial Review and Westminster Legislation

Justice. By simple judicial fiat in Van Gend en Loos\(^1\) the court established in 1963 that provisions of the Treaty of Rome could be 'directly effective' in the sense of being capable of creating for individuals rights enforceable before their national courts, independently of national legislatures. The question as to whether international law could have direct effects within a national system of law had, until this decision, been a matter to be determined by the rules of that national system. The court in Van Gend en Loos, however, rendered national rules on the matter irrelevant since they claimed that as a matter of Community law, such law was directly effective in the national sphere.

1 Case 26/62 Van Gend en Loos v Nederlandse Tarief Commissie [1963] ECR 1 at 12.

4.83 From the very first, then, the Court of Justice is seen to be limiting the competences of member states and expanding the scope of Community law on the basis of the ideal informing the Treaty of Rome, which referred in its preamble to a union of peoples and not simply of governments. Indeed, the case law of the Court of Justice since its seminal judgment in Van Gend en Loos may be seen as a series of footnotes to that decision in which the other characteristics of this new legal order have gradually revealed themselves\(^1\).

1 For an extended analysis of the competing arguments for and against the direct effectiveness of the Treaty provisions, see Stein 'Lawyers, Judges and the making of a Trans-national Constitution' (1981) 75 American Journal of International Law 1, 3-10.

4.84 For example, the precise relationship between national law and the law of the Community was not spelled out in the provisions of the Treaty, arguably because, as with the question of direct effect, this had been considered to be a matter for the various national legal systems to determine. The whole matter of the relationship between national and Community law was addressed by the Court of Justice in a case decided one year after Van Gend en Loos.

4.85 In Costa v ENEL\(^1\) the Court of Justice held that obligations undertaken by member states under the Treaty of Rome could not be called into question by subsequent legislative acts of those member states. If this were the case Community obligations would be contingent, rather than unconditional; the law stemming from the Treaty would accordingly be deprived of its character as Community law; and the legal basis of the Community would therefore be called into question. The court stated that in entering the Community, member states had permanently limited their sovereignty to extent that their subsequent unilateral legislative acts could not prevail against Community obligations. Community law was to be regarded as supreme over national law. Consequently, conflicts between the rules of the Community and national laws must be resolved by the national court applying the Community law principle that Community law takes precedence.

The Treaty of Union and the Treaty of Rome

4.86 The Treaty of Union is comparable to the Treaty of Rome in many significant respects. Both documents are international legal treaties. The purpose of both is to set up a customs union between states and to facilitate free trade. Both institute a new legislature to regulate the internal affairs of the formerly independent and sovereign states. Both apparently set limits on that new supra-national legislature. Finally, both apparently seek to require the equal treatment in law of all the subjects or citizens of the newly created Union.


4.87 It is submitted that the analogies which may be drawn between the Treaty of Union and the Treaty of Rome may provide us with useful insights into the potential development by the courts in Scotland of a domestic constitutional jurisprudence allowing for the judicial review of national legislation. This new domestic constitutional jurisprudence may parallel, and develop alongside the existing European case-law which already requires the courts in Scotland to ensure that national legislation and administrative practice conforms to the requirements of European Community law.

Equal treatment without regard to nationality

4.88 Article 4[2] of the Treaty of Union provides 'that there be a communication of all other rights and privileges and advantages which do or may belong to the subjects of either kingdom [of Scotland and England] except where it is otherwise expressly agreed in these Articles'. This seems to parallel the ban on nationality discrimination contained in article 6[1] (now article 12 post-Amsterdam) of the Treaty of Rome which specifies that 'within the scope of the application of this Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'. The Court of Justice has deduced from this article and other related articles in the Treaty that there is a directly effective general principle or fundamental right implicit within Community law that individuals are to be treated equally and not be discriminated against. Differences in treatment have to be objectively justified to the courts to be held to be lawful.


The establishment of a customs union and free trade area

4.89 Article 18[1] of the Treaty of Union, which requires the harmonisation of trade, customs and excise regulation as between Scotland and England, has a ready parallel in the customs union provisions of the Treaty of Rome, in particular article 12 (now article 25 post-Amsterdam):
'Customs duties on imports and exports and charges having equivalent effect shall be prohibited between member states. This prohibition shall also apply to customs duties of a fiscal nature'.

and article 30 (now article 28 post-Amsterdam):

'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member states'.

4.90 It is of particular interest to note that both of these provisions of the Treaty of Rome have been held by the Court of Justice to be sufficiently clear, precise and unconditional to have 'direct effect', and so may be relied upon directly by individuals before the courts, even in the absence of suitable implementing legislation of the member states'. Indeed it was in relation to the original article 12 of the Treaty of Rome (now article 25 post-Amsterdam) that the whole concept of the direct effect of Community law was first developed. In Van Gend en Loos1 the Court of Justice held that this article could be relied upon directly by an individual company before the Dutch courts so as to defeat a claim by the national customs and excise authority to customs duty on a product imported to the Netherlands from Germany.


4.91 Article 18(2)(i) of the Treaty of Union which gives the United Kingdom legislature the power, as it thinks fit, to harmonise public law between Scotland and England, has a certain affinity with Chapter 3 of Title V the Treaty of Rome dealing with the approximation of laws between the member states, and in particular with article 100 (now article 94 post-Amsterdam) which provides that (emphasis added):

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations and administrative provisions of the member states as directly affect the establishment or functioning of the common market'.

4.92 One could envisage a challenge to the validity of a harmonising directive passed by the Community legislature under article 94 on the ground that it could not be said to concern laws or administrative provisions which directly affect the establishing and functioning of the common market. Similarly, we could seem how article 18(2)(i) of the Treaty of Union might be used to challenge the validity of any post-Union legislation in the area of public law which did not have the effect of making such law the same throughout the United Kingdom. There might, however, be a problem with the title and interest or 'standing' of any challengers to the national legislation in question. By their very nature, neither
article 18[2][i] of the Treaty of Union nor article 94 of the post-Amsterdam Treaty of Rome would seem, of themselves to be capable of conferring individual justiciable rights.  


Limitations on the Treaty legislature

4.93 The provisions of article 18[2][ii] of the Treaty of Union which, on the face of it, places a limit on the legislative competence of the United Kingdom Parliament in allowing it to alter private law in Scotland only where is to the evident utility of the subjects in Scotland has a parallel with the expressed limitations of the Community legislature set out, in particular, in the 'proportionality clause' of article 5(3) of the post-Amsterdam Treaty of Rome which is in the following terms:  

'Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty'.

4.94 Article 5(3) may be seen as the general recognition within the Treaty of the Community principle of 'proportionality' which has been developed by the Court of Justice to assess the lawfulness of both the legislative and administrative actions of both Community institutions and member states acting in the field of Community law.  


Proportionality and evident utility

4.95 As we saw in Chapter 2 at paragraph 2.100, proportionality is a complex doctrine in Community law and involves the application of three distinct tests:

- the measure should be shown to be appropriately and effectively aimed at a legitimate end, in the sense that the relationship between means and ends is neither impossible or unlawful;
- the measure should be demonstrated to be a necessary one, in the sense that there are no less restrictive means which might achieve the same purpose;
- the measure should be seen to be proportionate or balanced, in the sense that any injury or restriction on the individual caused by the act should be offset by the gain to the general public or the Community as a whole.

4.96 To be lawful under and in terms of Community law, an action of the Community legislature must pass the tests of proportionality. It must therefore be shown not only to be aimed at a legitimate objective permitted by Community law, but that as a matter of fact it can attain that end and that the means chosen to reach the end are, in all the circumstances,
proportionate. Further, in accordance with the doctrine of subsidiarity it
must also be evident that those proportionate means which are available to
attain that objective are such that the objective could not be sufficiently
achieved by the member states acting individually, but rather could better
be achieved by the Community.

4.97 The Court of Justice originally developed the test of proportionality
as a test of the lawfulness of the laws and administrative practices of the
central Community institutions. Standing the primacy of Community law
over all and any conflicting provisions of national law, the Court of Justice
then extended the tests of proportionality to those acts of the national
legislatures and executives of the member state which could be said to have
effect within an area covered by Community law. We have already noted
that in Factortame 2 the Court of Justice held that the principle of the full and
effective protection of rights under Community law required that courts in
the United Kingdom should be able to set aside any potentially conflicting
national laws and administrative practices ad interim, pending a final
decision by the Luxembourg Court on the relevant Community law1.
1 Case C-213/89 R v Secretary of State, ex p Factortame Ltd (No 2) [1990] ECR 2433, ECJ and R v
Secretary of State, ex p Factortame Ltd (No 2) [1990] 2 AC 85, HL.

4.98 Thus, when national courts are called upon to apply Community law
to a case before them, they are required to act as Community courts and to
apply the Community test of proportionality to the matter before them. For
example, in the late 1980s prosecutions for breach of the Sunday trading
rules brought by local authorities in England and Wales were challenged
by large retailers as invalid on the basis that the trading restrictions
contained in the Shops Act 1950, under which these actions had been
brought, allegedly contravened the Community law principle of the free
movement of goods as set out in article 30 (now article 28 post-Amsterdam)
of the Treaty of Rome. In order to assess the correctness or otherwise of this
claim, the courts in England and Wales were enjoined by the Court of
Justice to apply the Community law test of proportionality to the restric-
tions set out in the 1950 Act.

4.99 Certain judges in England objected. Hoffman J, as he then was, while
accepting that that ‘the Treaty of Rome is the supreme law of this country,
taking precedence over Acts of Parliament’ went on:

‘In my judgment it is not my function to carry out a balancing exercise or to
form my own view as to whether legislative objects could be achieved by other
means. These questions involve compromises between competing interests
which in a democratic society must be resolved by the legislature. . . . The
function of this court is to review the acts of the legislature but not to substitute
its own policies or values. This is not an abdication of judicial responsibility.
The primacy of the democratic process is far more important than the question as to whether our Sunday trading laws could or could not be improved”.

1 Stoke on Trent Borough Council v B & Q plc [1991] 2 WLR 43 at 57.

4.100 By contrast, as we saw in Chapter 2 at paragraph 2.04 the Community law test of proportionality was applied to national legislation without demur by the House of Lords in the judicial review application by the Equal Opportunities Commission for a declaration that the distinction in the national statutory employment protection accorded to full time workers and part-time workers contravened the European law based prohibition on indirect sex discrimination. As the law then stood, full time workers required only two years qualifying service before receiving statutory employment protection, whereas part-time workers required five years service before obtaining statutory unfair dismissal and redundancy rights. Given that the vast majority of part-time workers in the United Kingdom were women, it was argued on behalf of the Equal Opportunities Commission that women were adversely and disproportionately affected by this rule laid down in national legislation.

4.101 In considering whether this difference in treatment of men and women could be objectively justified by the Secretary of State, Lord Keith of Kinkel, in the leading judgment in the case, applied the Community test of proportionality to the national legislation. He found that the stated purpose of this rule, namely to bring about an increase in the availability of part-time work, could properly be regarded as a beneficial social aim, and so passed the first limb of the test in being directed at a legitimate end. In considering the second limb of the test, namely whether or not the rule was necessary in order to achieve the end of more part-time work, Lord Keith found the evidence presented to him inconclusive, with employers organisations claiming that the removal of the distinction between part-time and full-time work would reduce the amount of part-time work available, while trade union representatives and academics in the industrial relations field took the opposite view.

4.102 It is in his consideration of the third limb of the proportionality test, whether or not the national measure in question can be seen to be proportionate or suitable, in the sense that any injury or restriction on the individual caused by the act should be offset by the gain to the community as a whole, that Lord Keith is at his most radical. It was argued by the Secretary of State, in attempted justification of the less favourable treatment accorded to part-time workers, that the longer period of time needed by them before they could acquire statutory employment protection resulted in an overall saving in indirect labour to the employer as measured by the unfair dismissal compensation and/or redundancy payment which might otherwise have to be paid to employees. The employer would therefore be more ready to employ part-time staff because they would, in effect, be cheaper. Lord Keith noted:

‘The same result, however, would follow from a situation where the basic rate of pay for part-time workers was less than the basic rate for full-time workers.
Judicial Review and Westminster Legislation

No distinction in principle can properly be made between direct and indirect labour costs... Legislation which permitted a differential of that kind nation-wide... considering that the great majority of part-time workers are women would surely constitute a gross breach of the principle of equal pay and could not possibly be regarded as a suitable means of achieving an increase in part-time employment. Similar considerations apply to legislation which reduces the indirect cost of employing part-time labour.1

1 R v Secretary of State for Employment, ex p the Equal Opportunities Commission [1995] 1 AC 1, HL at 30 (emphasis added).

4.103 On a traditional constitutional analysis of the Equal Opportunities case it would seem that the judges were usurping the function of the national legislature. Parliament had decided to differentiate between part-time and full-time workers. Parliament's wishes should be respected. The judges should not impose their own views as to the appropriateness, necessity and suitability of particular legislation. It is clear however, that the constitution has changed. Parliament does not have the last word where its legislation has effects in areas in which individuals can claim that their rights granted under Community law are being compromised.

4.104 It is clear, too, that where matters of Community law are involved, national judges have to subject national legislation to complex and controversial assessment as to its effectiveness and overall worth. It is submitted that it is precisely these same types of calculations which would be involved in any judicial assessment, under article 18(2)(iii) of the Treaty of Union, of the 'evident utility' of Westminster legislation purporting to alter the law of Scotland concerning the private rights of the subject. What Lord Keith considered in 1975 in Gibson v Lord Advocate1 to be a question unsuited for the judiciary to determine, has, some twenty years later when Community law is relied upon, become a question which Lord Keith is more than ready to decide upon, and decide against the arguments and justifications of the government.

1 1975 SC 136.

The Treaty of Union as a constitutional document

4.105 Constitutional interpretation is not an exercise in legal antiquarianism. It is not an attempt to discover once and for all what the original authors of the document in question meant or envisaged by any particular provision. Instead, if a document is seen to be a constitution, it is to be understood as providing a framework for legal relations today, here and now. It has to be read, not as an eighteenth century document whether it be the Treaty of Union of 1707 or the United States Constitution of 1787, but as a living document addressing contemporary situations and problems as and when they arise.


4.106 This approach to the text which characterises constitutional interpretation may be said to involve taking a dynamic, teleological
approach to the relevant constitutional provisions uncovering their purpose or spirit, rather than an approach constrained and limited by purely historical exegesis of the dead letter of the law. The choice between alternative interpretations may turn not on purely legal considerations but on a broader view as to what the orderly development of the polity requires, taking into account relevant social and legal changes and the general requirements of justice.

4.107 It may accurately be claimed that the entry of the Scottish legal system into the European Community legal order, on the accession of the United Kingdom to the European Community in 1973, has resulted in profound social and legal changes in the polity, the full implications of which have yet to be realised. It is clear that Community law has transformed the traditionally conceived relationships between Executive, Parliament and Judiciary in the United Kingdom. As is clear from the Factor tane decisions, by accepting the subordination of the national legal order to the Community, the national courts rather than Parliament have become the masters of the constitution.

4.108 In acceding to the European Communities, the United Kingdom transferred its national courts to a distinct supra-national judicial hierarchy, under the authority of a Supreme court, the European Court of Justice. National courts thereby became Community courts charged with implementing Community law in the national sphere. While the United Kingdom remains a member of the European Community, and its courts consequently part of the European court system, the power (and sovereignty) of the national Parliament has been fettered in that it is unable to enforce or to enact legislation which is contrary to Community law, since such legislation will not be recognised by its own national courts.

4.109 It is evident that in matters concerning Community law, the United Kingdom courts are required to adopt the interpretative techniques and approaches to legislation which have been developed in the jurisprudence of the European Court. A number of these techniques, for example teleological reasoning and proportionality, involve the courts taking a quite new and for the United Kingdom legal systems totally alien approach to legislative enactments.

4.110 It would seem that there are then two paradigms for the United Kingdom courts' approach to legislation of the Westminster Parliament. In non-Community matters, assuming the traditional English law understanding of the United Kingdom constitution is correct, it would appear that the courts should continue to take a classic legal positivist approach of strict interpretation and application of the authoritative texts enacted by Parliament. Thus as we have seen in Chapter 1 at paragraphs 1.63 to 1.92 in McDonald v Secretary of State for Scotland: the Second Division held, contrary to the approach of the House of Lords in the English case of M v Home
Office, that as a matter of strict interpretation of the Crown Proceedings Act 1947, it was not competent to seek interdict against the Crown in Scotland. In matters where questions of Community law arise, however, the courts are required to ascertain the purpose of national legislation and assess its compatibility in intention and effect with the ends of a higher law set out in the Treaties and the judgments of the Court of Justice. We have already noted in Chapter 1 at paragraph 1.62 the case of Millar & Bryce Ltd v Keeper of Registers of Scotland, where in reliance upon the Community law principle of effective protection of Community law rights, positive injunctions or orders ad factum praestandum under section 47(2) of the Court of Session Act 1988 were pronounced by the Lord Ordinary against the Crown on the basis that the petitioners had established a prima facie case that the respondents were acting in breach of Community competition law, in particular article 86 (now article 82 post-Amsterdam) of the Treaty of Rome relating to abuse of a dominant position.

1 1994 SLT 692.
2 [1993] 3 All ER 537, HL.
3 Millar & Bryce Ltd v Keeper of Registers of Scotland 1997 SLT 1000.

4.111 This difference in approach results in two models of law: one in which courts are supreme in matters of Community law, one in which the national legislature is supreme in matters untouched by European law. Such a constitutional model is, it is suggested, an inherently unstable one. The tendency for any mature legal system would be to seek coherence in its approach so that parties before the national courts receive the same protection and treatment regardless of whether or not a point of Community law arises in their particular case. As Lord Donaldson stated in M v Home Office when the Court of Appeal considered the question as to whether or not a minister of the Crown could properly be interdicted and found guilty of contempt of court if he refused to adhere to the interdict:

'It is anomalous, and in my judgment wrong in principle, that whereas the law gives the courts comprehensive power to preserve rights and to 'hold the ring' pending a final decision in a dispute between citizens (including companies) or between citizens and local authorities, its powers where central government is involved are more circumscribed. It is even more anomalous that as a result of Case C-213/89 R. v Secretary of State for Transport, ex p Factortame Ltd. (No 2) 1 AC 603 and the operation of European Community law, they now have comprehensive powers even where central government is involved, but only in relation to rights under Community law.'

1 [1992] 2 WLR 73 at 99-100.

4.112 Lord Donaldson’s remarks (‘anomalous and wrong in principle’) show the inherent instability of the existence of two separate paradigms of legal reasoning and two distinct sets of rights and remedies within the same legal structure. Just as it has been a basic principle of Community law that it be applied uniformly throughout the member states, so too the inherent dynamic of a national legal system will be to seek internal coherence and avoid the impression of arbitrariness. Accordingly one might
expect judges within the system to seek to apply and and/or modify existing national rules in a manner which will ensure that the same results will be achieved in similar factual situations, whether or not Community law is directly relevant.

4.113 In contrast to the position in English law, apparently still more or less hidebound by the historical baggage of the absolute sovereignty of Parliament, the opportunity is now open to Scots lawyers and judges using the Act of Union in an imaginative contemporary and properly constitutional way, to ensure that there is a parity of remedies and approaches to Westminster legislation, whether or not a question of Community law is involved.

4.114 The approach by the European Court of Justice to the Treaty of Rome may be seen as a paradigm for a new distinctively Scottish approach to constitutional interpretation. This might involve some or all of the following findings in relation to the Treaty of Union:

- that challenges to the validity of a Westminster Act of Parliament for its failure to accord with provisions of the Treaty of Union could be brought only before the Court of Session in an application for judicial review seeking declarator, reduction and interdict;¹
- that clear, precise and unconditional articles of the Treaty of Union are found to have direct effect such that they may be relied upon by individuals directly before the Scottish courts;
- that article 18[1] of the Treaty of Union might be used either to challenge the enforcement against an individual party of any rules of Scots law which regulated trade, custom or excise and which differed from the rules applicable in England;
- that article 18[1] of the Treaty of Union might be used to insist on the direct enforcement in Scotland of the applicable English law concerning such trade, custom and excise;
- that article 18[2][i] of the Treaty of Union might be used to insist on the uniformity of approaches in Scotland and England in matters of public law and could form the basis for a challenge to the validity of any legislation in the area of public law which had the effect of introducing new divergences between Scots law and English law;
- that questions of the 'evident utility' of Westminster legislation would be accepted as justiciable before the Scottish courts. Article 18[2][ii] of the Treaty of Union could be used to challenge the validity of Westminster legislation which affected private law in Scotland, on the grounds that the proposed legal change was not for the 'evident utility' of the subjects in Scotland. For the sake of legal coherence within the system, the national 'evident utility' test could be developed along the same lines as the Community proportionality test;
- that it be accepted that the tri-partite analysis of West² should not be applied to the situation of the judicial review of primary Westminster legislation, since there cannot properly be said to be a body delegating power, a body to whom that power was delegated, and the person for whose benefit that power might be exercised in order for
the supervisory jurisdiction of the Court of Session to be invoked. Instead, a new formal constitutional analysis whereby the courts in Scotland are recognised as having a separate but equal sovereignty under Scots law to ensure respect for the Rule of Law even against the sovereignty of the Westminster legislature and the executive.

1 See T B Smith 'Constitutional Law' 5 The Laws of Scotland: Stair Memorial Encyclopaedia para 350.
3 See Sir Stephen Sedley 'The Sound of Silence: constitutional law without a constitution' (1994) 110 Law Quarterly Review 270 for further development of the idea of the sovereignty of the judiciary.

4.115 It is plain, however, that any attempt to treat the 1707 Act of Union as a constitutional document on a par with the 1787 Constitution of the United States or the 1957 Treaty of Rome will require a radical change in approach from the judiciary and from legal practitioners in Scotland. As appears evident from the history of the limited attempts that there have been to date to seek the judicial review of primary legislation, there will have to be a fundamental transformation in the legal culture of this country and in the popular understanding of the constitution and the role of the judiciary therein.

4.116 This section sets out one way in which this new and radical legal project, the constitutionalisation of Scots law and of Scottish judges, might be begun. The consequences of embarking on such a course are not clear. Just as the accession of the United Kingdom to the European Communities involved the commencement of a journey to an unknown continental destination, so to the 're-patriation' of the Scottish constitution would lead this country into unknown constitutional territory. Fundamental question remain to be explored, for example the question of the alterability of the provisions of the Treaty (by referendum?) the compatibility with the Treaty of the arrangements under the Scotland Act 1998 for a new devolved Scottish Parliament to legislate on internal affairs in Scotland and the extent to which the Acts of the Scottish Parliament would be subject to the judicial review of the Scottish courts under the new dispensation. It is to such matters that we turn in the next chapter.

INTRODUCTION

5.01 The Scotland Act 1998 is sometimes represented by politicians and writers of romantic, if unhistorical, disposition as effectively re-establishing the pre-1707 Union Parliament of Scotland. It does not, of course. The Union of 1707 is not dissolved: section 37 of the 1998 Act specifically provides that the English Union with Scotland Act 1706 and the Scottish Union with England Act 1707 continue to have effect, subject to the new Act. Moreover section 1(1) of the 1998 Act which states that ‘there shall be a Scottish Parliament’ does not restore the old Estates of Scotland but rather establishes the new Scottish Parliament as a subordinate legislative body ultimately remaining, like parish councils in England, subject to the control of the Parliament of the United Kingdom at Westminster. The power of the Parliament of the United Kingdom to make laws for Scotland is unaffected by the Scotland Act (see section 28(7)).

5.02 It is crucial to any proper understanding of the role of the judiciary in relation to the new Scottish Parliament that it be recognised that is not an independent sovereign body. Notwithstanding that they require specific royal assent as a condition of their validity, the Acts of the Scottish Parliament are defined in the Human Rights Act 1998 as ‘subordinate legislation’. The powers of the Scottish Parliament and Executive are de-limited and circumscribed by the provisions of the Westminster statute which set them up.

5.03 What has been created in the Scottish Parliament is a democratic legislature whose Acts are, however, subject to control by the judiciary. In French constitutional writing, the idea of the judiciary having the power to review and strike down provisions of laws which have been duly passed by the legislature has been termed ‘un gouvernement des juges’. This is how the French would characterise the American constitutional position under which, since the seminal judgment in 1803 of the Supreme Court of the United States in Marbury v Madison, the courts of that country have claimed the power to declare ‘a legislative act contrary to the constitution’ as ‘not law’. By contrast, on the French constitutional model there can be no possibility for the judicial review of legislation once formally enacted. The separation of powers as understood in post-revolutionary France (given the experience during the Ancien Regime of judicial review of laws by a
variety of regional courts, termed the Parlements) meant that the duty of judges was seen to be one of applying the law, rather than questioning it. Since the adoption of the Constitution of the Fifth Republic in 1958, however, the French model has allowed for a narrow window of opportunity for limited constitutional review of proposed legislation, after its passage through Parliament but prior to its formal promulgation, which may be carried out by the Conseil Constitutionnel on a reference from the President of the Republic, the Prime Minister, the presidents of the two assemblies or 60 members of either the National Assembly or the Senate.

2 1 Cranch 103 (1803) at 177.

5.04 The Scotland Act 1998 has, perhaps surprisingly, gone for a belt and braces approach. It provides both for pre-legislative judicial review by the Privy Council of proposed Scottish legislation on the French model and allows for the post-enactment judicial review of Scottish legislation by all courts in the United Kingdom hierarchy, on the American constitutional model. The granting of such wholesale powers of legislative judicial review creates a challenging new role for the judiciary. It raises questions as to the inter-relationship between the principle of judicial respect for the democratic will of the Scottish people (as expressed by the Scottish Parliament) and the enforcement by the judiciary of the limits laid down on that legislature in accordance with the democratic will of the peoples of the United Kingdom (as expressed by the Westminster Parliament and government in the provisions of the Scotland Act).

5.05 Since the limits of the new legislative body are set out in statute, the task of ensuring that the Parliament stays within the powers granted to it is one for the courts. Section 29(1) of the 1998 Act provides that ‘an Act of the Scottish Parliament is not law so far as any provision is outside the legislative competence of the Parliament’. Possible conflict between the Westminster Parliament and the Holyrood Parliament on claims that the new body is exceeding its limited powers is thus made into a juridical rather than a nakedly political matter. The danger is, of course, that in giving the task of policing the Scottish Parliament to the courts, the judiciary come to be seen or to be presented as acting in a broadly political role, holding the ring between the demands of the Westminster Parliament and the expectations of the Holyrood Parliament. The juridicalization of what is essentially political conflict will inevitably lead to a perception of the politicisation of the judiciary.

PROSPECTIVE OVER-RULING

5.06 This fundamental political change in the expected role of the courts become plain when one consider the new power which is given to any
court (not simply the Court of Session) under section 102 of the 1998 Act. In terms of this section a court may suspend or limit the retrospective effect of its rulings in relation to successful challenges as to the vires of the legislative activity of either the Scottish Parliament or Scottish Executive, having regard to, among other matters, the extent to which persons who are not parties to the proceedings would otherwise be adversely affected.

5.07 At one level, this new power of the national courts to grant purely prospective rulings might be seen simply as an example of legal transplant or constitutional spill-over from the practice of the European Court of Justice which has long claimed and exercised the power to limit the temporal effect of its rulings, particularly in cases where that Court's decision clarifies (or alters) the law in a manner which might have a substantial economic impact. The compatibility of any power of retrospective limitation of judgments with the native constitutional principles of the common law and the role of the judiciary in developing the law has been called into question. As Lord Goff has noted, in the context of a discussion of the implications of the judicial abandonment of established rule that error in law will not found a claim for recovery of monies under the principles of unjustified enrichment:

'[A] system [of prospective overruling], although it has occasionally been adopted elsewhere with, I understand, somewhat controversial results, has no place in our legal system.'

1 The Court of Justice has, for example, limited the effect of its judgements in this way as regards the direct effect of article 119 (Case 43/75 Defrenne v SABENA (No 2) [1976] ECR 455); in finding that a University registration fee payable by non-nationals in Belgium was contrary to Community law (Case 24/86 Blaisot v University of Liège [1988] ECR 379); and in holding that article 119 applied to the payment of employment pensions (Case 262/88 Barber v Guardian Royal Exchange Assurance Group plc [1990] ECR I-1889).

2 See Lord Browne-Wilkinson in Kleinwort Benson v Leicester City Council, [1998] 4 All ER 513 at 527:

'The theoretical position has been that judges do not make or change law: they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed: its true nature is disclosed, having existed in that form all along. This theoretical position is, as Lord Reid said, a fairy tale in which no-one any longer believes. In truth, judges make and change the law. The whole of the common law is judge-made and only by judicial change in the law is the common law kept relevant in a changing world. But whilst the underlying myth has been rejected, its progeny – the retrospective effect of a change made by judicial decision – remains.

...[I]n the absence of some form of prospective overruling, a judgment overruling an earlier decision is bound to operate to some extent retrospectively: once the higher court in the particular case has stated the changed law, the law as so stated applies not only to that case but also to all cases subsequently coming before the courts for decision, even though the events in question in such cases occurred before the Court of Appeal decision was overruled.'

3 Kleinwort Benson v Leicester City Council [1998] 4 All ER 513 at 536a-b per Lord Goff.

5.08 Giving the courts a discretionary power to limit the retrospective effects of their judgments means that, controversially, their decisions as to whether to grant or refuse retrospective limitation or suspension will no longer be ones which can be presented as determined by purely legal considerations or seen as a purely objective applications of the requirements of the rules. Rather the courts are expressly to take into account...
broad non-legal considerations and to consider pragmatic arguments regarding the perceived consequences of those judgments.

5.09 As guardians and interpreters of the law, judges have natural authority. In non-legal matters, their views have no greater weight or privilege than others. The 1998 Act sets up a regime which might be described as 'the government of judges'. The danger is that, in being forced to assess and pronounce on the non-legal, and to reach purely discretionary rather than rule guided decisions, judges will forfeit their protective mystique and their claim to be 'above politics' will lose its credibility. Judges may then come to be regarded simply as another set of political actors within the new politics of post-devolutionary Scotland and their decisions fair game for increased public scrutiny and criticism. This aspect will come particularly to the fore when the courts are called upon to enforce legal limitations on the power of the Holyrood Parliament.

PRE-ENACTMENT JUDICIAL SCRUTINY OF BILLS OF THE SCOTTISH PARLIAMENT

5.10 The Lord Advocate (for the Scottish Executive) the Advocate General (for the United Kingdom government) and the Attorney-General (presumably for any distinct English and Welsh interest in the United Kingdom government) all have the power under section 33 of the 1998 Act to refer the question as to whether a Bill passed by the Scottish Parliament or any provision of such a Bill is or is not within the legislative competence of the Scottish Parliament to the Judicial Committee of the Privy Council. The Attorney General for Northern Ireland has, for reasons unknown, not been given any such power to refer Scottish Bills to the Judicial Committee.

5.11 The Judicial Committee of the Privy Council is constituted under and in terms of section 103(2) of the 1998 Act. Only those Privy Councillors who hold or have held the office of a Lord of Appeal in Ordinary, or high judicial office as defined in section 25 of the Appellate Jurisdiction Act 1876 (that is to say English and Northern Ireland High Court and Court of Appeal Judges and, in Scotland, Senators of the College of Justice) may sit and act as a member of the Committee in proceedings under the Act. In effect, what this means is that: firstly, Privy Councillors who are Commonwealth judges are excluded from sitting in Scotland Act proceedings; and secondly, unless new Privy Councillors are created who do not sit in Parliament, there will be high degree of overlap between those who are active House of Lords judges and the Privy Council judges.1

1 See D Oliver 'Comment: the Lord Chancellor, the Judicial Committee of the Privy Council and Devolution' [1999] Public Law 1-5 questioning whether it be appropriate, given the requirements of judicial independence set out in article 6 of the European Convention, that past and present Lord Chancellors should be eligible to sit on devolution cases before the Privy Council in the outcome of which the Westminster Executive might have an interest.
The section 33 reference procedure as regards Bills introduces a constitutional novelty into the United Kingdom which, as we have noted, appears to be modelled, at least in part, upon current French constitutional practice whereby the *Conseil Constitutionnel* may be asked to rule on the constitutionality of provisions of a Bill which has been passed by the French Parliament, but not yet given the force of law by formal promulgation. The French constitution, in contrast to that of the United States of America, continues to bar the courts from any possible judicial review of measures once they have been duly passed into law by the legislative assembly.


The section 33 procedure is innovative in the context of adjudication in the United Kingdom in that it will require the members of the Judicial Committee of the Privy Council to reach a judgment not on what is the case but on what they anticipate would be the case if the legislation were to be passed unamended. As has been noted:

'A reference under this clause will involve the judges in deciding issues based on hypothetical facts not yet the subject of litigation, an unusual practice for British courts'.


Further, it is not at all clear whether, in deciding to make such references, the law officers in question will be acting in a partisan role as members of a particular Executive, or in defence of the public interest as a whole. This dual function of the law officer in bringing civil proceedings generally was acknowledged by the then holder of the office of Attorney-General for England and Wales, Sir Michael Havers, in the following Parliamentary statement in 1986:

'In civil proceedings a distinction is to be drawn between proceedings in which the Attorney-General is involved in a representative capacity on behalf of the government, and action taken undertaken by him on behalf of the general community to enforce the law as an end to itself. In the latter capacity the Attorney-General again acts, whether *ex officio* or *ex relatione*, wholly independently of the government'. In the former he is by definition representing it. In this representative capacity the Attorney-General will assert the public interest as perceived by the government as a whole'.

5.14 Judicial Review and the Scottish Parliament and Executive

3 House of Commons Debates, 8 December 1986, col 2 (emphasis added).

5.15 No matter the reasons given by the law officer making the reference, the exercise of the section 33 powers of reference appears to be yet another example of the 1998 Act channelling political conflict and disagreement into the juridical sphere; once a Scottish Bill has been referred to the Judicial Committee, the Bill cannot be submitted for royal assent while the reference is under consideration; further progress on it is suspended. If, having heard the reference, the Judicial Committee in effect finds against the Holyrood legislature and decides that a Bill or any of its provisions would not be within its legislative competence, the Parliament is to be given the opportunity to re-consider any Bill it has passed.

1 Scotland Act 1998, s 36(4)(a).

5.16 If a reference under article 234 (formerly article 177) of the Treaty of Rome is made by the Judicial Committee to the European Court of Justice in Luxembourg for a preliminary ruling seeking clarification of a point of Community law, the Scottish Parliament is given the power, if it resolves that it wishes to reconsider the Bill, to seek withdrawal of the reference to the courts under section 34 of the 1998 Act. The suggestion that the Judicial Committee might make such a reference when considering whether a Scottish Bill, or any of its provisions, would be within the legislative competence of the Holyrood Parliament appears not to take into account the case law of the Court of Justice to the effect that the preliminary reference procedure is not appropriate for the resolution of hypothetical questions. In Foglia v Novello1 the Court of Justice asserted its right to look into the circumstances surrounding references from national courts and to refuse to give judgment where it felt that it was being asked to deliver a consultative opinion on a general or hypothetical question rather than to assist in the administration of justice in member states. Moreover in Djabali v Caisse d’Allocation Familiales de l’Essone2 the Court of Justice confirmed that it would not answer questions put to it under the preliminary reference procedure by national courts where its judgment is not necessary for the national court to give judgment on the case and facts before it. Article 234 therefore clearly cannot be used to obtain from the Court of Justice advisory opinions on general matters which do not arise from the facts of the dispute actually before the national court.

1 Case 104/79 Foglia v Novello (No 1) [1980] ECR 745; Case 244/80 Foglia v Novello (No 2) [1981] ECR 3045.

5.17 Under a quite separate power, namely section 35 of the 1998 Act, the Secretary of State may also make an order prohibiting the Presiding Officer of Parliament from submitting a Bill for royal assent if it contains provisions which the Secretary of State has reasonable grounds to believe would be incompatible with any international obligations of the United Kingdom or the interest of defence or national security.
5.18 This reference to the international obligations of the United Kingdom is potentially a provision of particular significance in that it effectively binds the Scottish Parliament to respect the whole range of international treaties which have been ratified by the Crown even where they have not been incorporated into the domestic law of the United Kingdom. Thus the Scottish Parliament will be bound by, among other treaties, the UN International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the European Social Charter concluded under the auspices of the Council of Europe in 1961.

5.19 In addition, such a prohibitory order may be made by the Secretary of State if a Bill contains provisions making modifications of the law as it applies to reserved matters and which the Secretary of State has reasonable grounds to believe would have an 'adverse effect' on the operation of the law as it applies to reserved matters. In making any such order the Secretary of State must identify the Bill and provisions in question and set forth his reasons. The decision of the Secretary of State will then be subject to the usual principles of judicial review. The Parliament is to be given the opportunity to re-consider any provisions of the Bill it has passed which have been made the subject of any section 35 Order by the Secretary of State1.

1 Scotland Act, s 36(4)(c).

5.20 Section 40 of the 1998 Act prohibits the courts in any proceedings brought against the Parliament or its officers or members from pronouncing any order for suspension, interdict, reduction or specific performance directly or indirectly against the Parliament. Instead they are limited to pronouncing orders for declarator.

DEVOLUTION ISSUES AND JUDICIAL REVIEW

5.21 The task of judicial review of the validity of Scottish legislation which has been formally enacted is not, however, one reserved to the Judicial Committee or any other new 'constitutional court'. Instead, following an American model of constitutional review, the Scotland Act 1998 puts it within the power of all United Kingdom courts to review and strike down on grounds of competency both Acts of the Scottish Parliament and subordinate Scottish legislation emanating from the Scottish Executive. The re-vamped Judicial Committee of the Privy Council is, however, given the final say in such devolution issues, rather than the existing Judicial Committee of the House of Lords1. Again there is no specific requirement for any of the members of the Privy Council sitting on such proceedings involving devolution issues to be qualified in Scots law2.

1 For extra-judicial reservations about the appropriateness of using the Judicial Committee of the Privy Council in this way, rather than the House of Lords, see Rt Hon Lord Steyn 'Incorporation and Devolution - a few reflections on the changing scene' [1998] European Human Rights Law Review 153-156.
5.21 Judicial Review and the Scottish Parliament and Executive


5.22 Paragraph 1 to Schedule 6 of the Scotland Act 1998 defines a new category of legal questions or 'devolution issues' which arise out of the creation of a devolved Parliament and Government for Scotland as follows:

- whether an Act of the Scottish Parliament or any provision thereof is within the legislative competence of the Parliament;
- whether any function which has been, or is proposed to be exercised, is a function of the Scottish Ministers, the First Minister or the Lord Advocate;
- whether any function which has been, or is proposed to be exercised, by a member of the Scottish Executive is within devolved competence;
- whether any function which has been, or is proposed to be exercised, by a member of the Scottish Executive is or would be incompatible with any of the Convention rights or with Community law;
- whether any failure to act by a member of the Scottish Executive is incompatible with any of the Convention rights or with Community law;
- questions about whether a function is exercisable in or as regards Scotland and any other questions arising by virtue of the Act about reserved matters.

This last 'devolution issue' appears to envisage the possibility of judicial review of the actions of ministers of the Crown as unlawfully encroaching on devolved issues. The original clause in the Bill was clearer on that issue.

1 Paragraph 1(f) of Schedule 6 to the Scotland Bill was in the following terms: 'whether a matter in relation to which a Minister of the Crown has purported to exercise or proposes to exercise a function is a devolved matter'.

5.23 Part II of Schedule 6 concerns the raising of devolution issues in court proceedings in Scotland. Paragraph 4 gives power to the Advocate-General (on behalf of the United Kingdom government) or the Lord Advocate (on behalf of the Scottish Executive) to institute such proceedings and envisages the possibility that the Lord Advocate may wish to defend proceedings brought by the Advocate-General.

1 As to the procedure where a devolution issue arises in any proceedings, see Act of Sederunt (Rules of the Court of Session 1994) 1994, SI 1994/1443, Chapter 25A (added by the Act of Sederunt (Devolution Issues Rules) 1999, SI 1999/1345).

5.24 Under paragraph 5 of Schedule 6 both of these law officers are entitled to intimation of any devolution issue arising before a court or tribunal in Scotland in proceedings to which they are not party. They are then entitled to conjoin themselves as parties to the proceedings and may participate therein so far as relates to the devolution issue.

5.25 Paragraphs 7 to 11 of Schedule 6 set up a two stage preliminary reference procedure modelled in part on article 234 (formerly article 177) of the Treaty of Rome. Under this procedure courts and tribunals lower than the Inner House have a discretion or, if they are final courts of appeal a
duty, to refer any devolution issue arising in proceedings before them to the Inner House of the Court of Session in civil matters or to a two or more judge High Court of Justiciary in criminal matters. The decision of the Inner House on the devolution reference may itself be appealed to the Judicial Committee of the Privy Council.

5.26 Superior courts in Scotland, namely a three or more judge Court of Session in civil matters and a two or more judge High Court of Justiciary in criminal matters, may themselves refer devolution issues which have been raised directly before them (rather than referred to them by lower courts) to the Judicial Committee of the Privy Council. Where there is no right of appeal against the decision of these court to the House of Lords, provision is made for an appeal to the Judicial Committee either with leave of the Scottish superior courts, or failing such leave, with 'special leave' of the Judicial Committee.

5.27 Part III of Schedule 6 deals with the raising of devolution issues before the courts of England and Wales. Provision is made for intimation to and participation of the Lord Advocate and the Attorney-General as the United Kingdom government's law officer for England and Wales. Paragraphs 18 to 23 of the schedule (in a parallel with the Scotland procedure) provide for references to be made to the High Court or the Court of Appeal by lower courts, reference to the Judicial Committee by the Court of Appeal, and appeals with leave from the High Court and the Court of Appeal to the Judicial Committee. Part IV of the schedule sets out like provisions in relation to intimation to the law officers of references and appeals as regards devolution issues raised in the course of proceedings in Northern Ireland.

5.28 Paragraph 32 of Schedule 6 allows the House of Lords to refer any devolution issues arising in judicial proceedings before it to the Judicial Committee of the Privy Council 'unless the House considers it more appropriate, having regard to all the circumstances, that it should determine the issue'.

5.29 Paragraph 33 of Schedule 6 allows for compulsory references directly to the Judicial Committee of devolution issues in proceedings in which any of the Lord Advocate, Advocate General, Attorney-General or the Attorney-General for Northern Ireland are parties on the application of any of the participating law officers.

JUDICIAL SCRUTINY OF SCOTTISH LEGISLATION

5.30 Section 29 of the 1998 Act provides that a provision of an Act of the Scottish Parliament will be beyond the Parliament’s legislative competence in the following circumstances:
- 'Reserved matters': under reference to the purpose of the provision in question, and having regard to, among other things, its effects in all the circumstances, it may be said to 'relate to' matters specified in Schedule 5 to the Act as reserved to the Westminster Parliament\(^1\). 'Relate to' is further defined in Schedule 4 to the Act as meaning substantive modification or amendment, rather than simple re-statement of the reserved enactments in question\(^2\). It should also be noted that the matters specified in Schedule 5 as reserved to the Westminster Parliament may be modified as is thought necessary or expedient by Her Majesty by Orders in Council, without the need for further primary legislation\(^3\).

- 'Harmonisation provisions': it does not otherwise relate to reserved matters but purports to make incidental modifications of Scots private law\(^4\) or Scots criminal law\(^5\) as applying to reserved matters, unless the purpose of the amendment is to ensure consistency in the application of law as between reserved and non-reserved matters\(^6\) and it has no greater effect on reserved matters than may be said to be 'necessary', having regard only to the law making powers of the Scottish Parliament, to give effect to the purpose of the original provision\(^7\). This reference to a test of 'necessity' would seem to be the statutory introduction of yet another doctrine derived from Community law, namely the principle of proportionality\(^8\).

- 'Protected enactments': it is in breach of the specific restrictions set out in Schedule 4 to the 1998 Act\(^9\). The enactments set out in Schedule 4 as protected from modification by the Scottish Parliament may also be modified by Orders in Council\(^10\).

- 'Human rights': it is incompatible with any of the fundamental rights incorporated into domestic law of the United Kingdom by the Human Rights Act 1998\(^11\).

- 'Community law': it is incompatible with Community law\(^12\).

- 'Lord Advocate' it purports to remove the Lord Advocate from his position as head of the systems of criminal prosecution and of the investigation of deaths in Scotland\(^13\);  

- 'Extra-territorial effect': insofar as it purports to form part of the law of country or territory other than Scotland, or seeks to confer or remove functions exercisable outside Scotland\(^14\).

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1 Scotland Act 1998, s 29(2)(b), (3).
2 See, in particular, the following provisions of Schedule 4:  
   2(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters.  
   ...  
7(1) Part I of this Schedule does not prevent an Act of the Scottish Parliament –  
(a) restating the law (or restating it with such modifications as are not prevented by that Part, or  
(b) repealing any spent enactment  
or conferring power by subordinate legislation to so do'.
3 SA 1998, s 30(2).
4 SA 1998, s 126(4) which defines 'Scots private law' as 'the following areas of the civil law of Scotland—  
(a) the general principles of private law (including private international law);  
(b) the law of persons (including natural persons, legal persons and unincorporated bodies);  
(c) the law of obligations (including obligations arising from contract, unilateral promise, delict, unjustified enrichment and negotiorum gestio;
(d) the law of property (including heritable and moveable property, trusts and succession); and
(e) the law of actions (including jurisdiction, remedies, evidence, procedure, diligence, recognition and enforcement of court orders, limitation and actions and arbitration; and include references to judicial review of administrative action.'
5 SA 1998, s 126(5) which defines 'Scots criminal law' as including 'criminal offences, jurisdiction, evidence, procedure and penalties and the treatment of offenders'.
6 SA 1998, s 29(2)(b), (4).
7 SA 1998, Sch 4, para 3 which is in the following terms: '3(1) Paragraph 2 does not apply to modifications which--
(a) are incidental to, or consequential on, provision made (whether by virtue of the Act in question or another enactment) which does not relate to reserved matters, and
(b) do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision.
3(2) In determining for the purposes of subparagraph 1(b) what is necessary to give effect to the purpose of a provision, any power to make laws other than the power of the [Scottish] Parliament is to be disregarded'.
8 See A O'Neill Decisions of the European Court and their Constitutional Implications (1994) at Chapter 4 'Factortame's Wake: the direct reception of Community law' for a discussion of the use and extent of the doctrine of proportionality in Community law.
9 SA 1998, s 29(2)(c).
10 SA 1998, s 30(2).
13 SA 1998, s 29(2)(e).
14 SA 1998, s 29(2)(a).

5.31 Section 28(5) of the 1998 Act provides, however, that the validity of an Act of the Scottish Parliament is not affected by any invalidity in the proceedings of the Parliament leading to its enactment. Thus, questions of vires are the only matters which may be raised in the judicial review of Acts of the Scottish Parliament, although it has been suggested that failure to follow the terms of proposed concordats between the Scottish Executive and United Kingdom government departments which provide for consultation about and advance notification of proposed Scottish legislation and Executive action, may form the basis for legitimate expectation challenges to any resulting legislation. Frivolous or vexatious challenges to the competency of Scottish legislation need not, however, be taken up by the courts.

1 See Lord Mackay of Drumadoon QC 'Henry VIII and his colleagues are coming to Scotland - what are the implications for the Scottish Parliament and the Scottish Executive?' unpublished paper delivered to the Faculty of Advocates Conference The Scottish Parliament - Implications for Lawyers 2 May 1998.
2 See the Scotland Act 1998, Sch 6, para 2 to the Act which provides as follows: 'A devolution issue shall not be taken to arise in any proceedings merely because of any contention of a party to the proceedings which appears to the court or tribunal before which the proceedings take place to be frivolous or vexatious'.

5.32 Section 117 of the 1998 Act provides that so far as it may be necessary or in consequence of the exercise of a function by a member of the Scottish Executive within devolved competence, any pre-commencement enactment or prerogative instruments which referred to ministers of the Crown should be taken as references also to Scottish Ministers.
5.33 Section 101 of the 1998 Act is an unusual provision in a statute in that it seeks to give specific guidance to the courts in their approach to the interpretation of provisions of both Bills and Acts of the Scottish Parliament as well as of any subordinate legislation emanating from a member of the Scottish Executive. The courts are to seek to avoid a finding that any such provision is ultra vires by interpreting any provision which could be read in such a way as to put it outside either the legislative competence of the Parliament or the powers conferred on members of the Scottish Executive under the Act 'as narrowly as is required for it to be within competence, if such a reading is possible' and to give effect to it accordingly (emphasis added).

5.34 Further, standing the inclusion of both Acts of the Scottish Parliament and any 'order, rule, regulations, scheme, warrant, bye-law or other instrument made by a member of the Scottish Executive' in the definition of 'subordinate legislation' for the purposes of the Human Rights Act 1998, the courts will also be required by section 3(1) of that Act to interpret and apply Scottish legislation so far as it is possible to do so 'in a way which is compatible with the Convention rights' (emphasis added)\(^1\).

1 As to the Convention rights, see Appendix 2.

5.35 As we have seen the courts, too, are given the express power under section 102 of the 1998 Act to remove or limit the retrospective effect of any decision which they might make to the effect that the Scottish Parliament or member of the Scottish Executive has acted outwith their respective legislative competencies. The courts may also suspend the effect of their decision as to incompetency 'for any period and on any conditions to allow the defect to be corrected'.

5.36 If considering whether to make any such limitation or suspensory order, the courts are required to intimate this to the Lord Advocate and, if the matter is a 'devolution issue' the other appropriate law officer (the Advocate General in proceedings in Scotland, the Attorney-General for proceedings in England and Wales, and the Attorney-General for Northern Ireland in Northern Irish proceedings). Such intimation allows the law officers to become parties to the proceedings if they are not so already and permits them to take part in the proceedings so far as they relate to the making of such an order. In deciding whether to make any order in relation to temporal limitation or suspension of their decision the courts are enjoined to have regard to, among other things, 'the extent to which persons who are not parties to the proceedings would be otherwise adversely affected' (emphasis added).

5.37 There is however no express duty laid on the courts under the 1998 Act actually to consider the retrospective effects of their decisions to uphold a challenge to the competency of any provision of Scottish legislation. In the absence of such a positive duty, and given the manner in which section 102 is drafted, it would appear arguable that where the court
is not giving consideration to making any order either removing or limiting any retrospective effect, or suspending the prospective effect, of its decision that a provision of Scottish legislation is ultra vires, then no intimation or right of participation need be given to the law officers, and no regard need be had to the interests of persons who are not parties to the litigation. Instead the decision will have the same retrospective effects as any other court decision. The question of the extent of the duty of the courts positively to advise and allow the participation of the law officers is perhaps a matter which will be resolved only in the course of litigation and ultimately by decision of the Judicial Committee of the Privy Council.

5.38 A statutory re-formulation of the English doctrine of precedent is found in section 103 of the 1998 Act which asserts the binding nature of decisions of the Judicial Committee of the Privy Council in proceedings under the Act in all other courts and legal proceedings, apart from later cases brought before the Committee. This provision would also appear to alter the general rule that the House of Lords in its judicial capacity is not bound by decisions of the Judicial Committee of the Privy Council. On devolution issues arising from the Act 1998 at least, the House of Lords has been superseded as the final court of appeal in the United Kingdom.


JUDICIAL SCRUTINY OF THE SCOTTISH EXECUTIVE

5.39 The Scottish Executive consists in: the First Minister; Scottish ministers who have been appointed by the First Minister from among the members of the Scottish Parliament; and the Lord Advocate and the Solicitor General for Scotland, neither of whom need to be appointed from among the elected Members of the Parliament.

5.40 Section 53 (to be read in the light of Part III paragraphs 12 to 14 of Schedule 4 to the 1998 Act) provides for a general transfer of non-reserved functions of ministers of the Crown to Scottish ministers so far as these are exercisable in or as regards Scotland.

5.41 Section 54(2) of the 1998 Act makes it clear, however, that it is outside the devolved competence of the members of the Scottish Executive to make, confirm or approve any provision by subordinate legislation which would be outside the legislative competence of the Parliament if included in an Act of the Scottish Parliament. The question as to whether any function of a body, United Kingdom government department, office or office-holders relates to reserved matters is to be determined, by virtue of section 126(3), by reference to the purpose for which the function is exercisable, having regard (among other things) to the likely effects in all the circumstances of any exercise of the function. (emphasis added). Together with section 29(1) of the Act, which enjoins the courts to look at
the purpose of legislation, this provision introduces into national legal practice another doctrine derived from the practice of the European Court of Justice, namely the purposive or teleological approach to legal interpretation.

5.42 Further, section 57(1) of the 1998 Act provides that, despite the transfer of functions to Scottish ministers in relation to observing and implementing obligations under Community law, the responsibility for the national implementation of Community law as regards Scotland remains a function exercisable by ministers of the Crown. Further section 57(2) re-affirms members of the Scottish Executive have no power to make any subordinate legislation or to do any other act so far as the legislation or act is incompatible either with the fundamental rights which have been incorporated from the European Convention on Human Rights or with Community law.

5.43 By virtue of section 58 of the 1998 Act the Secretary of State has the power to direct a member of the Scottish Executive either: (1) to refrain from proposed action where he has reasonable grounds to believe that such action would be incompatible with the international obligations of the United Kingdom; or (2) to order otherwise competent action from any member of the Scottish Executive where he has reasonable grounds to believe that such action is required for the purpose of giving effect to any such international obligations. Such positive action which may be required is stated in section 58(3) to include their ‘making, confirming or approving subordinate legislation’ or indeed introducing a Bill to the Scottish Parliament. While the Secretary of State may order a Scottish minister to introduce a Bill before the Edinburgh Parliament, the Secretary of State is given no power to order that Parliament to enact any such Bill: such power would, perhaps, be seen as too blatant a disregard for the democratic principle.

5.44 Further, the Secretary of State may by order revoke any subordinate legislation of the Scottish Executive if he has reasonable ground to believe that it would be incompatible with any international obligations or the interests of defence or national security, or which make modifications of the law in relation to reserved matters and the Secretary of State has reasonable grounds for believing that it will have an ‘adverse effect’ on the operation of the law as it applies to reserved matters. As with the parallel provisions in relation to Acts of the Scottish Parliament, the Secretary of State is required to state his reason in making any such order, and his or her decisions will therefore be subject to judicial scrutiny review on the usual grounds for review of administrative action.

5.45 Paragraphs 34 to 35 of Schedule 6 to the 1998 Act allows the Lord Advocate, the Attorney-General, the Advocate General and, surprisingly, the Attorney-General for Northern Ireland to refer a devolution issue
arising from the proposed exercise of a function by a member of the Scottish Executive directly to the Judicial Committee of the Privy Council, even where this matter has not arisen in any prior legal proceedings. This again would appear to be asking the Judicial Committee to rule on strictly hypothetical matters. The effect of any of these law officers making such a direct reference is, on notification of that fact to the Scottish Executive, automatically to interdict members of the Scottish Executive from exercising that function until the reference has decided or otherwise disposed. Failure on the part of any member of the Scottish Executive to respect this prohibition may result in court proceedings being taken against him at the instance of the Advocate General.

5.46 Section 63 of the 1998 Act allows for the transfer of additional functions exercisable by ministers of the Crown in or as regards Scotland so as to be exercisable in Scotland either by Scottish ministers alone or by Scottish ministers concurrently with ministers of the Crown, or by ministers of the Crown only with the agreement of or after consultation with Scottish ministers. Section 108 is the mirroring provision which allows for the redistribution of functions from the Scottish Executive to ministers of the Crown by specific Order in Council of Her Majesty. Section 54 of the Act, which defines the devolved competence of Scottish ministers, in effect automatically links the devolution or distribution of executive power as between Scottish ministers and ministers of the Crown to the extent to which legislative competence is devolved to the Scottish Parliament. This will prevent a process of 'limping devolution' whereby Scottish ministers have a greater or lesser range of powers than the Scottish Parliament to which they are answerable.

5.47 Finally, ministers of the Crown are required by section 106(4) of the 1998 Act to consult Scottish ministers before any subordinate legislation is made to transfer a function otherwise exercisable by a minister of the Crown to the Scottish ministers which relates to the observing or implementing of an international obligation or obligation under Community law, to achieve within Scotland a particular result defined by reference to a quantity, whether this quantity is expressed as an amount, proportion or ratio. By virtue of section 106(7) it is outwith the legislative competence of the Scottish Parliament or the devolved powers of the Scottish Executive to do any act which is incompatible with the achievement of the particular required result.

HUMAN RIGHTS ISSUES AS DEVOLUTION ISSUES

5.48 In Chapter 4 we looked at the mechanisms provided under the Human Rights Act 1998 for the judicial review of primary and subordinate legislation. Given that the question as to the compatibility of legislation emanating from the Scottish Parliament and Executive with the rights
incorporated by the Human Rights Act into United Kingdom law from the European Convention on Human Rights is also designated a 'devolution issue' under Schedule 6 to the Scotland Act, it is necessary to consider how the two statutes interact

1 The rights incorporated by the Human Rights Act 1998 are known as 'the Convention rights', see further Appendix 2.

5.49 Section 100 of the 1998 Act specifies that, apart from the Lord Advocate, the Advocate General and the Attorney-General, only those who would be regarded by the European Court of Human Rights as 'victims' under and in terms of article 34 of the European Convention are able to bring proceedings before the courts under the statute on the ground that an Act of the Scottish Parliament or and act or omission of the Scottish Executive or otherwise to rely on any of the Convention rights in any such proceedings.

5.50 Section 100(3) of the Scotland 1998 Act parallels section 8(3) and (4) of the Human Rights Act 1998 and limits any damages which might be awarded by a national court for breach of Convention rights to the measure and approach adopted by the European Court of Human Rights Court in relation to the 'just satisfaction' of an applicant's claim under reference to article 41 of the European Convention.

5.51 Although the European Convention was incorporated into domestic Scots law in the same way as it was incorporated into the laws of England and Wales and of Northern Ireland, namely by the Human Rights Act 1998, with the creation of a Scottish Parliament, the Convention will be given a different constitutional status in Scotland from the rest of the United Kingdom. Under the Scotland Act 1998, the rights guaranteed under the Convention will have the status of a higher law as against any legislation passed by the Scottish Parliament or by any member of the Scottish Executive. Given this different constitutional character, the European Convention is likely to have a more immediate and significant impact in Scotland than in the rest of the United Kingdom.

5.52 One particular area in which human rights considerations might have an immediate impact in relation to executive action will be the possibility that the courts in Scotland will have to abandon their traditional deference to the prosecutorial discretion enjoyed by the Scottish law officers. As members of the Scottish Executive their actions and omissions became subject to review by the courts on human rights grounds with effect from 20 May 1999. As has been noted:

'It is quite possible, for example, that decisions of the Lord Advocate or Solicitor General as prosecuting authority could be challenged collaterally in criminal proceedings as in breach of the European Convention on Human Rights and so raising a devolution issue'.

1 Cf the position in England where the courts have shown themselves ready to judicially review prosecutorial decisions of the Director of Public Prosecutions, eg in relation to the reinstatement of prosecutions discontinued by the Crown Prosecution Service (R v DPP,


5.53 In relation to the range of legislation which might competently be passed by the Scottish Parliament, clause 28(8) of the Scotland Act as originally presented to the Westminster Parliament provided that an Act of the Scottish Parliament ‘may modify a provision made by or under an Act of [the Westminster] Parliament, whenever passed or made, if the modification is otherwise within its legislative competence’. This clause was not directly carried over into the Act as passed. Instead, the Act has set out in Part 1 of Schedule 4 a list of provisions of particular Westminster enactments which were specifically protected from modification. Accordingly, applying the principle of statutory construction that expressio unius est exclusio alterius, it would seem to be that apart from those provisions specified in Schedule 4, it will be within the competence of the Scottish Parliament to modify, amend or repeal any pre-existing primary or secondary legislative provisions emanating from the Westminster Parliament, provided always that the subject matter of the provisions in question is not a reserved matter as set out in Schedule 5 to the Act.

5.54 Further and in any event, paragraph 7 of Part II to Schedule 4 of the 1998 Act seems to envisage that an Act of the Scottish Parliament may consolidate, update and re-state the law, whether at common law or as comprised in an Act of the Westminster Parliament or subordinate legislation thereunder, even within the area of reserved matters. If there is such adoption of the law in reserved matters by the re-dressing of it in the garb of an Act of the Scottish Parliament, it remains outwith the legislative competence of the Scottish Parliament to make any substantive modification to that law.

1 Scotland Act 1998, Sch 4, para 7(2) provides as follows:

7(2) For the purposes of paragraph 2 [the prohibition on the modification of the law on reserved matters] the law on reserved matters includes any restatement in an Act of the Scottish Parliament, or subordinate legislation under such an Act, of the law on reserved matters if the subject-matter of the restatement is a reserved matter.

5.55 The Westminster Parliament has reserved to itself a list of matters set out in Schedule 5 to the 1998 Act. Any matter not specified in that Schedule is then in principle transferred to the competence of the Scottish Parliament. That Parliament has thus been accorded legislative competence in a broad range of domestic issues, these include: health; education; local government; social work; housing; economic development; judicial appointments; civil and criminal law and procedure; the criminal justice and prosecution system; legal aid; prisons; police and fire services; the environment; agriculture, forestry and fishing.
In England and Wales all of the above areas remain wholly within the competence of the Westminster Parliament: primary legislation in these areas will therefore be subject only to the 'interpretative obligation' placed on the courts by section 3(1) of the Human Rights Act 1998, to read and give effect to that legislation so far as possible in a way which is compatible with the Convention rights. Where the courts finds that the legislative provision in question cannot be interpreted in accordance with the requirements of the European Convention, the provision nonetheless remains valid, operative and enforceable. As we have seen in Chapter 3 at paragraph 3.77 under sections 10 to 12 of the Human Rights Act, it is a matter for the minister of the Crown, answerable to the Westminster Parliament, to decide whether and how to amend the offending provision, and whether or not to give it retrospective effect.

The contrast with the situation in relation to Scottish legislation is stark. Section 29(2)(d) of the 1998 Act states that a provision of an Act of the Scottish Parliament will be deemed to be outside the competence of the Scottish Parliament and hence 'not law' insofar as it is incompatible with any of the European Convention or with Community law. Similarly, by virtue of section 57(2) 'a member of the Scottish Executive has no power to make any subordinate legislation, or to do any act, so far as the legislation or act is incompatible with any of the Convention rights or with Community law'.

Thus, the courts will be required to strike down Scottish legislation which is found to contravene Convention rights. Further, it will be for the courts and not the Scottish Parliament, to consider whether to limit the retrospective effect of any such ruling of invalidity under section 102 of the Scotland Act 1998. However, since the courts are themselves defined as public authorities by section 6(3)(a) of the Human Rights Act 1998, any decision limiting retrospectivity will itself have to be compatible with the rights guaranteed under the European Convention.

In relation to primary Westminster legislation, then, the manner of remedying any incompatibility between the law and Convention rights is, under the Human Rights Act 1998, a decision for the Westminster Parliament and United Kingdom Executive. In relation to Scottish legislation, however, the manner of remedying any incompatibility between the law and Convention rights rests with the courts before which the matter is raised.

It is not, however, clear under which statute a court would be acting in considering a claim that a provision of Scottish legislation contravenes a Convention right. Section 7(1)(b) of the Human Rights Act 1998 allows a person who claims that a public authority (defined in section 6(3)(b) as 'any person certain of whose functions is of a public nature') has acted or proposes to act in a way which is incompatible with a Convention right to 'rely on the Convention right or rights concerned in any legal proceedings'
before any court in the United Kingdom. Since both the Acts of the Scottish Parliament and the secondary legislation issued by members of the Scottish Executive are defined as subordinate legislation for the purposes of the Human Rights Act 1998, it would follow that any provision of such Scottish legislation which appears to any court before which the matter is raised to contravene a Convention right may be treated as invalid and unenforceable under and in terms of section 3 of the Human Rights Act. In contrast to the position under the Scotland Act, there is no provision for filtering out frivolous or vexatious arguments. There is no need for the courts to go through the section 4 declaration of incompatibility procedure since there is nothing in the Scotland Act, the primary Westminster legislation, which prevents the removal by the court of incompatible provisions of the Scottish legislation. There is, however, no provision in the Human Rights Act for any variation by the court of the retrospective effect of the court’s decision on incompatibility. There is no possibility of a fast track reference on the issue raised to higher courts. Final appeal against any decision on compatibility of Scottish legislation with the Human Rights Act would lie either with the House of Lords or, if the question were raised in Scotland in the course of criminal proceedings, with the High Court of Justiciary acting as a criminal appeals court.

5.61 If, however, the incompatibility of the Scottish legislation with the Convention right as raised in the course of legal proceedings is characterised by the courts as a ‘devolution issue’, then the matter has to be intimated to the Lord Advocate and other relevant law officer for the jurisdiction of the United Kingdom in which the proceedings in question take place. The courts are then enjoined to consider whether and to what extent any decision on incompatibility should be made retrospective. The court may also suspend its judgment to allow the identified defect to be corrected. The final decision on the question of the compatibility of Scottish legislation with the Convention rights, when this matter is raised as a ‘devolution issue’ would lie with the Judicial Committee of the Privy Council.

1 Scotland Act 1998, Sch 6, paras 5, 16, 26.
2 SA 1998, s 10(2)(a).
3 SA 1998, s 10(2)(b).

5.62 Further, by virtue of section 107 and 112(1) of the Scotland Act 1998 a minister of the Crown has the power to amend, even retrospectively, the offending Scottish provision by subordinate Westminster legislation to bring it within devolved legislative or executive competence, including into line with the requirements of the Convention.

1 Scotland Act 1998, s 114(3).

5.63 It seems unlikely that the Westminster Parliament would have intended that the complex systems of checks, references and balances that has been put in place in relation to the resolution by the courts of ‘devol-
ution issues' could simply be over-ridden in cases where it is alleged in the
course of any legal proceedings that a provision of Scottish legislation is
incompatible with the rights incorporated by the Human Rights Act, but
that is what appears to have been done.

5.64 If the schema of Schedule 6 to the Scotland Act 1998 is to be pre-
served in the case of challenges based on incompatibility with Convention
rights, either the Westminster Parliament or the courts will have to stipu-
late that for the purposes of section 7(1)(b) of the Human Rights Act, the
only reliance that can in law be made on Convention rights in relation to
provisions of Scottish legislation is in the context of the matter raising a
'devolution issue' for the purposes of the Scotland Act. No direct challenge
could be made to any such ruling as not providing an effective remedy for
the protection of Convention since this provision of the Convention, article
13*, has not been incorporated into the Human Rights Act. The paradoxical
result of any such approach would be that secondary Scottish legislation
passed by members of the Scottish Executive would receive more pro-
cedural protection from being set-aside by the courts than would subordi-
nate Westminster legislation made by ministers of the Crown.

1 Article 13 of the European Convention on Human Rights is in the following terms:
'Everyone whose rights and freedoms as set forth in this Convention are violated shall
have an effective remedy before a national authority notwithstanding that the violation
has been committed by a person acting in an official capacity'.

CONCLUSION

5.65 Devolution issues, such as questions as to the compatibility of Scot-
tish legislation with Convention rights, are in the nature of things, more
likely to be raised before the courts in Scotland. Scottish courts and tri-
bunals would seem thereby to be placed at the vanguard of the develop-
ment of human rights protection in these islands. It will be a challenging
and potentially perilous position for them. The challenge is to maintain
public confidence in their impartiality. The peril is always that in their
emphasis on the rule of law they may be dragged them into the political
arena, with their decisions being presented not as the upholding of individ-
ual rights but as the thwarting of the democratic will embodied in the acts
of the new legislature and executive.

5.66 In 1976, commenting on the implications of the doctrine emanating
from the European Court of Justice to the effect that judges throughout the
national hierarchies were required as a matter of Community law to strike
down or dis-apply provisions of domestic law which contravened directly
effective Community law rights, Lord Devlin noted that 'the British have
no more wish to be governed by judges than they have to be judged by
administrators' 1. One suspects, in the light of the more exposed position of
the judiciary in Scotland vis-à-vis the new legislature, that one of the first
acts of the Scottish Parliament will be to seek to establish a formal Judicial
Appointments Committee to seek to ensure that those who, as Senators of the College of Justice, sheriffs, magistrates and chairs of tribunals, have the duty to police the limits of devolved powers under the new dispensation, will themselves, at least at the time of their initial appointments, be subject to a degree of democratic scrutiny – thus it might be said that the judges will themselves be governed.

1 Lord Devlin, letter to The Times, 27 October 1976.
3 See R Black 'The Scottish Parliament and the Scottish Judiciary' 1998 SLT (News) 321-324 for a plea for a new open procedure under the supervision of the Scottish Parliament in the appointments to the Court of Session and shrieval bench.
Chapter 6

Judicial Review Procedure in Practice

INTRODUCTION

6.01 A procedure specifically designed for the speedy and economical resolution of matters raised by way of judicial review was first introduced into the Court of Session rules by Act of Sederunt in 1985, applications for judicial review being made under rule 260B. The procedure is now contained in Chapter 58 of the 1994 consolidated Rules of the Court of Session (RCS 1994).

1 Act of Sederunt (Rule of Court Amendment No 2) (Judicial Review) 1985, SI 1985/500.

6.02 The introduction of this new procedure in Scotland was effected in the wake of the successful procedural reforms in England and Wales in the 1970s, now consolidated in Order 53 of the Rules of the Supreme Court, which had resulted in an exponential growth in applications for judicial review to the High Court. The disparity between the speed and economy of the English procedure in comparison to the slow and costly ordinary procedure which then applied in Scotland to applications to the court’s supervisory jurisdiction was highlighted by Lord Fraser of Tullybelton in his judgment in a homelessness judicial review Brown v Hamilton District Council in which he stated:

[I]t is for consideration whether there might not be advantages in developing special procedures in Scotland for dealing with questions in the public law area, comparable to the English prerogative orders...[which] have advantages over ordinary procedures such as declarations, particularly by making available remedies which are speedy and cheap and which protect public authorities from unreasonable actions.

1 Consequent upon Report on Remedies in Administrative Law (Law Com No 73).
2 1983 SC (HL) 1 at 49.

6.03 This call from Lord Fraser was repeated by him in Stevenson v Midlothian District Council and was heeded in Scotland by the setting up of a working party under the chairmanship of Lord Dunpark which reported in 1984 with a series of proposals which suggested changes in procedural law which could be effected by Act of Sederunt and also changes in substantive law, notably in relation to title and interest to sue to bring it into line with the broader English requirements of ‘sufficient interest’ and thereby to enable any persons directly or indirectly affected by alleged unlawful acts or decisions competently to challenge them before the courts. Such a change in the rules on standing required, in the view of the Dunpark
committee, specific legislation emanating from Parliament. None has, however, been forthcoming.

1 1983 SLT 433 at 437.

STANDING TO CHALLENGE IN JUDICIAL REVIEW

6.04 In recent years, the requirements on locus standi in judicial review applications have been radically loosened by the courts in England and Wales; there being no requirement to show title to sue. Since the 1977 reforms, all that has been required of the courts is to determine whether or not the applicant has shown a 'sufficient interest' in the matter to which the application relates. In recommending a broad inclusive approach to this test of 'sufficient interest' Lord Diplock observed:

'[There would be a] grave lacuna in... public law if a pressure group... or even a single public-spirited tax-payer were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful action stopped'.

1 Supreme Court Act 1981, s 31(3) provides that 'the court shall not grant leave [for judicial review]... unless it considers that the applicant has a sufficient interest in the matter to which the application relates' (emphasis added).

6.05 In general the English courts have acted in accordance with the observations of Lord Diplock and have interpreted the test on standing liberally. As well as permitting concerned individuals the opportunity to seek to right public wrongs in judicial review, the courts in England and Wales have increasingly allowed representative organisations to pursue applications for judicial review whether on behalf of their own particular membership or even on behalf of the wider public interest. Thus, the Fire Brigades Union together with other unions and the Trades Union Congress has been permitted to challenge the non-implementation of a statutory scheme for criminal injuries compensation. The Equal Opportunities Commission has been found to have standing to challenge provisions of general employment protection legislation on the grounds of its indirectly sex discriminatory effects. Greenpeace, as a 'responsible and serious environmental campaigning organisation' incorporated under the companies legislation was found to have sufficient interest to challenge the authorisation of the thermal oxide nuclear re-processing plant at Sellafield in Cumbria. The Child Poverty Action Group and the National Association of Citizens Advice Bureaux have been permitted to challenge the assessment of supplementary benefits for welfare claimants. The World Development Movement was allowed to challenge the decision of the Secretary of State for Foreign Affairs to approve overseas development aid in respect of the Pergau Dam project in Malaysia. The Protesters Animal Information Network have been afforded a hearing to challenge the grant
by the Government of licences for the export of live animals. The Joint Council for the Welfare of Immigrants has been permitted to challenge new rules on benefits for asylum seekers. Finally, the charity Help the Aged has been able to challenge the refusal of a local authority to provide financial help to persons assessed by them as being in need of care and attention.

1 For a review of some of the more recent English cases, see K Gledhill 'Standing, Capacity and Unincorporated Associations' [1996] JR 67 and C Hilson and I Cram 'Judicial Review and environmental law - is there coherent view of standing?' (1996) 16 Legal Studies 1.


3 R v Secretary of State for the Home Department, ex p the Fire Brigades Union [1995] 2 AC 513, HL.

4 R v Secretary of State for Employment, ex p the Equal Opportunities Commission [1996] AC, HL.

5 See R v HM Inspectorate of Pollution, ex p Greenpeace (No 1) [1994] 4 All ER 321, CA on the application for an interlocutory injunction and R v HM Inspectorate of Pollution, ex p Greenpeace (No 2) [1994] 4 All ER 329, QB on the consideration of the merits of the application, including the question of applicant's standing.

6 R v Secretary of State for Social Services, ex p the Child Poverty Action Group [1989] 1 All ER 1047, CA.


10 R v Sefton Borough Council, ex p Help the Aged [1997] 4 All ER 532.

6.06 RCS 1994, Chapter 58 does not contain any explicit reference to the requirements of standing. Scottish courts have classically required there to be both title and interest to sue as a prerequisite to an individual or body being permitted to raise an petition for judicial review. Having title to sue has been defined as being a 'party ... to some legal relation which gives ... some right which the party against whom he raises the action either infringes or denies'. The interest which the party seeks to protect must also be considered by the court to be 'a material or sufficient interest' which will be prejudiced by the decision complained of. The emphasis on title to sue and the consequent need for there to be identifiable individual rights which might be breached as a pre-requisite before being able to call in aid the supervisory jurisdiction of the court does not fit in well with a broader constitutional analysis of judicial review as a procedure to allow the courts to police and prevent wrong-doing by the state and its emanations.


2 D and J Nicol v Dundee Harbour Trustees 1915 SC (HL) 7 (emphasis added).

3 Air 2000 v Secretary of State for Transport (No 2) 1990 SLT 335. See also Air 2000 v Secretary of State for Transport (No. 1) 1989 SLT 698

4 See Simpson v Edinburgh Corporation 1960 SC 313 for a relatively narrow definition of what constitutes 'prejudice' sufficient to ground an action for judicial review.


6.07 Thus Age Concern Scotland was found to have adequate title but insufficient interest to pursue an action for judicial review of a circular
issued by the chief adjudication officer appointed by the Secretary of State for Social Security on severe weather payments, although an individual claimant would have satisfied the requirements of both title and interest. Similarly a taxi drivers' association was found to have no title to challenge an alteration in a local authority's licensing policy despite the fact that they were found to have an interest to sue because of the adverse effect the change in policy, if implemented, would have on their members' livelihoods. A number of petitions for judicial review brought by business competitors indirectly affected by allegedly unlawful acts in planning and licensing cases have been dismissed on the basis of the petitioners' lack of title to sue. It was held that they did not fall within the list of objectors set out in the statute under which the powers in question were being exercised and therefore did not have rights to be violated by the exercise of those powers.

2. See Mulvey v Secretary of State for Social Security 1995 SLT 179, OH.
3. See Paisley Taxi Owners Association Ltd v Renfrew District Council, 1997 SLT 1112, OH per Lord Dawson and Inverness Taxi Owners and Drivers Association v Highland Council (19 February 1999, unreported) OH. Cf City Cabs (Edinburgh) Ltd v City of Edinburgh District Council 1988 SLT 184, OH; R v Liverpool City Council, ex p Liverpool Taxi Fleet Operators Association (1972) 2 QB 299, CA; and R v London Borough of Tower Hamlets, ex p Tower Hamlets Combined Traders Association (1994) COD 325, QL per Sedley J.

6.08 Despite the fact that at Scots common law the possibility of an actio popularis is at least recognised in theory, the continued emphasis in the Scottish cases to date in which the point has been taken on the formal requirements of both title and interest to sue means that access to judicial review is more restricted than in England. Further, in contrast to England, where it has been held that the question of standing is one which can only properly be resolved after consideration of the full legal and factual context of the case, it has been stated that in Scotland questions as to the title of the petitioners to pursue the application for judicial review litigation and the nature of their interest which they are thereby seeking to protect, is logically prior to any other in the litigation, and one which should normally and therefore deal with as a preliminary matter before any consideration of the merits of the petition.


6.09 One consequence of the relatively restrictive rules on standing in judicial review applied by the Scottish courts is that pressure groups and other parties interested in challenging the general law or executive
judges' matter by way before the courts in recreational rejected a challenge own motion consider the merits challenge the petitioners' affected concern standing taken 6.10 There is some indication in practice of a more liberal approach being taken in Scotland to questions of standing, whether directly by decision of judges or from the fact that respondents may choose not to challenge the standing of applicants for judicial review in matters of particular public concern and interest. In some cases, for example brought by neighbours affected by a particular decision, the respondents have chosen not to challenge the petitioners' standing and the court has been willing to consider the merits of these applications rather than to dismiss them on its own motion on grounds of competency. More recently the court has rejected a challenge to the title and interest of a community council seeking to challenge decisions of a district council regarding the demolition of local recreational amenities. Further it has been held that a trade union could lawfully challenge on behalf of future employees the legality of a University's proposed new employment policy.

6.11 Certainly, too, the growing importance of judicial review in environmental law issues will have an impact on matters of standing. In Kincardine and Deeside District Council v Forestry Commissioners a local authority was held to have sufficient standing to be able to challenge an award to a third party of an afforestation grant by the Forestry Commission and in Swan v Secretary of State for Scotland, another case concerning an award to a third party of an afforestation grant, the title and interest of the neighbouring proprietors and individuals who regularly walked on the moor-land in the area to test the legality of this award was not challenged.

1 See CO/14885/95 R v Secretary of State for Scotland, ex p Greenpeace (24 May 1995, unreported) QB.
4 Cockenzie and Port Seton Community Council v East Lothian District Council 1996 SCLR 209.
EXHAUSTION OF STATUTORY REMEDIES

6.12 Judicial review is, in theory, a remedy of last resort, open to an aggrieved party only after other statutory remedies otherwise available have been explored and exhausted. RCS 1994, rule 58.3(2) states that an application by way of petition of judicial review under Chapter 58 may not be made if the application is, or could be, made by some other statutory avenue of appeal or review. Thus if a party seeking judicial review has either neglected to utilise or has by-passed other remedies provided by statute, or has sought to run them both at the same time, the court may dismiss the judicial review petition on those grounds.

1 For an example of this rule being applied, see Chowdry v Social Security Appeal Tribunal 1998 SCLR 375, OH per Lord Milligan.
2 See Strathclyde Buses Ltd v Strathclyde Regional Council 1994 SLT 724, OH.
3 O'Neill v Scottish Joint Negotiating Committee for Teaching Staff 1987 SLT 648.
4 See eg Nahar v Strathclyde Regional Council 1986 SLT 570.

6.13 The general principle that the failure to exhaust statutory remedies renders a petition for judicial review incompetent because premature was stated by Lord McDonald in British Railways Board v Glasgow Corporation:

'[R]ecourse to common law proceedings in the Court of Session is not competent if the complainant has not availed himself of his statutory right of review, unless the failure was due ... to the fact that resort to the statutory remedy would, in the particular circumstances be otiose or to some other special reason'.

1 1975 SLT 45 at 47 (emphasis added).

6.14 In Tehrani v Argyll and Clyde Health Board (No 2) the Lord Ordinary noted that, although the principle that there be exhaustion of available statutory remedies before one can have recourse at common law to the Court of Session's supervisory jurisdiction was commonly expressed as being a matter of competency, it was not a principle which refused to admit of exceptions. The Lord Ordinary's decision on this point was not challenged or argued on the reclaiming motion to the Inner House. He stated:

'I turn now to consider the argument advanced by counsel for the board that this application is incompetent. This argument was based on the proposition that it is generally not competent to have recourse to the court for a common law remedy when provision is made by statute for a form of review and recourse to that form of review has not been made... The principle contended for by counsel for the board is not in doubt, but it is to be noted that the principle is not of uniform application and has not always been applied (Dante v Assessor for Ayr 1922 SC 109; British Railways Board v Glasgow Corporation 1976 SC 224). In my opinion the circumstances of each case have to be examined in order to decide whether the principle is to be applied'.

1 1990 SLT 118 at 124 (emphasis added).
6.15 Thus, in *Moss' Empires v Glasgow Assessor*¹ the failure on the part of the respondents to inform the petitioners of their right to appeal, in breach of their statutory duty, was held to constitute exceptional circumstances such as to permit a recourse to judicial review in the Court of Session; while in *Choi v Secretary of State for Home Department*² the Lord Ordinary, Lord Cameron of Lochbroom, excused the petitioner’s failure to exercise his statutory rights of appeal against a decision of an immigration officer to refuse him entry to the United Kingdom simply on the basis that the petition for reduction of that decision set out classical judicial review grounds for challenge of the decision³. The judge stated:

‘I am…satisfied that the accumulation of grounds averred both of a procedural impropriety and of irrationality in this case are of such a kind as can constitute special circumstances of the kind which the courts have had in mind in setting out the general rule and the exceptions to it’.

¹ 1917 SC (HL) 1.
² 1992 SLT 590, OH.
³ *Mensah v Secretary of State for Home Department* 1996 SLT 177, OH per Lord Coulsfield.

6.16 By contrast in *Gurnam Singh v Secretary of State for Home Department*¹ the Lord Ordinary, Lord Abernethy, observed that it would only be in very special circumstances that the court would be willing to grant the remedies available under judicial review procedure where, as in the case of immigration and asylum applications, the legislature had provided for a full statutory appeal process.

¹ 1995 Immigration Appeal Reports 616, OH.

6.17 In any event, in deciding whether an alternative remedy does indeed exist, practical considerations may be taken into account. The proposed alternative statutory remedy has to be an adequate one. Thus, as was found in *City Cabs (Edinburgh) Ltd v City of Edinburgh District Council*², where a decision affects a considerable number of people the fact that each individually might be able to take a statutory appeal will not prevent the issue being raised on behalf of all of them by way of judicial review.

² 1988 SLT 184.

6.18 In *Accountant in Bankruptcy v Allans of Gillock Ltd*³, however, Lord Cowie sitting in the Outer House upheld the competency of a judicial review petition brought by the accountant in bankruptcy in which he sought reduction on the grounds that it was ultra vires of an order by the sheriff which purported to bring forward the date of sequestration of a bankrupt. The creditors opposed the petition, arguing that it was incompetent by reason of the failure to follow out an appeal against the sheriff’s order either to the sheriff principal or to the Court of Session. It was held by the court that, in principle, judicial review would be competent, notwithstanding the existence of an alternative appeal, in relation firstly to a case involving an ultra vires order amounting to a miscarriage of justice and secondly where there were exceptional circumstances in this case caused by the effect which the purported order would have on the interests of
those involved whether as creditors of the bankrupt or as his trustee in bankruptcy.

1 1991 SLT 765, OH.

6.19 In Tarmac Econowaste Ltd v Assessor for Lothian Region\(^1\) Lord Clyde, sitting as Lord Ordinary, considered a petition for judicial review challenging the vires of a decision of the assessor to alter the valuation roll entry in relation to a particular site by deleting the earlier entry and substituting a new valuation in respect of a former quarry which had become a waste tip. Lord Clyde upheld the objection to the competency of proceeding by way of judicial review on the grounds of failure to exhaust available statutory remedies, namely an appeal to the local valuation appeal committee. The Lord Ordinary went on to observe, however, that the inadequacy of the statutory appeal alternative to an application for judicial review might be a sufficient reason for recourse to judicial review, but that this was an area of law that might be open to development in the interests of the provision of an effective procedure for redressing wrongs.

1 1991 SLT 77.

6.20 In Sangha v Secretary of State for the Home Office\(^1\) Lord Marnoch held that a party's failure on the advice of an immigration counsellor to follow through the statutory appeal process against a refusal of asylum did not constitute exceptional circumstances such as to permit recourse to the courts by way of judicial review. There was no reason to depart from the general rule that a party and his agent be treated as one\(^2\).

1 1997 SLT 544, OH.

2 See to similar effect the decision of the House of Lords in Al-Mehdawi v Secretary of State for the Home Department [1990] 1 AC 876 at 899E-G, 901C-D and the refusal of leave decision in R v Secretary of State for the Home Department, ex parte the Equal Opportunities Commission: [1997] Imm AR 483, QB.

Judicial review of primary legislation

6.21 In the English courts, there has been some acceptance that judicial review might be appropriate in certain circumstances, notably in the context of challenges to the validity of primary legislation, notwithstanding the availability of alternative private remedies\(^1\). As Dillon LJ stated in the Court of Appeal judgment in R v Secretary of State for Employment, ex parte the Equal Opportunities Commission:

There may be cases in which it is appropriate for proceedings for judicial review to be brought before a private law claim can be launched eg where a statute or a certificate of a minister apparently precludes a person from bringing proceedings in the private tribunal which would otherwise be appropriate\(^2\).

1 See eg R v Secretary of State for Employment, ex parte the Equal Opportunities Commission [1995] 1 AC 1, HL and R v Secretary of State for Employment, ex parte Seymour-Smith and Perez [1998] IRLR, HL.

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6.22 In the only challenge in Scotland to date as to the validity of primary legislation since the 1986 reforms of judicial review procedure, Lord Cameron of Lochbroom dismissed on grounds of competency a petition brought by the National Union of Public Employees against the Lord Advocate for review of the compatibility of the Transfer of Undertakings (Protection of Employment) Regulations 1981 with the European Acquired Rights Directive 77/187/EEC which the regulations purported to implement. The Lord Ordinary held that the union had no separate title and interest distinct from its individual members to pursue the matter by way of judicial review and, insofar as the petitioners sought vindication of employment protection rights conferred upon individuals under Community law, this matter could and should be brought by the individual union members before the Industrial Tribunal system rather than by way of judicial review.

1 SI 1981/1794.

ACADEMIC OR HYPOTHETICAL QUESTIONS

6.23 It is clear that the courts in Scotland will not allow themselves to be used as arbiters in purely academic legal disputes. The court has to be satisfied that it is pronouncing on an issue of live practical importance to a party and is not dealing with purely hypothetical questions. Thus, in a series of cases seeking judicial review of decision on licensing the court has held that past refusals of licensing permission could not be subject to judicial review unless these refusal were still current and were applicable to planned events in the future. Where, however, a decision complained of had only been partially implemented by the time the matter was brought to the courts for review and the petitioner was able to point to continuing practical consequences of the impugned decision, judicial review was held still to be available to him.

1 See Drennan v Associated Ironmoulders of Scotland 1921 SC 151.
2 Macnaughton v Macnaughton's Trustees 1953 SC 387; Unigate Foods Ltd v Scottish Milk Marketing Board 1975 SC (HL) 75.
4 Conway v Secretary of State for Scotland 1996 SLT 689, OH.

6.24 In R v Secretary of State, ex parte Salem Lord Slynn made the following observations:

'...In a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se.'
The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the future.'

1 [1999] 2 WLR 483, HL, per Lord Slynn at 487H-488B.

MORA, TACITURNITY AND DELAY

6.25 Under the rules applicable to the English procedure, judicial review proceedings have to be brought within three months of the decision complained of, unless the court finds good reason for extending the time to make the application and further considers that this decision would not be likely to cause hardship or prejudice to the respondents or to be detrimental to good administration. In Scotland, there is no specific time limit within which proceedings are to be brought. Instead the court is granted a discretion, if it considers that in all the circumstances there has been unwarranted delay in bringing proceedings before it, to dismiss the application on grounds of mora, taciturnity and delay. In Watt v Secretary of State for Scotland Lord Weir observed as follows:

'The plea [of mora, taciturnity and acquiescence] is not one which arises with great frequency or is readily sustained by the courts. However, in the field of administrative law where a challenge is made against some decision or action effects of which may be limited in time, the court will be more quick to infer from silence and inactivity that a person is acquiescing in a changed state of affairs whatever may be. I would endorse the observations of Lord Prosser in Hanlon v Traffic Commissioner. Judicial review is a process designed to give speedy consideration to problems which arise and where time is of materiality. 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 acquiescence.'

1 Rules of the Supreme Court Order 53, r 4 and the Supreme Court Act 1981, s 31.
3 1988 SLT 802.

6.26 Thus in Atherton v Strathclyde Regional Council Lord Cameron of Lochbroom dismissed a petition brought by a motor vehicle trader for judicial review of a decision taken in May 1990 to remove his name from the chief constable’s list of contractors approved for the purpose of removing vehicles including abandoned vehicles. In September 1990 he was acquitted of any offence in relation to the car but in October 1990 he was refused reinstatement to the list. A petition for judicial review of the decision to remove him from the list was presented in October 1992 and, in
May 1993, was amended to bring under review instead the decision to refuse reinstatement. The court found that there been no breach by the chief constable of his duties in relation to the list but held that, in any event, there had been inordinate delay in seeking judicial review amounting to *mora*, taciturnity and acquiescence and accordingly refused the prayer of the petition.

1 1995 SLT 557, OH.

6.27 In *Perfect Swivel Ltd v City of Dundee District Licensing Board (No 2)* \(^1\) Lord Abernethy considered a case in which holders of an hotel licence whose application for regular extension of permitted hours was heard and refused on 20 June 1991 did not seek to challenge this refusal until their lodging of a petition for judicial review on 8 January 1992. The Lord Ordinary rejected the respondents' claim that the petition was barred by *mora*, taciturnity and acquiescence on the grounds that, although immediate steps to challenge the decision in question had not been taken, the petitioner had not been silent or acquiescent and instead had made further application for a regular extension in October 1991 which was also refused. Lord Abernethy reserved his opinion on the matter of principle as to whether inaction by applicants without any resultant alteration of the respondents' position or other material change in circumstances was of itself sufficient to bar judicial review. He was in any event not satisfied on the facts that any reconsideration of the June 1991 decision would be so detrimental to good administration as in itself to justify dismissal of the petition.

1 1993 112, OH.

6.28 The underlying justification for dismissal on the grounds of *mora* vary. On some analyses, the question addressed by the court is whether or not on the facts before it the court is justified in inferring from the petitioner's delay in raising proceeding acquiescence in the breach complained such as now to personally bar him from insisting on the enforcement or protection of his claimed rights. In other cases, the relevant test is whether or not the fact of delay in raising proceedings can be said to have caused prejudice to the respondents such that it would be unfair to them to allow matters to be opened at this stage. In yet other cases, the argument which supports the plea is that the decisions in question are spent, there is no live practical question to decide as between the parties and the question of its lawfulness or otherwise has accordingly become purely academic.

2 See *Swan v Secretary of State for Scotland and Iain Dykes* 1998 SC 479 and *Carlton v Glasgow Caledonian University* 1994 SLT 549, OH.
FORM OF PROCEDURE

6.29 RCS 1994, rule 58.3(1) provides that applications to the 'supervisory jurisdiction' of the Court of Session shall be made by way of petition for judicial review. The procedure is therefore mandatory and exclusionary in the sense that any other form of proceeding which is, in substance, an appeal to the court's supervisory jurisdiction, however that is to be understood, is incompetent.

1 For RCS, Chapter 58, see Appendix 1.

6.30 In Sleigh v City of Edinburgh Council it was suggested by the Lord Ordinary Lord Cullen that because of 'certain novel and unique features' of RCS 1994, Chapter 58 judicial review it might not be competent to amend an ordinary action (in casu for interdict) into a judicial review petition.

1 1988 SLT 253, OH.

6.31 It has been suggested, however, that RCS 1994, Chapter 58 procedure is residuary in nature rather than all-embracing or super-eminent, such that it is not competent to proceed by way of a Chapter 58 application to the court's supervisory jurisdiction where there are other specific procedures for the achieving of particular remedies which have been provided for under the Rules of Court. In Bell v Fiddes a petition for judicial review was brought on behalf of individuals against whom decree had passed in an undefended action in the sheriff court, seeking reduction of the decree and suspension and interdict of diligence on it. It was perhaps wrongly conceded by counsel for the petitioners, presumably on the basis of his being unable to define any relevant tri-partite relationship, that the situation of review by the Court of Session of a decree of an inferior court or tribunal did not fall within the analysis of the extent of the supervisory jurisdiction essayed by Lord President Hope in West v Secretary of State for Scotland. This concession was made notwithstanding that, as the Lord Ordinary observed 'the phrase 'supervisory jurisdiction of the court' could be taken to cover, in its widest meaning, actions of reduction of inferior court decrees and indeed, perhaps, various other forms of legal process'. On the basis of this concession, the Lord Ordinary upheld the motion made on behalf of the respondent that the petition be dismissed as incompetent. Lord Marnoch observed that where specific provision is made elsewhere in the Rules of Court for a particular review procedure (for example, reduction under Chapter 53 or suspension under Chapter 60 of an order of an inferior court or tribunal) it is not competent to proceed by way of Chapter 58 judicial review procedure. It may be that the rationale of this case will not survive any subsequent review by the Court of Session of the extent of its supervisory jurisdiction and the necessity or otherwise of identifying in all situations a tri-partite relationship as a pre-requisite to proceeding by way of judicial review as opposed to the public/private distinction relied upon in judicial review England and Wales.

1 1996 SLT 51, OH.
3 1996 SLT 51 at 524.
4 For House of Lords decisions on this matter see: O'Reilly v Mackman [1983] 2 AC 237; Cocks v Thanet District Council [1983] 2 AC 286; Davy v Spelthorne Borough Council [1984] AC 262; Roy
6.32 RCS 1994, Form 58.6 sets out the style to be used in any petition for judicial review. The designation, title and interest of the petitioner is to be specified as well as the designation and relation of the respondent to the matter to be reviewed. Any persons who might have an interest in the matter must also be specified. This is potentially of significance because it may be that a petition for judicial review could be dismissed on the basis that all parties with an interest have not been called.

1 See eg Thomas John Casey v Edinburgh Airport Ltd (23 February 1989, unreported).

6.33 Judicial review is only competent where there is a specific decision, act or omission which it is sought to challenge. Thus, the petition should identify the particular act, decision or omission to be reviewed. In Hands v Kyle and Carrick District Council the proprietor of land at an hotel sought declarator that he was entitled to complete development of the land in terms of a grant of planning permission issued in 1978 which permitted him ‘to form a hotel extension by means of sixteen suites and dining/kitchen accommodation’. Lord Prosser sitting in the Outer House rejected an objection to the competency of his proceeding by way of an ordinary action as follows:

The... argument upon competency was to the effect that the only competent procedure was that of judicial review. It was contended that because the defendants had intimated their view upon the matter that was tantamount to a decision. The correct way to bring that type of decision under the scrutiny of the court was by the procedures for judicial review. I see no force in this submission. The expression of views by planning authorities, when these views do not take the form of an actual decision with legal consequences, is not a matter open to review. The issue in this case is not as to the validity of a decision, but as to the legal effect of decisions which are not themselves questioned. I reject this argument.

1 1989 SLT 124, OH.
2 1989 SLT 124, OH at 127.

6.34 Questions as to the competency of using judicial review procedure to review a draft statutory order prior to its being made has been raised before the court but not decided upon. The reviewability or otherwise of draft orders, unimplemented policies or proposals for future action appears to depend very much on the particular factual circumstances and legislative context in which these preliminary decisions have been reached. Thus in Aberdeen City Council v Local Government Boundary Commission for Scotland Lord Penrose accepted the competency of a review of a draft proposals for changes in local government ward boundaries, noting that it might be open to the court to strike down such proposals even at a preliminary stage if it could be satisfied that they were based on some fundamental methodological error which vitiated their whole approach.

1 Strathclyde Buses v Strathclyde Regional Council 1994 SLT 724, OH. Cf R v HM Treasury, ex p Smedley [1985] 1 QB 657 where the English Court of Appeal appeared to accept the
Factual Basis for Judicial Review

6.37 Reviewability of a proposal by the United Kingdom to make payments out of the consolidated fund to the European Community before the draft order giving effect to this proposal had been approved by Parliament.

2 See Inverness Taxi Owners and Drivers Association and others v Highland Council, OH unreported decision of Lord MacLean, 19 February 1999 re non-reviewability of a not yet implemented general policy change in taxi licensing by the local authority.

3 1998 SLT 613, OH.


REMEDIES SOUGHT IN THE JUDICIAL REVIEW PETITION

6.35 The petition should specify the particular remedies sought by the petitioner in relation to the decision complained of. As we have seen, RCS 1994, rule 58.4(b) gives the court the power to make such order as it thinks fit in relation to the decision under review 'including an order for reduction, declarator, suspension, interdict, implement, restitution, payment (whether of damages or otherwise) and any interim order'. In Chapter 1, we considered the remedies available to the court and how the court has in practice exercised these in the context of judicial review. It should always be borne in mind that the court has a discretion as to what remedies, if any, to grant in judicial review and is not confined to the particular remedies sought in the petition.

1 See Sutherland District Council v Secretary of State for Scotland 1988 GWD 4-167, OH.

6.36 Further, the court has a broad discretion in relation to the resolution of the matter brought before it and is not bound to grant any of the remedies sought even where the factual basis on which the petition is brought is made out. In particular, the court may grant or refuse any part of the petition, with or without conditions, and it may make any order in relation to the decision under review as it thinks fit, whether or not such an order was sought in the petition. Lord Clyde has made the following observation in relation to this power:

'It is open to the court under Rule of Court 260B (4) [now rule 58.4] to make such order in relation to the decision in question as it thinks fit, but I consider that counsel was correct in submitting that the court should not compel a petitioner to accept a remedy not sought and not desired by him or her.'

1 See eg King v East Ayrshire Council 1998 SC 182.

2 Mecca Leisure Ltd v City of Glasgow District Licensing Board, 1987 SLT 483, OH.

FACTUAL BASIS FOR JUDICIAL REVIEW

6.37 A judicial review petition must set out a factual basis in support of the grounds of challenge. It should always be borne in mind that the relevant facts can only be those which applied at the time the decision was made. Any subsequent developments will not in general avail a petitioner
seeking to challenge the validity of a decision since the validity of a
decision falls to be tested within the context of the facts and circumstances
which applied at the time the decision was made. Judicial review is not an
appeal; it is not a hearing de novo. As Lord Johnstone has noted:

'It is essential that the court in exercising its supervisory jurisdiction reviews
the decision against the background of the material before the minister at the
relevant time and not by reference to subsequent events which may have
clarified or altered the factual basis upon which his decision proceeded. To do
otherwise would turn the court into an appellate body as regards the substance
of the decision and that is not its role in the exercise of this jurisdiction'.

1 See eg in the context of planning decisions, *Russell (John G Transport) v Strathkelvin District Council* 1992 SLT 1001, OH.

2 *Shetland Line (1984) Ltd v Secretary of State for Scotland* 1996 SLT 653, OH per Lord Johnstone at 658C.

6.38 A change in relevant factual circumstances which is duly brought to
the attention of the decision-maker may constitute grounds for an indi-
vidual requesting the decision-maker to re-consider his original decision
(and any refusal to re-consider may form the basis of a judicial review
challenge). But a change or development in factual circumstances since the
making of the original decision, whether at the time when the petition was
drafted or by the time the matter comes before the court, cannot, of itself,
properly form the basis for a request to the court, by way of judicial review,
to quash the original decision and either substitute its own decision or
ordain the decision-maker to reconsider. Any such approach misunder-
stands the role of the court in judicial review. The function of the court in
judicial review is to ensure that, in the first place, the decision-maker
properly applied himself to the law and the facts in reaching his decision. It
is not for the court itself to weigh the equities of the matter and reach its
own view on the correct decision. Courts review, decision maker decide.

6.39 As well as setting out the relevant facts the petition should also
properly specify the legal argument which it is proposed to make, making
reference in the body of the petition both to any relevant enactments and
past case law or other authority on which it is intended to rely.

6.40 RCS 1994, rule 58.6(2) requires the petitioner to lodge with the
petition all relevant documents which are within his possession and con-
tral and in so far as he founds upon a document outwith his possession or
control, rule 58.6(3) provides that he should append a schedule specifying
the document in question and identifying the person who possesses or
controls it. Recovery of these documents may be sought either by applying
for an order under section 1 of the Administration of Justice (Scotland) Act
1972 or, if the documents are in the hands of any party appearing before the
court at first hearing, under and in terms of rule 58.9(2)(b)(vii). It has been
observed, however, that the clear inference from the terms of Chapter 58,
and in particular rule 58.7 must be that 'ordering production of documents
against a respondent falls to be made at the stage of the first hearing and not
at the stage of the first order'.

1 See *Kelly 1985 SC 333*, OH.
FIRST ORDERS

6.41 RCS 1994, rule 58.7 specifies that on being lodged, a petition shall, without appearing on the motion roll, be presented forthwith to the Lord Ordinary in court or chambers for an order specifying such intimation, service and advertisements as may be necessary, listing what documents if any are to be served with the petition and setting a date for a first hearing which should be no earlier than seven days after the expiry of the period specified for intimation. The appearance before the court of counsel for the petitioner or other person having right of audience is required at this stage. In Kelly v Monklands District Council (No 1), in rejecting a contention made on behalf of the respondents that it was not open to the judge at the stage of first orders for the judge call for answers to be lodged within a specified period (in casu seven days) Lord Ross made the following observations:

'Under judicial review, when a first order is made specifying service, I am clearly of the opinion that this involves calling on all parties claiming interest to lodge answers, if so advised, within a fixed number of days. I do not regard such service as being inconsistent with rule 260B (13)(b) [now RCS 1994 58.8(1)(b)] or (16)(b)(i) [now RCS 1994 58.9(2)(b)(iv)]. Service of the petition calls on the person upon whom service is effected to lodge answers, if so advised. Accordingly it is open to that person to decide whether or not to lodge answers, and rule 260B (13) (b) [now 58.8(1)(b)] merely recognises that such a person may lodge answers. Moreover, if the person upon whom service is effected chooses not to lodge answers, rule 260B (16)(b)(i) [now 58.9(2)(b)(iv)] recognises that the court, at the first hearing, may order answers to be lodged within a specified time'.

1 RCS 1994, r 58.8(1)(b) provides as follows:

'A person to whom intimation of the first hearing has been made and who intends to appear ... (b) may lodge answers and any relevant documents.'

2 RCS 1994, r 58.9(2)(b)(iv) provides as follows:

'After hearing the parties the Lord Ordinary may ... make such order for further procedure as he thinks fit and in particular may ... order answers to be lodged within such period as he shall specify'.

3 1986 SLT 165, OH at 166.

6.42 The Lord Ordinary is also empowered at the first order stage to consider any application for an interim order. If there is a suitably worded caveat and the interim order sought falls within its terms then the respondents to the petition will be advised at this stage by the Keeper of the Rolls of the existence of the petition and the time and place of the first order hearing so that the respondent may, if so advised, appear to oppose the interim order sought. It is at this stage that the vast majority of applications for interim liberation from detention are made in immigration and asylum cases. The court in such applications appears to operate an informal tariff whereby liberation will normally be granted on consignation of a specified sum by way of caution and on acceptance of regular reporting requirements to a local police station. Where no interim orders are sought, there is no intimation given to the respondents that first orders are being sought.

6.43 It should be noted that, in contrast to the position in England, there is no requirement in Scotland that leave be sought and granted by the court
before an individual may proceed to an application for judicial review. The
decision as to whether or not to grant a first order which effectively initiates
the judicial review proceedings is, however, a matter wholly within the
discretion of the Lord Ordinary. On certain relatively rare occasions the
court has refused a first order for service of the petition and dismissed it at
that stage, on the basis that it raises no stateable case to answer\(^1\). In Butt v
Secretary of State for the Home Department\(^2\) Lord Gill observed as follows:

‘In the normal case the relevancy of the petition will fall to be decided at a first
hearing because, in the majority of judicial review cases only the petitioner is
represented at the hearing on the first order. Even if the respondent is rep-
resented at that hearing the court will usually be in no position to make a
decision disposing of the petition: for example, because the petitioner may
have to recover essential documents relation to the decision complained of, or
may be ordered to serve specified documents on the respondents; or because
the respondent may wish to lodged answers to the petition and to have time to
prepare his defence on the facts and the law.

...\

Without attempting to state any universal rule in the matter, I suggest that it
would certainly be appropriate for the court to consider, and indeed refuse, the
petition at a first order hearing in a case where (1) the respondent is rep-
resented; (2) all necessary documents are to hand; (3) the respondents wishes
to have the petition disposed of without resort to a first hearing and is in a
position to present a fully prepared case; and (4) there is no dispute of a factual
nature such as to prevent the court from making a properly informed decision
at that stage\(^3\).

\(^1\) See eg Sokha v Secretary of State for the Home Department 1992 SLT 1049, OH and Scottish
National Party v British Broadcasting Corporation (23 September 1996 unreported) OH.
\(^2\) 15 March 1995, unreported OH.
\(^3\) See to like effect the decision of the Lord Ordinary, Lord Eassie, in Rafagat Ali v Secretary of

6.44 This occasional limited filtering by the court at the first order stage
on the ground of no stateable case means that, in contrast to the position in
England, the vast majority of petitions will proceed, unless the facts
change, to a first hearing before the Lord Ordinary at which full arguments
will normally be heard. In particular it should be noted that where either
the respondent has no caveat lodged or the petitioner seeks no interim
orders against him at the stage of first hearing, there is unlikely to be any
testing of the strength or merits of the petition at that hearing. The result is
that, particularly in immigration and asylum cases, many petitions of
questionable weight and resting on weak legal arguments are, by default,
permitted to proceed to first hearing.

6.45 By contrast, in England and Wales, an application for judicial review
may only be brought with leave of the court. While the courts there use the
leave stage as an important filter to avoid the courts there from being
over-burdened with applications which are entirely without merit, in Scotland there is as yet no such formal leave requirement.

6.46 Occasionally, particularly in immigration cases, judicial review applications are raised before the courts in England and Wales but, having been refused leave to proceed, are then raised again in Scotland before the Court of Session. Ministers of the Crown are domiciled throughout the United Kingdom. Jurisdiction can accordingly be based against any decision of ministers of the Crown in either Scotland or England on the basis of their domicile within the respective geographical jurisdictions. The question then arises as to whether or not the decision to refuse leave in the English action may bar the raising of proceedings in Scotland on application of the principles of res judicata which prevents the re-litigating of proceedings between the same parties which raise the same issues and seek the same result or substantive remedy. Whether or not the courts in Scotland would regard a English court’s decision to refuse leave for judicial review as an antecedent judicial decree of a competent tribunal pronounced in foro contentioso (permitting either the application of the principles of res judicata or pleas to the interests of international comity such as to prevent the petitioner from going forum shopping by raising substantively the same issues over the same decision before the various national jurisdictions within the United Kingdom) has not yet been authoritatively decided in Scotland.

1 See eg Sokla v Secretary of State for the Home Department 1992 SLT 1049 at 1051 and 1053–1054.
2 See Esso Petroleum Co Ltd v Latu 1956 SC 33; Matuszczyk v National Coal Board 1955 SC 418; Edinburgh and District Water Trustees v Clippens Oil Co Ltd (1899) 1F 899; and Gow v Henry (1899) 2F 48.
3 See Magris Holdings Ltd v City of Edinburgh District Council, 1994 SLT 971. Clink v Speyside Distillery C. Ltd 1995 SCLR 797, OH per Lord Cullen at 799C.

FIRST HEARINGS

6.47 The introduction of a judicial review procedure was envisaged in the Dunpark reforms as leading to a swift consideration and speedy resolution of the issues raised. It was intended that the delays inherent in the ordinary procedure would be minimised by eliminating the need for the adjustment of pleadings, the lengthy procedures for the recovery of documents, replacing oral evidence with affidavits and with the few specialist judicial review judges nominated under RCS 1994, rule 58.5 taking an active role in the proceedings. In the jargon of civil procedure reformers, the procedure would be ‘front-loaded’ and the judge made the ‘master of procedure’, both characteristics which have subsequently been taken up in the new commercial procedure under Chapter 47. It was thought that these characteristics would ensure that judicial review proceedings might thereby be satisfactorily dealt with in a matter of weeks, or at most a few months, from the granting of the first order. This is in stark contrast to the years taken to reach any conclusion of an action brought under the ordinary procedure.
6.48 In practice, RCS 1994, Chapter 58 judicial review procedure has not always lived up to the intentions of its framers. Due to pressure on judicial time, in some cases judicial review hearings are fixed up to ten months to a year from the date when first orders are pronounced. Notwithstanding this lengthy period when the matter is wholly outwith any judicial supervision, rule 58.8(1) requires that as little as forty-eight hours notice may be given to the agent for the petitioner and the Keeper of the Rolls by any person to whom intimation of the first hearing has been given and who intends to appear at the first hearing. Further, there is no requirement that any such party who has intimated an intention to appear or be represented need lodge any answers or documentation prior to the first hearing. Rule 58.8(2) makes provision for the possibility of intervening third parties, other than the original petitioner and respondents, in that it allows persons other than those specified in the original first order to apply for leave to enter the process.

6.49 RCS 1994, rule 58.9 provides that, after hearing the parties at the first hearing, the Lord Ordinary may either determine the petition then and there, or instead make a number of order for further procedure. These further orders include: adjourning or continuing the first hearing to another date; ordering service on a person not specified in the original first order; making any interim order; ordering the lodging of answers within a specified time period; ordering further specification in the petition or in any answers on specified matters; ordering facts founded upon by any party to the hearing to be supported by affidavit evidence; ordering the lodging of documents by any party appearing within a specified time scale; appointing a reporter to report on such matters of fact as the Lord Ordinary may specify; or ordering a second hearing on such issues as he may specify.

6.50 It would appear from the range of orders open to the Lord Ordinary under RCS 1994, rule 58.9(2)(b) that the first hearing was originally intended to be a formal procedural hearing, perhaps akin to the preliminary hearings provided for in the commercial procedure under rule 47.11, to clarify and focus the issues between the parties and allow the judge to set his mark on the proceedings. In practice, however, the vast majority of applications for judicial review are determined at the first hearing. First hearings under rule 58.9 have become, in effect, substantive legal debates, set down for between one and two days, at which the legal arguments set out in the petition are rehearsed. Given that first hearings have in most cases become the occasion for the substantive consideration of the merits of the judicial review application, the failure to require answers from the respondents prior to the first hearing has become something of a lacuna in the Rules of Court.

1 See eg Lord Clyde's remarks in Blair v Lochaber District Council 1995 SLT 407, OH at 408: The petition has come before me for a first hearing. Both the petitioner and the district council were represented by counsel, but no answers had been lodged by the respondents. It was pointed out that the first order did not call for answers to be lodged. Rule 58.8 of the Rules of the Court of Session however does allow the lodging of answers by a person intending to appear and, in my view, the present is a case where it would have been useful for formal notice to have been given in that way of the respondents' position.
6.51 It should be noted that (sometimes radical) amendment of the petition shortly before the first hearing is not uncommon, particularly in immigration cases. This is often because the counsel who drafted the petition is not available to appear at the first hearing and the counsel who is able to appear is not willing to support the legal arguments set out in the petition as originally drafted. Although such a practice would seem to be contrary to the spirit and schema of RCS 1994, Chapter 58 judicial review procedure, the amendment procedure is often allowed retrospectively by the bench in the exercise of 'judicial compassion' or other equitable considerations having regard to the human rights implications of their decision.

6.52 In any event, there is no specific statutory provision in Scotland for an award of expenses to be made directly against counsel and the competency of such a course at common law has been doubted\(^1\). Awards of expenses have been made against solicitors personally at common law on the ground of a breach of their duty not to raise insupportable actions in abuse of process\(^2\). The Scottish position is to be contrasted with the position in England and Wales where, under reference to section 51(6) of the Supreme Court Act 1981, the court may, if it appears just in all the circumstances, pronounce 'wasted costs' orders personally against both barristers and solicitors whose conduct of litigation was improper, unreasonable or negligent and had resulted in unnecessary costs being incurred\(^3\).

1 In Reid v Edinburgh Acoustics Ltd (No 2) 1995 SLT 982, OH, it was expressly conceded before Lord MacLean by counsel seeking an award of expenses against a firm of solicitors that it was not competent to make an award against counsel personally. Consequently the Lord Ordinary refused, on grounds of unfairness, to find a solicitor who had acted on counsel's advice personally liable for expenses.

2 See Blyth v Watson 1987 SLT 616, OH per Lord Morison and Stewart v Stewart 1984 SLT (Sh Ct) 58 per Sheriff Ireland QC.

3 See Ridehalgh v Horsefield [1994] Ch 205, CA.

6.53 RCS 1994, rule 58.10 makes provision for the Lord Ordinary to order a 'second hearing' on specific issues identified by the judge, at which the parties at the first hearing should lodge all documents and affidavits to be founded upon. Prior to the second hearing date, which is to be fixed by the Keeper of the Rolls in consultation with the Lord Ordinary and the parties as soon as reasonably practicable after the first hearing, the Lord Ordinary may have the case put out by order for the purpose of obtaining such information from the parties as he considers necessary for the proper disposal of the petition at the hearing and in the course of which he may make such order as he thinks fit, including the appointment of a commissioner to recover documents or take the evidence of a witness. At the second hearing the Lord Ordinary may adjourn or continue the hearing for such further procedure as he thinks fit, or determine the petition. In practice, the second hearing procedure is rarely used since, aside from the by order procedure, it appears to be less flexible than the first hearing. If a judicial review petition cannot be determined either for or against the petitioner at the first hearing, what often happens is that the matter is
continued to a further first hearing, with the judge making such further orders as he or she thinks fit.

EVIDENCE IN SUPPORT OF A PETITION FOR JUDICIAL REVIEW

6.54 RCS 1994, 58.6(4) provides that an affidavit should be lodged setting out the terms of the decision, act or omission under review and the basis on which judicial review is sought if these facts are not apparent from the documents lodged with the petition. Under rule 58.9(2)(b)(vi) the court may also order affidavits to be lodged within a specified time period to support any fact founded upon by any party at the first hearing of the petition. In contrast to the position in England and Wales, affidavit evidence is used in Scottish judicial review as an optional and extra means of supplementing the facts set out in the petition. It is not the only way in which facts may be brought before the court. Where facts are in dispute between the parties in proceedings for judicial review the court can order that appointed matters proceed by way of proof before answer, with evidence taken and tested in the usual way. As has been stated by Lord Morison:

'The use of affidavits as a substitute for oral evidence is recognised by the Act of Sederunt dealing with judicial review but it may not be appropriate to deal with contentious issues of fact or opinion even although the affidavits may be amplified, as occurred in the present case, by ex parte statements relative to matters raised at the hearing by parties or by the court. If the petitioners are right in their submission that the respondents' evidence is insufficient to prove their case in the particular respect now alleged, the proper course in the circumstances is, in my opinion, not to find that they are thereby in breach of statutory duty but to allow them an opportunity of providing further specification by oral evidence which would be subject to cross examination'.

1 See eg Jooben v University of Stirling 1995 SLT 120.
2 Walker v Strathclyde Regional Council (No 2) 1987 SLT 81, OH.

6.55 By contrast, in English judicial review procedure affidavits, which are normally drafted by counsel for the parties, are universally used and relied upon by the courts. Affidavit evidence is used to expand upon a decision letter, allowing the decision-maker a chance more fully to explain his reasons for reaching the decision being challenged. In the case of a conflict of evidence the courts in England and Wales will normally rely upon the respondents' affidavit since the onus is upon the applicant to establish their case. In England and Wales, affidavit evidence is regarded as a substitute for, rather than as in Scotland, a supplement to oral evidence. Specific leave is required from the courts in England and Wales if it is sought to challenge such evidence by cross-examination. Lord Diplock has noted:

'It will only be on rare occasions that the interests of justice will require that leave be given for cross-examination of deponents on their affidavits in applications for judicial review. This is because of the nature of the issues that
normally arise upon judicial review. The facts, except where the claim is invalid on grounds that a statutory tribunal or public authority that made the decision failed to comply with the procedure prescribed by the legislation under which it was acting or failed to observe fundamental rules of natural justice or fairness, can seldom be a matter for relevant dispute upon an application for judicial review, since the tribunal’s or authority’s decision of fact, as distinguished from the legal consequences of that facts that they have found, are not open to review by the courts except on the principles laid down in Edwards v Bairstow [1956] AC 14, 36; and to allow cross-examination presents the courts with a temptation, not always easily resisted, to substitute its own view of the facts for that of the decision making body upon whom exclusive jurisdiction to determine facts has been conferred by Parliament’.

Chapter 7

Judicial Review and Agriculture and Fisheries

INTRODUCTION

7.01 Since the entry of the United Kingdom into the Common Market in 1973, the activities of the executive and administration in relation to agriculture and fisheries issues in Scotland have been largely delimited by their obligations under Community law. The role of national authorities in these spheres can only be properly understood within the context of an understanding of the requirements of Community law. In particular, the assessment of the possibilities for an individual’s judicial review of national administrative action in these fields requires an awareness of the demands of, and the rights granted under, Community law1.

1 See eg Case 83/78 Pigs Marketing Board v Redmond [1979] ECR 2347.

7.02 Article 32(4) of the post-Amsterdam EC Treaty (formerly article 38(4) of the Treaty of Rome) provides that a common policy on agricultural products (which includes fisheries and stock-farming as well as products of the soil) shall be established among the member states. The common agricultural policy may be said to be the European Community’s first area of true sovereignty. The Community has taken over a large part of the member states spending on agriculture. Once the common policy has been decided the member states play only an ancillary role, implementing the decisions reached at the discretion of the Community administration. Subject to these requirements of Community law, the responsibility for the regulation of agricultural and fisheries issues is a matter which has been devolved to the new Scottish Parliament and Executive by the Scotland Act 1998.

7.03 This transfer of sovereignty from the nation state to the Community in the sphere of agriculture and fisheries means that national executive, administrative or indeed legislative action may be subject to judicial review on the grounds that such action goes beyond or unjustifiably varies that which is warranted by Community law1.


7.04 Further, in general the administration of the common agriculture policy is a situation in which the member state administrations have a very
limited discretion. If the actions of the national authorities such as the Scottish Office are shown to be in contravention of Community law and if they have resulted in loss to individuals, then a *Francovich* damages claim may properly lie against the member state. Such a claim might be brought in conjunction with the substantive judicial review application. As the Court of Justice noted in a case where the United Kingdom refused to grant a licence for export of live animals to Spain on the grounds of unsubstantiated concerns over animal welfare:

'Where, at the time when it has committed the infringement [of Community law], the member state in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach [to support a *Francovich* damages claim].'

1 For a discussion of the case law in *Francovich* damages, see Chapter 4, paras 4.43 to 4.53.

7.05 On the other hand, the supremacy of Community law also means that national action within the parameters of the requirements of Community law will, if anything, be less easy to challenge since the Court of Justice has held that the legality of a Community provision in the sphere of agriculture can be challenged only if it can be shown that the measure is 'manifestly inappropriate' having regard to its objective. In *FEDESA* the court stated:

'[W]ith regard to the judicial review of compliance with those conditions [of proportionality] it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by articles 40 and 43 of the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions pursues. (see in particular case C-265/87 *Schräder* [1989] ECR 2237 paragraphs 21-2)'.


**THE EUROPEAN COMMON AGRICULTURAL POLICY**

7.06 The common agricultural policy (CAP) is avowedly based on three principles:

- the establishment of a single market for the free movement of agricultural goods within the Community;
- a preference for Community produce whereby priority is given to the sale of Community produce by regulating the flow of imports into and financially supporting exports from the Community, and by subsidising Community agricultural production to make it competitive with goods imported into the Community;
- financial solidarity whereby all the member states contribute to a central fund, the European Agricultural Guidance and Guarantee
Fund (EAGGF), from which expenditure in pursuit of the aims of this common agricultural policy is made irrespective of the product or the member state in which it is produced.

7.07 The main activity under the CAP was initially the implementation of the policy on prices and markets which sought to ensure that market prices for agricultural produce in the Community did not fall below certain minimum levels. These levels were in general greater than world market prices for the products. Under this price support policy when supplies were abundant specialist Community intervention agencies, concerned with products ranging from butter and skimmed milk powder to pork, beef and table wine, bought in ‘surplus’ production with a view to returning it to the Community market-place in leaner times or otherwise disposing of it, for example by exports to non-Community countries. With other products, for example sunflower-, cotton-and rape-seed, subsidies were paid to the processing industries to use Community produce. With yet other products, such as flax, hemp and silkworms, flat rate grants on the quantity produced were paid directly to the primary producers.

7.08 The consequences of these market intervention mechanisms become notorious. Farmers were given an incentive to greater and more intensive production regardless of the requirements of the marketplace. As a result, between 1973 and 1988 the volume of agricultural production within the Community increased by 2% annually, while internal demand for consumption of these products experienced an annual increase of only 0.5%. By the 1980s there was massive over-production of such products as wheat, butter, milk powder and beef. Some producers regarded the Community intervention agencies as their only customers, and rather than seek new markets, they produced agricultural produce simply with a view to selling it to the intervention agencies at artificially high guaranteed prices. Agricultural over-production was stockpiled indefinitely in warehouses in the form of butter mountains and wine lakes. Spending on this kind of market intervention from the EAGGF increased six-fold between 1975 and 1988. Over two-thirds of the total Community budget was spent in agricultural market support. By 1988 the budget of the EAGGF at ECU 27.5 billion was greater than the total national budgets of Ireland or Greece. More than half of this budget was spent on the storage or disposal of surpluses by subsidising exports. The CAP became an international as well as domestic scandal. In 1988 budgetary guidelines for the first time set a maximum ceiling for the CAP budget.

7.09 The European Commission proposed certain reforms of the CAP in early 1991 whereby the price support mechanisms would be used only to maintain prices at current world market levels, but the resulting loss of income to smaller farmers would be compensated for by direct payments from the Community. Larger, more efficient farmers would be expected to rely to a far greater extent on the open market. Financial support was provided both for less intensive farming methods and for non-production
in the form of payments in respect of land 'set-aside', either to lie fallow or to be used for non-food crops. These reforms were adopted in part by the Council in 1992. The basic principles of the unity of the market, Community preference and financial solidarity were not, however, changed in these reforms. The Court of Justice has held that it is not possible to derive from the provisions either of the Treaty or of the rules of secondary community law any general uniform definition of 'agricultural holding', which was universally applicable in all the provisions laid down by law and regulation relating to agricultural production. Consequently it is said to be a matter for Community institutions to define for the particular rules what is meant by agricultural holding.

1 See (1992) 6 EC Bulletin 73-74 (paras 1.3.140-1.3.146).

7.10 It should be noted that any sums paid under and in respect of the CAP by way of levies are not taxes in the sense of compulsory unilateral impositions or demands on individuals which restrict the liberty of the subject. Instead these levies are part of a grand trans-national scheme of subsidies and administration the main aim of which has been the implementation of the policy on prices and markets which seeks to ensure that market prices for agricultural produce in the Community do not fall below certain minimum levels. These levels have, in general, been greater than world market prices for the products and the result of this market intervention has been to subsidise over-production within the Community at vast cost to the general Community tax-payer and to the great profit of agricultural producers within the Community. Accordingly, unlike the position in relation to national taxes, there is no presumption as regards payments within the CAP that the demands or levies upon individual should be narrowly or strictly construed. If a producer is willing to enter into the system of subsidies and market intervention then he must equally be ready to modify his production or pay levies as required by that same system. The levy is simply a corollary of the subsidy: both are attempts to manipulate and control agricultural production. One cannot, in principle, accept one and refuse the other. Under the Community rules relating to the Community aid given to agricultural producers under and in terms of the structural reforms sought under the CAP (for example arable land set-aside) the court has held that the member states' authority is confined to questions of a technical nature. The member states therefore have no authority unilaterally to restrict the class of beneficiaries to such aid.

1 See Case C-321/91 R v Intervention Board for Agricultural Produce, ex p Tara Meat Packers Ltd [1993] ECR I-2811, ECJ.
2 Case C-190/91 Antonio Lante v Regione Veneto [1993] ECR I-67, ECJ.

7.11 Agriculture remains the Community’s only truly integrated sector of economic production. Such integration has been achieved by a mass of Community regulations which are directly applicable within the member states. The institutions and methods of the CAP no longer serve as examples of how to integrate European industry in post-1992 Europe. The
principle of subsidiarity means that the favoured methods of integration have been the mutual recognition of national standards and the adoption of directives which leave precise methods of implementation to member states, rather than Community regulations which leave them no discretion or room for manoeuvre. The centralist, interventionist regulatory bias of the CAP is now thought old-fashioned. This notwithstanding, the Commission maintains that the achievement of a single internal market in agricultural goods still requires 'common prices, common rules on competition, stable exchange rates in the agricultural sector and the approximation of administrative, public-health and veterinary rules and regulations'\(^1\) with uniform rules applied at the Community's external frontiers. These goals require central management.


7.12 The day to day administration of the CAP is however a matter delegated to the authorities of the member states. Aside from the Community provisions on the general policy to be adopted in the matter of agriculture and fisheries there is a host of Community legislation, both regulations and directives dealing with questions of the health, welfare and hygiene of farmed animals, fish and plants. In addition the Community is concerned to ensure common public health standards throughout the member states relative to animal and fishery products. These standards fall to be enforced within each member state so that no further checks need be carried out on such products when they are exported within the Community.

7.13 The Community seeks to ensure that the member states' authorities maintain a common approach in the interpretation and application of the CAP primarily by means of Community regulations. Article 189 of the Treaty of Rome provides that 'a [Community] regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states'. The 'direct applicability' of Community regulations means that no national legislation is required to implement them to give them legal effect in the domestic legal systems of the member states. Community regulations bind the member states and have the force of law within the national territories without the intervention of national parliaments. Whether or not the provisions of a regulation also have direct effect, in the sense of creating enforceable rights for individuals which may be relied upon before the national courts, is a matter for the proper construction of the provision in question: the provision has to be clear, precise and unconditional\(^1\). Insofar as the regulations can be construed as creating vested rights in individuals they may be said also to be 'directly effective' in the same way as Treaty articles. As with articles of the Treaty, direct effect may, in principle, be relied upon against both public and private parties. The Court of Justice has held that articles 30 and 34 of the Treaty of Rome (now articles 28 and 29 post-Amsterdam) and the regulations on the common organisation of the markets confer upon individuals rights which they may enforce before the courts of a member state\(^2\).
7.14 The Integrated Administration and Control System (IACS) Scheme was established by EC Council Regulation 3508/92 in an attempt to streamline the administration of the CAP. It required each member state to set up integrated schemes for the administration and control of direct Community aid to producers in the crop and livestock sectors within their national territories. Article 6 provided that as a condition for eligibility under one or more of the Community schemes covered by the regulations, each farmer should submit each year an area aid or animal aid application indicating the agricultural parcels and animals for which aid was sought together with 'any other necessary information provided either by the regulations relating to the Community schemes, or by the member state concerned'. Article 12 permitted the Commission to lay down more detailed rules implementing the scheme. The directly applicable IACS Council and Commission regulations have been supplemented in the United Kingdom by national regulations which identify the national authorities responsible for implementing and controlling the Community aid schemes. As a competent authority under the regulations, the Scottish Office have produced each year since 1993 explanatory booklets on the IACS EC farm subsidies, setting out the procedures to be followed by applicants. The SOAEDF explanatory booklet sets out the factors which the department will take into account in determining whether or not and the extent to which farm businesses will be made awards under the EC direct grant aid schemes. They are, therefore, a statement of United Kingdom administrative policy seeking to implement a provision of Community law. As such, the explanatory booklet sets out not only guidance but also an authoritative interpretation of the existing law and the rights of individuals. Accordingly it would appear to be sufficient to constitute a judicially reviewable act for the purposes of both Community and Scots law. The Court of Justice has interpreted its judicial review jurisdiction broadly, holding that judicially reviewable acts for the purposes of Community law include 'all measures adopted by the institutions, whatever their nature and form, which are intended to have legal effects'.

1 OJ L355/1, 5.12.92.
2 See EEC Commission Regulation 3887/92 (OJ L391/36, 31.12.92) which introduced specific rules governing the application of the IACS scheme with a view to avoiding fraudulent claims on the scheme.
4 See Scottish Old People's Welfare Council 1987 SLT 179, OH. Note that in R v Secretary of State, ex p Equal Opportunities Commission [1994] 2 WLR 409, HL the matter reviewed was simply the expression of an opinion on the requirements of the law contained in a letter from the Secretary of State.
PROPERTY RIGHTS AND GENERAL PRINCIPLES IN JUDICIAL REVIEW

7.15 It should always be borne in mind that the interpretation and application of national law and administrative measures within the area of the CAP has to be done in the light of broader considerations, in particular the general principles of Community law, such as the doctrine of proportionality. Thus in R v Minister of Agriculture, Fisheries and Food, ex parte Bell Lines Ltd, a ministerial decision to restrict the import of milk into the United Kingdom to certain specified ports was challenged in an action for judicial review. Prior to the Milk Ports Order, the only milk imported into the United Kingdom had been shipped from Ireland via two ports on the Irish Sea. The ministerial decision did not include these or any other ports on the Irish sea among the newly designated 'milk ports'. This decision was challenged on the grounds that it introduced an unreasonable restriction on intra-Community trade (contrary to article 30 (now article 28 post-Amsterdam) and unjustifiable under article 36 (now article 30) of the Treaty of Rome) and a declaration was sought from the English High Court that the two Irish Sea ports also be designated ports of entry for milk. Article 36 (now article 30) falls to be interpreted in the light of the doctrine of proportionality. The declaration was granted by the judge who held that in considering the justifiability of the decision under article 36 (now article 30) it was not limited to the criteria set out in Wednesbury, namely: whether the minister had taken into account matters he should not have done; or failed to take into account matters he should have done; or whether the decision could be described as 'utterly unreasonable'. Rather, if it were plain to the court that the decision constituted, under Community law criteria, an impermissible (which is to say, disproportionate) restriction on Community trade it therefore contravened one party’s rights arising from Community law, and it was accordingly open to the court to substitute its decision for that of the minister.


7.16 Respect for the principle of equal treatment is also a matter which is required to be observed in national action in the Community law regulated agricultural sector. In Klensch the Court of Justice held that the specific prohibition on discrimination among agricultural consumers and producers which is laid down in article 40(3)(2) of the Treaty of Rome covered all measures relating to the common organisation of agricultural markets, irrespective of the authority which laid them down. This the principle was said to be binding on member states when they were seeking to implement this common organisation of the agricultural market.

As we have seen in Chapter 2 at paragraph 2.24, the Court of Justice has accepted that certain substantive rights having their origin in the German constitution are also protected under Community law. Notable amongst these are the right to pursue a trade or profession of one’s choice as well as the right to property, both of which are recognised under Community law. The court does not view these as absolute rights but rather considers them in relation to their social function. It has held that Community laws which adversely affect established property or profession rights will be held to be invalid if found to constitute a disproportionate and intolerable interference infringing the very substance of the rights of the individual. It should be noted that the right to the peaceful enjoyment of one’s possessions, in effect a guarantee of the right to property, is also enshrined in article 1 to the First Protocol to the European Convention on Human Rights. Where a person has been deprived of his possessions by operation of law, the Court of Human Rights has held that in all but exceptional circumstances he will still have a right to payment of compensation.

2 A similar approach to the ‘non-absolute’ nature of Community fundamental rights is taken in R v Chief Constable of Sussex, ex p International Traders’ Ferry [1999] 1 All ER 129, HL.
4 Marckx v Belgium (Ser A No 31, Judgment 13 June 1979) 2 ECHR 330 at 335.
5 Lithgow v United Kingdom (Ser A No 102, Judgment 8 July 1986) 8 EHRR 329 at 371.

In Wachauf v Federal Republic of Germany the Court of Justice held that when member state authorities adopted or implemented Community legislation, they were required to ensure that the fundamental rights of individuals were respected. Community milk quotas attached to particular land were held by the court to constitute an asset with real economic value, and hence a species of property. Consequently their permanent suppression by the German authorities without compensation was said by the court to constitute an intolerable interference in the right of property. In another judicial review from Germany, the court held that in principle milk quotas were a species of heritable property which could in principle be passed on. However, the court has held in a preliminary ruling in a judicial review of the English authorities that there is no right to dispose of these milk quotas for profit, since such profit is not derived either from the tangible assets of the holding or the occupational activity of the milk quota holder.

2 The inter-relationship between this principle of respect for property rights and the subsequent development by the Court of Justice of the possibility of claiming Francovich damages against a member state for failure properly to implement Community law has yet to be considered and determined by the court.

Because of the financial value of the quotas to individual milk producers, the detail of the operation of the scheme has been a continuing source of litigation both before national courts and before the Court of Justice. In C B Shaw & Sons a judicial review was taken before the Court of Session seeking reduction of a decision of the Scottish Milk Marketing Board to require registered milk producers to make capital contributions to it to fund its purchase of a shareholding in a company involved in the
processing and manufacture of milk and dairy products. It was argued that such action was contrary to Community law, in particular article 5 of EC Council Regulation 1422/75, as the purpose of the levy was to fund commercial activities. The petition was refused as unfounded in law.

1 In Broadland Properties Estates Ltd v Mann 1994 SLT (Land Court) 7 it was held that an allocated milk quota could not in itself be regarded as a tenant's improvement of the holding and that, accordingly, in determining the rent properly payable for the holdings the value of milk quota allocated thereto required to be taken into account. In R v Dairy Produce Quota Tribunal for England and Wales, ex p Caswell [1990] 2 AC 738, HL the court upheld a finding of the English High Court refusing a remedy on grounds of the detriment to good administration in respect of errors made by the United Kingdom tribunal responsible for the determination of milk quota allocation disputes.


3 C B Shaw & Sons v Scottish Milk Marketing Board 1994 GWD 2-104, OH.

7.20 The BSE crisis has given rise to judicial review litigation directly before the Court of Justice1, the Court of First Instance2 and via the English courts3 in relation to challenges to the validity of EC Commission Decision 96/329/EC4 imposing a world wide ban on British beef exports. In R v Ministry of Agriculture, Fisheries and Food, ex parte First City Trading5 it was alleged that there had been a breach of the Community law principles of equal treatment and of proportionality as a result of the treatment of slaughterhouses and exporters under the national compensation scheme for those adversely affected by the beef export ban. In finding against the applicants, Laws J observed, somewhat controversially, that since the national compensation scheme could not be said to be either in implementation of or a specific derogation from Community law, it could not be said to be taken pursuant to Community law and accordingly did not fall subject to scrutiny on the basis of the general principles of Community law which were prayed in aid.


7.21 In R v Intervention Board for Agricultural Produce, ex parte First City Trading Ltd1 the Court of Justice upheld the legality of the decision of the Intervention Board to seek recovery of advance payments of export refunds covering the difference between world market prices and prices within the Community which had been made to meat exporters in the expectation that their exports would be supplied to a third country. In the event, the world-wide British beef ban resulted in both the cancellation
of confirmed export orders and the repatriation to the United Kingdom of such exported beef as was still in transit at the time the ban was announced. The court held that neither the principles of force majeure, proportionality, equity, nor the protection of legitimate expectations were sufficient to allow the thwarted exporters to retain the advance export refund monies which had been paid over to them by the Intervention Board.

1 Case C-263/97 [1998] ECR I-5537, ECJ.

7.22 In Scotch Premier Meat Ltd v Secretary of State for Scotland¹ a judicial review was taken of the Secretary of State's decision effectively to exclude a particular slaughterhouse from participating in the compulsory slaughter of animals under the slaughtering scheme provided for under EC Commission Regulation 716/96 as part of the measures to eradicate BSE from the British herd. This regulation required participating slaughterhouses to be organised and operated in such a way as to ensure that no bovine animals intended for human consumption were present when animals were being slaughtered under the eradication scheme, and for the separation of such animals and their products from animals and their products falling within the scheme. The Secretary of State interpreted this as meaning that since the petitioner's abattoir also undertook the slaughter of non-scheme animals in a separate hall but on the same premises, their premises could not participate in the scheme. In refusing a motion for interim orders, the court held that the regulation authorised, subject to the usual tests of rationality and proportionality, the taking of all steps seen to be necessary to achieve total separation between scheme animals and their products and animals for human consumption and their products. The objective of the regulation was clear - the precise means to achieve it was a matter within the discretion of the member state. In any event, the court noted that there were no words in the regulation to indicate that it was intended to confer any rights on the operators of slaughterhouses such as to require protection by the court under the principle of ensuring the effectiveness of Community law.

1 1997 SLT 1080, OH.

COMMON FISHERIES POLICY

7.23 The Community's 'Blue Europe' common fisheries policy first agreed upon in 1983, and revised in 1992, was made against a background of the perceived need to conserve fish stocks within the Community waters of the Atlantic Ocean and adjacent seas¹. The policy is within exclusive Community competence² and is enforced through a unified system of control and enforcement³ by the member states' authorities subject to checks and controls of the Commission's own Fisheries Inspectorate⁴. The common fisheries policy has four main areas or aims: to ensure equal access to Community waters⁵; to conserve stocks against exhaustion through unlimited fishing⁶; to establish a modern competitive fishing
fleet; and to organise and unify the EC fish market, ensuring reasonable earnings for fishermen and reasonable prices for consumers.

3. See EC Regulation 2847/93.
4. See EC Regulation 2847/93, article 29-30.
5. See EC Regulation 101/76, article 2(1).
6. EC Regulation 3760/92.
7. EC Regulation 3699/93.
8. EC Regulation 3759/92.

7.24 With these sometimes competing aims in mind, total allowable catches (TACs) are agreed annually for over one hundred species of fish. These totals are then apportioned in fixed percentage quotas for a given stock among the various member states. The quotas for each member state are reached on application of the principle of 'relative stability', that is, after taking into account such matters as the size, location, needs and traditional fishing grounds of each member state's fishing fleet so as 'to retain the traditional fishing possibilities for all states concerned'.


7.25 The question of the opening up of territorial and other traditional national fishing grounds to the nationals of other member states is one of great sensitivity in the United Kingdom since 60% of the Community fishing resources fall within the 200 mile fishing limit for British waters. In R v Kirk a Danish sea captain was found to be fishing in United Kingdom waters contrary to measures which the United Kingdom government had passed unilaterally in the face of a deadlock at Community level. These measures provided for criminal sanctions in the event of their breach. Captain Kirk was prosecuted under these provisions. The question of the legitimacy of these national provisions under Community law was raised. Community regulations had been passed which sought to give ex post facto legitimacy and validity to the United Kingdom provisions, which would otherwise have been contrary to the Community's Common Fisheries Policy of open access to fishing waters. The Court of Justice, however, held that these Community regulations were in effect penal provisions which purported to have retroactive effect. They were therefore held to be invalid on human rights grounds. They fell, and with them the national measures which they sought to validate.


7.26 In its decision in Romkes the Court of Justice upheld the validity of the Community regulations establishing fish quotas. It held them to be, in principle, compatible with the Treaty prohibition against nationality discrimination and a justifiable derogation from the Treaty principles of free
movement because in accordance with the aims of the CAP in allowing for
the stabilisation of markets in the long terms and the optimum utilisation of
the relevant factors of production. The quota system was said not to
discriminate unlawfully on grounds of nationality since 'it requires fisher-
men of each member state to make an effort to restrict their catches to levels
in proportion to the catches they were taking before the entry into force of
the Community system for the conservation of fishing resources'1 and
objectively apportions the restrictions accordingly.


7.27 In addition to fixing quotas, the common fisheries policy involved
the introduction of a new monitoring and inspection regime to enforce
quotas and various technical conservation measures, including fixing
minimum mesh sizes of nets, specifying the minimum size of landed fish
and restricting fishing activities in certain zones. Member states were
couraged to impose penalties on fishermen found to be acting in breach
of these conservation measures. Although the primary responsibility for
inspection and enforcement rests with the national authorities of the
member states, community inspectors have the right to be present during
national monitoring and inspection operations and can make their own
independent inspections to verify that the national inspection authorities
are up to scratch.

7.28 In 1986 Spain and Portugal joined the Community. Their accession
resulted in doubling the number of fishermen and the per capita fish
production and consumption in the Community and increased fishing
capacity by 75% and the tonnage of the Community fishing fleet by around
65%. After a transitional period, their fleets were fully integrated in to the
Community fishing systems and national quotas were fixed for them. The
Community fishing fleet was further increased in 1996 with the accession
of Sweden and Finland.

7.29 By the early 1990s it had become evident that the system of TACs and
national quotas had had little effect on the reduction of fishing effort or the
rate at which particular species of fish were being caught and landed. A
system for the management of fishing effort was thought necessary to
reduce the imbalance between the capacity of the Community fishing fleet
and the availability of fishing resources. Community fishing licences
administered by the flag member states were introduced2. EC Council
Regulation 1627/943 set out a framework for restricting individual vessels
fishing effort by making their activities in certain defined fisheries subject
to the possession of special fishing permit. The Commission has also
adopted measures under the Multi-annual Guidance Programmes (MAGP)
aimed at reducing the overall size of the fishing fleet so that it
becomes properly commensurate with available stocks. This involves a
check on both tonnage and engine power of the fishing vessels in the fleet
and limitation on 'fishing effort'4. Early retirement schemes and compen-
sation payments for fishermen losing their jobs as a result of this enforced

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restructuring of the fishing fleet have been introduced. Restrictions on the number of days at sea that fishing vessels of a particular size were also brought into force. The Court of Justice upheld the validity of these restriction on conservation grounds, notwithstanding the claims of fishermen that they unlawfully restricted their livelihoods contrary to the proclaimed social and economic objectives of the common fisheries policy.

4. ‘Fishing effort’ is defined in article 3(f) of EC Regulation 3760/92 as the vessel fishing capacity determined by its engine power and/or tonnage multiplied by the time spent in the fishing zones.

THE PROBLEM OF QUOTA-HOPPING

7.30 As we have noted, national quotas are fixed for the fishing fleets of each of the member states. As the Court of Justice has stated:

‘The aim of the quotas is to ensure for each member state a share of the Community’s total allowable catches, determined essentially on the basis of the catches from which traditional fishing activities, the local populations dependent on fisheries and related industries of the member states benefited before the quota system was established.’


7.31 It soon became apparent, however, that the system of separate quotas for national fishing fleets could be circumvented by vessels owned in and operated from one member state, for example Spain, re-registering in another member state, for example the United Kingdom, and so becoming entitled to a share in that member state’s quota. In 1988 the Dutch government implemented a strict regime on the landings and processing in the Netherlands of, in particular, sole and plaice caught under the Dutch quota by Dutch registered trawlers. As a result of the stricter enforcement measures and the decommissioning programme set up by the Dutch government the number of vessels, crew members and the fleet capacity of the Dutch cutter fleet, including beam trawlers, has declined markedly. One of the responses of the Dutch fishermen affected by the new regime was to acquire the fishing rights of neighbouring foreign fishing fleets, notably the United Kingdom. By 1996 an estimated 30% of the gross registered tonnage of the British fishing fleet was foreign owned. This foreign owned sector comprised some 150 vessels of which around 30 (now 38) were Dutch owned and operated and accounted for some 46% of the United Kingdom’s hake quota uptake, 44% of plaice, 29% of monkfish, and 18% of sole.
7.32 This practice of ‘quota-hopping’, particularly by Spanish fishermen seeking access to fishing areas from which they had been excluded following the introduction of 200 mile limits by the United Kingdom and the other member states in 1977, was already firmly established by the late 1980s when the United Kingdom Parliament passed the Merchant Shipping Act 1988. The proclaimed purpose of the Act was to implement and enforce the quota system established by the common fisheries policy with a view to achieving the political objective of ‘relative stability’ whereby the specified percentage share of the total allowable catch allocated to each member state for particular fish species should be caught only by fishermen of the nationality of the member state to which quotas were allocated. It was the provisions of the Merchant Shipping Act 1988 which gave rise to the extensive Factortame litigation.

7.33 The Merchant Shipping Act 1988 contained provisions as to British nationality, domicile and residence which had to be satisfied by the owners and operators of vessels before they could be registered in the new Register of British Shipping. Registration was the pre-requisite to obtaining a licence to fish under the quota permitted the United Kingdom by the common fisheries policy. The Act sought to ensure that British registered vessels were operated, managed and controlled from within the United Kingdom. It came into force on 1 December 1988 and it was provided by the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 that the validity of registrations under the previously applicable Merchant Shipping Act 1894 would expire on 31 March 1989.

7.34 In R v Secretary of State for Transport, ex parte Factortame an application was made for the judicial review of the Secretary of State’s decision not to re-register certain fishing vessels under the Merchant Shipping Act 1988 and in effect to expel them from the British Merchant Shipping Register. On 10 March 1989 the court at first instance, holding that the matter raised substantive questions of Community law, ordered that a reference be made to the Court of Justice under article 177 (now article 234 post-Amsterdam) for a preliminary ruling on these questions of Community law. This was registered with the court as case C-221/89. A second reference to the court was made by the House of Lords in July 1989 on the question of the availability under Community law of interim relief against the Crown. This was registered as Case C-213/89. On 4 August 1989 the Commission brought an action against the United Kingdom government under article 169 (now article 226 post-Amsterdam) in respect, inter alia, of the same provisions of the Merchant Shipping Act 1988 as were the subject of the
Factortame complaint. This case was registered as Case C-246/89. On 10 October 1989 the President of the Court of Justice granted an interim order against the United Kingdom government in the article 169 case brought by the Commission. This interim order required the United Kingdom to suspend the application of the nationality requirements contained in section 14 of the Merchant Shipping Act 1988.

1 R v Secretary of State for Transport, ex p Factortame [1989] 2 CMLR 353, QB.
3 R v Secretary of State for Transport, ex p Factortame [1990] 2 AC 85, HL.
4 Case C-213/89 R v Secretary of State for Transport, ex p Factortame (No 2) [1990] ECR 2433, [1990] 3 CMLR 1, EC.

7.35 As a result of the court's ruling, an Order in Council, the Merchant Shipping Act 1988 (Amendment) Order 1989 was made which amended section 14 of the 1988 Act with effect from 2 November 1989 so that the requirements for registration in the Register of British Shipping were no longer that a fishing vessel be 'British-owned' but rather must be 'Community owned'. However, the Act as amended still retained requirements for qualified EC nationals to be resident and domiciled in the United Kingdom before they could partake in its fishing quotas.


7.36 The central problem raised by the Factortame litigation is this – how can a system of national fishing quotas be reconciled with the four freedoms of persons, services, capital and goods throughout the Community and with the basic Community law prohibition against discrimination on grounds of nationality? The member states have sought to resolve this conundrum by a variety of means. Many of their efforts have been weighed in the balance and found wanting by the Court of Justice, however, which has consequently struck down these national provisions as contrary to Community law.

7.37 In Pesca Valentia Ltd v Irish Minister for Fisheries and Forestry the court upheld the validity of an Irish requirement that Irish registered vessels over 65 feet in length have at least 75% of their crew as EC nationals, at a time before Spain had joined the EC. Thus an Irish registered fishing vessels which was crewed solely by Spaniards could lawfully be excluded from participating in the Irish fishing quota.


7.38 In R v Minister of Agriculture, Fisheries and Food, ex parte Agegate Ltd, a judicial review of a refusal of a fishing licence by the United Kingdom national authorities, the crewing conditions attached to a United Kingdom fishing licence to the effect that a percentage of their crew should reside within the United Kingdom were held to be contrary to Community law.
The conditions applied to the fishing licence were designed to ensure that vessels fishing eligible for the United Kingdom quota had a 'real economic link' with the United Kingdom. Thus not only were 75% of the crew required to be Community nationals but the same percentage had to be resident on shore in the United Kingdom and the skipper and crew had to be contributing the United Kingdom social security system. The Court of Justice held that the residence requirement was not justified by the quota system, although the condition requiring the crew to contribute to the United Kingdom social security system was held not to be on the face of it incompatible with Community law.


7.39 In R v Minister of Agriculture, Fisheries and Food, ex parte Jaderov Ltd, another judicial review of a fishing licence refusal, the Court of Justice held that Community law did not preclude member states from introducing new operating conditions to its fishing licences which were designed to ensure a real economic link between that vessels fishing operations and the member state's populations dependent on fisheries and related industries. Further, since fishing licences were by their nature limited in time and subject to the volatility of the industry, operators in this sector had no enforceable legitimate expectation that Community rules would prevent the making of changes in the conditions attached to the licences. The competence of the member states to lay down fishing licence conditions was said by the court to derive solely from Community law, in particular article 5(2) of EC Council Regulation 170/83. Permissible conditions designed to ensure such a real economic link with the state in question included the following:

- a requirement to operate from and land catches at national ports on a certain number of occasions; and
- a requirement that the fishing vessels be present in the national ports on a specified number of occasions, provided that this did not hinder normal fishing operations.

2 OJ 1983 L24/1.

7.40 In its reply to the reference from the Divisional Court judgment on the substantive issues in Factortame, the Court of Justice held that the nationality, residence and domicile provisions of section 14 of the 1988 Act, even as amended following the court's interim order, were contrary to Community law. The court held that it was not contrary to Community law for a member state to stipulate, as a condition for the registration of a fishing vessel in its national register, that the vessel in question must be managed and its operations directed and controlled from a port within that member state since such a requirement was of the essence of establishment. However such a fishing vessel could not be lawfully required to begin all its journeys at its port of control or to call there frequently or to land a certain proportion of its catches there or at some other ports within the member state. Further, the court held that the fact that a minister could in his discretion grant an exemption to, or dispensation from, the oper-
ational and/or nationality requirements did not make the requirements lawful, stating that 'the mere fact that the competent authority is empowered to grant exemptions and dispensations cannot justify a national measure which is contrary to the Treaty, even if the power is in fact freely applied'. As a consequence of the court's ruling, the fishermen affected by the discriminatory provisions of the Merchant Shipping Act 1988 raised an action for Francovich damages against the United Kingdom government for its failure to respect Community law.

2 See now the Merchant Shipping (Registration, etc) Act 1993.
3 See [1991] 3 CMLR 589 at 629, para 38.

7.41 EC Commission v United Kingdom: re fishing licences I was the article 169 (now article 226 post-Amsterdam) action brought by the Commission in relation to the similar fishing licence requirements which were at issue in Factortame, namely: a requirement of British nationality in relation to the legal owners and 75% of the beneficial owners as a condition for registration as a fishing vessel within the British register of shipping. The decision in Factortame was confirmed and the condition held to be unlawful as contravening the Community law prohibition on nationality discrimination.


7.42 In EC Commission v Ireland the Court of Justice held that the imposition by Ireland of a requirement of the grant of a fishing licences that nationals of other member states who owned an Irish registered fishing vessel should set up an operating company with its principal place of business in Ireland and governed by Irish law constituted an unlawful interference with the Treaty article 52 (now article 43 post-Amsterdam) right of establishment and unlawful discrimination on the grounds of nationality since no similar requirement was made of Irish nationals.


7.43 In EC Commission v United Kingdom: re fishing licences II the Court of Justice considered the validity of conditions similar to those set out in Jaderow and Agegate, namely: operation of a vessel from the United Kingdom as evidenced by 50% of landings by weight being sold within or trans-shipped across national territory; and 75% of crew as Community nationals, excluding Spaniards and Portuguese, resident within the United Kingdom with contributions by the skipper and crew to United Kingdom national insurance. The court confirmed that the exclusion of Spaniards and Portuguese directly and the residence requirements indirectly contravened Community nationality discrimination law. The court did not, however, directly consider the lawfulness of the operating requirement on landings, which the Commission alleged was unlawful because it contained no exemption or derogation for fishing vessels whose normal operation was likely to be hindered, on the ground that it had been raised
too late in the proceedings by the Commission. The court stated (at paragraph 19):

'[I]t follows from [the] Jaderow [judgment]… that although the operating condition may in certain factual circumstances prove to be incompatible with Community law, it is not as such, and in a general way, contrary to the provisions of that law'.

2 [1993] 1 CMLR 564, para 19 (emphasis added).

7.44 In EC Commission v Ireland: re British Fishing Boats¹ the Irish ban on United Kingdom registered vessels where less than 75% of the crew were Community nationals (excluding Spanish and Portuguese nationals) from fishing within the exclusive Irish waters and landing or trans-shipping their catch was found to be contrary to Community principles of non-discrimination. The fact that in Agegate the nationality requirements were found to be lawful in relation to the United Kingdom rules for its own flagged fleet (reverse discrimination) did not make discrimination lawful when practised by another member state.


7.45 In EC Commission v French Republic¹ the Court of Justice declared that a requirement that in order to be eligible for registration under the French flag, more than 50% of the shares in the vessel be owned by natural persons having French nationality or by a legal person having its seat in France was contrary to the nationality discrimination provisions of the Treaty. Further any requirement that the actual control or management of legal persons owning vessels must be in the hands of French nationals or that a certain proportion of capital in these legal persons be controlled by French nationals were also found to be contrary to such provisions.


7.46 In Commission v Hellenic Republic¹ the Court of Justice held that similar provisions of Greek law requiring Greek registered ships to have at least half of their shares owned by Greek nationals or by legal persons more than half of whose capital was held by Greek nationals were contrary to Community law.


7.47 During the Amsterdam negotiations to amend the Treaty of Rome the United Kingdom unsuccessfully lobbied (the matter being subject to veto by any other member state) for the addition of a specific protocol to the Treaty in the following terms:

'Nothing in the Treaty establishing the European Community shall prevent any member state from distributing the fishing availabilities allocated to it under the Common Fisheries Policy to vessels flying the flag of or registered in, that State in accordance with such requirements as the member state considers
appropriate to ensure that such vessels have real economic links with the populations dependent on fisheries and related industries, namely:

1. A requirement of a minimum of the legal and beneficial ownership of such vessels to be within the State;
2. A minimum proportion of the crews to reside in the State;
3. A minimum proportion of fishing trips to originate from ports within the State;
4. A minimum proportion of catches to be landed within the territory of the State'.

1 See Ministry of Agriculture Fisheries and Food Press Release, 22 July 1996.

7.48 It is arguable that the thrust of the decisions of the Court of Justice has been to render the Community’s common fisheries policy in relation to national fish quotas unworkable in practice. While the court has in theory recognised the legitimacy of the efforts of member states in seeking to protect the economic interests of their own traditional fishing industries, in practice it has refused to give them sufficient leeway effectively to derogate from the general principle of Community law, embodied in article 14 of the post-Amsterdam Treaty of Rome, that there should be no discrimination on grounds of nationality.

7.49 Thus, while in law the member states might impose general operating conditions on fishing vessels, these conditions should apparently not operate in practice such as to hinder or prevent the normal operations of the individual fishing vessels in question. As the Court of Justice noted in Jaderow:

'The system of national quotas was adopted in order to enable the measures for the conservation of fishery resources provided for by article 102 of the Act of Accession to be implemented in the shortest possible time. It thus constitutes a stage towards a Community fisheries policy designed to lead to the restructuring and adaptation of the fishing fleets to the fishing resources available. That quota system constitutes nonetheless a derogation from the general rule of equal conditions of access to fishery resources laid down in article 2(1) of Regulation No. 101/76.

Consequently, the measures which the member states may adopt when exercising the power conferred upon them by article 5(2) of Regulation No 170/83 with a view to excluding certain of the vessels flying their flag from sharing in the utilisation of their national quotas are justified only if they are suitable and necessary for attaining the aim of the quotas set out above.

That aim may in fact justify conditions designed to ensure that there is a real economic link between the vessel and the member state in question if the purpose of such conditions is that the populations dependent on fisheries and related industries should benefit from quotas. On the other hand, any requirement of an economic link which exceed those limits cannot be justified by the system of national quotas.

Consequently... Community law as it now stands does not preclude a member state from laying down conditions designed to ensure that the vessel has a real economic link with that State if that link concerns only the relations
between the vessels' fishing operations and the populations dependent on fishing and related industries.  


7.50 It would appear, then, to be accepted by the Court of Justice that member states have a legitimate interest in preserving from Community-wide fishing the catches for which their nationals have traditionally fished, with a view to safeguarding the activities of their local populations dependent on fisheries and related industries which existed before the common fisheries policy came into force. In particular, member states would appear to be authorised to lay down specific requirements as to the mode of operation of nationally registered vessels fishing under their national quota with a view to ensuring a real economic link, as narrowly defined, between those fishing dependent populations of the member state and the vessels fishing against that member state's quota. Although lawful in principle, particular economic link requirements imposed by a member state may still be attacked as disproportionate in practice in individual cases.

LEGAL CHALLENGES TO FISHERIES REGULATION IN SCOTLAND

7.51 As we saw in Chapter 4 at paragraphs 4.64–4.67, in Gibson v Lord Advocate a challenge was made as to the enforceability in Scotland of article 2 of EC Community Regulation 2141/70 which provided that each member state should ensure equal conditions of access to and exploitation of the fishing grounds situated in waters within its territorial waters for all fishing vessels flying the flag of any member state. These regulations and section 2(1) of the European Communities Act 1972 which gave them the force of law within the United Kingdom were said to contravene Article XVIII of the Treaty of Union between Scotland and England which provided that ‘no alteration be made in laws which concern private right, except for the evident utility of the subjects within Scotland’. In dismissing the action, the Lord Ordinary, Lord Keith of Kinkel, stated that the obligations imposed by the regulations were imposed upon states rather than upon individuals and therefore did not of themselves ‘effect any alteration in the private laws of Scotland’. In any event he was of the view that the question as to whether a particular Act of the United Kingdom altering a particular aspect of Scots private law was or was not ‘for the evident utility’ of the subjects within Scotland was not a justiciable issue in the Court of Session and was instead essentially ‘a political matter’. 

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7.51 Judicial Review and Agriculture and Fisheries

2 It is instructive and indicative of the extent to which Community law has transformed the role and attitude of the national judiciary to compare this 1975 judgment of Lord Keith with his speech in R v Secretary of State for Employment, ex p the Equal Opportunities Commission [1994] AC 1 where he considered precisely these kind of issues of the general utility of legislation, in particular the justifiability of the decision of the legislature to differentiate between the level of statutory employment protection granted to full-time workers as opposed to part-time workers (the vast majority of whom were women). This primary legislative distinction was struck down by their Lordships as disproportionate and unjustified sex discrimination.

7.52 Issues concerning the common fisheries policy have generally come before the courts in Scotland not by way of direct applications for judicial review1, but rather as *op exceptionis* challenges by way of defence to a criminal charge made to the validity of the fishing regulations founded upon2. Thus, in *Mehlich and Gewiese v Mackenzie*3 the High Court of Justiciary made an article 177 (now article 234 post-Amsterdam) reference to the Court of Justice in respect of the conviction of two German fishing skippers who had been arrested by British fishery protection authorities off the west coast of Scotland and charged on summary complaint with a statutory offence of fishing for herring in a prohibited area. Each accused stated a preliminary plea to the competency of the proceedings to the effect that the national provisions under which they were charged was ultra vires and void, in that they required the approval of the European Commission prior to being brought into operation and that this approval had not been sought or granted. The 1981 order under which they were charged was a re-enactment of an earlier order made in 1978 which had in fact been approved by the Commission. Their preliminary pleas were repelled by the sheriff and each of the accused was convicted. Each appealed by stated case asking the High Court whether or not the sheriff was as a matter of law entitled to hold that the Order was valid and enforceable as at the date of the alleged offences. The question referred by the High Court to the Court of the Justice was whether there had indeed to be re-notification to the Commission where a previously approved national measure had been re-enacted without substantive amendment. The court held that no fresh consultation of the Commission was required in such a case and that the 1981 order was consequently enforceable.

1 See, however, *Watt v Secretary of State for Scotland* [1991] 3 CMLR 429 and *R v Ministry of Agriculture, Fisheries and Food, ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714, QB.
2 See *Mortensen v Peters* 1906 SLT 227 for an early example of such a challenge to the validity of national legislation regulating fisheries.

7.53 In a similar context, the validity of United Kingdom regulations prohibiting British registered vessels from carrying particular types of nets in Scottish waters was challenged in *Walkingshaw v Marshall*. The decision of the sheriff at first instance to uphold the challenge to the validity of the regulations as ultra vires was appealed to the High Court of Justice which itself decided that the matter required a reference to be made to the European Court of Justice1.

7.54 In *Wither v Cowie* regulations requiring British registered vessels to report by radio to their national authorities whenever crossing from one sea area to another were challenged before the sheriff before whom prosecutions were taken as contrary to Community law who decided *ex proprio motu* to refer the questions arising to the Court of Justice. This decision was appealed against by the procurator fiscal outwith the statutory time limit but the High Court of Justiciary held that while it was competent to hear such an appeal, it would only be justified in interfering with the exercise of the sheriff’s discretion if it felt that the decision was plainly wrong. This was not a finding which could be made on the facts of the case.

2 See HM Advocate 1990 SLT 798.

7.55 In neither *Walkingshaw* nor in *Cowie* were these challenges to validity upheld by the Court of Justice. While many of the judgments of the court in the area of the common fisheries policy turn on the prohibition against any form of discrimination based on being a national of another member state, Community law does not, prevent ‘reverse discrimination’ whereby the member state may treat its own nationals, and nationally registered vessels, more strictly than those registered in other member states.

1 See also *David Watt v Secretary of State for Scotland* [1991] 3 CMLR 429, OH.

7.56 In *Cowie*, as in *Mehlich*, the Court of Justice noted that the United Kingdom was obliged to notify the Commission of any new control measures in respect of their fishing fleet. They had not notified the Commission of the new licence condition at issue. This failure was held not to be such as to affect the validity of the condition as matter of Community law. It is not clear whether this aspect of these decisions remains valid in the light of the decision of the Court of Justice in *CIA Security v Signalson* where it was held that the failure by a member state to notify the Commission of draft technical regulations before adopting them as required by a secondary Community law provision (articles 8 and 9 of EC Directive 83/189) ‘renders such technical regulations inapplicable so that they may not be enforced against individuals’.

1 Le Mehlich and Gewiese v Mackenzie 1984 SLT 449.
2 Case 194/94 [1996] ECR I-2201 at para 45. See more recently Case 226/97 *Johannes Martinus Lemmens (Criminal proceedings)* [1998] All ER (EC) 604, EC where the court held that the ruling in *CIA Security* was limited to a situation where non-notified national regulations hinder the free movement principles of Community law.

7.57 In *Walkingshaw v Marshall*, however, on receipt of the reference back from the Court of Justice which upheld the proportionality and compatibility with the principles of Community law of the challenged national measures and the remit from the High Court of Justiciary to the sheriff for the matter to proceed to trial, the sheriff still managed to find the regulations in question inapplicable. He did so since he was not satisfied that they had been validly made after due consultation with affected parties.
and accordingly he pronounced a verdict of 'not proven' against the accused fisherman\(^1\).


### 7.58

In *Westwater v Thomson*\(^1\) the High Court of Justiciary considered an appeal from the master and skipper of a British registered fishing vessel who was charged with a statutory offence under section 30 of the Fisheries Act 1981 and subordinate legislation in respect that he failed to record in the vessel's logbook the locations of four catches made as required by EC Commission Regulations 2807/83 and 2241/87. A submission that the accused had no case to answer was upheld by the sheriff on the ground that the accused had done all that he was required to do when he recorded the ICES zone which was the smallest zone for which a total allowable catch had been fixed, rather than the particular statistical rectangle in which the catch as made. The Crown appealed on the ground of error in law. It was held by the High Court that the master was required to insert in the logbook, in the manner described by reference to an example, the statistical rectangle in which most of the catches were made and it was not sufficient compliance with the rules for him to state only the ICES zone in which the catches were made. A submission that the detailed rules laid down in the various Community instruments considered should be construed strictly in his favour in view of their penal consequences was rejected on the grounds that Community law had to be applied uniformly throughout the Community. The High Court also applied the *acte claire* doctrine holding that the answer to the Community law point at issue in the case was so obvious as to leave no scope for any reasonable doubt and that therefore, notwithstanding that there was no appeal against their decision, no reference would be made to the European Court of Justice for a preliminary ruling under article 177 (now article 234 post-Amsterdam).

1 1993 SLT 703.

### 7.59

Finally, applying the ratio of the decision of the Court of Justice in *Wachauf* the claim that the national courts have a duty to uphold a Community law right to compensation on compulsory expropriation by national authorities, even in the absence of specific legislation, has been upheld in Scotland in a recent judicial review concerning fish farming or aquaculture, a matter which also falls within the common fisheries policy. In *Booker Aquaculture Ltd v Secretary of State for Scotland*\(^1\) it was held that the failure by the national authorities to compensate a fish farm whose fish were compulsorily slaughtered as part of Community based measures to control the outbreak of disease constituted an unlawful interference with the fish farmer's property rights which were protected under Community law. Accordingly declarator was pronounced by the court against the Secretary of State to the effect that, notwithstanding the terms of the *Diseases of Fish (Control Regulations) 1994*\(^2\), he was bound to make provision for due compensation to the owner of fish slaughtered under the regulations\(^3\).

3 At the time of writing this case was the subject of a reclaiming motion on behalf of the Secretary of State to the Inner House.

7.60 The precise amount of any such compensation, and whether by virtue of the principles of Community law it need cover all of the petitioners' losses, is a matter which remains to be determined\(^1\). The Court of Human Rights has held under reference to article 1 of the First Protocol to the Convention on Human Rights that while compensation should be 'reasonably related' to the value of property taken, there was no guarantee of full value compensation where there existed legitimate public interest reasons for payment of a sum which was less than market value\(^2\).


Chapter 8

JUDICIAL REVIEW AND EMPLOYMENT

INTRODUCTION

8.01 In appealing to the supervisory jurisdiction of the Court of Session, the petitioner for judicial review, in effect, requests the court to apply the standards of rationality and fairness of procedure which, the petitioner claims, have been breached by the respondent decision maker. By virtue of the employment protection legislation which has been in place since the early 1970s employers are, however, already expressly required to abide by the requirements of reasonableness and procedural fairness, at least in respect of those of their employees who are entitled to statutory employment protection. Where there is statutory employment protection it might be said that there is no 'remedy gap' which might be filled by judicial review.

2 In 'Public Law and Contractual Employment' 1994 Industrial Law Journal 201 Sir Stephen Sedley gives an account of the current English position in this area.

8.02 It should be noted that in general questions relative to general statutory employment protection and the regulation of industrial relations will remain a matter reserved to the Westminster Parliament, by virtue of the statutes listed in Head H1 of Schedule 5 to the Scotland Act 1998. By virtue of Head G of Schedule 5 it would appear however that the specific regulation of professions other than architect, auditors and 'health professionals' will be a matter for the devolved Scottish Parliament. The appointment and removal of judges of the Court of Session has also been devolved, subject to the procedure set out in Section 95 of the Scotland Act 1998.

Tri-partite relationships and Employment Law

8.03 Employment law is characteristically a bi-partite relationship - a contract between an employer and an individual employee, chosen for his or her particular abilities. The particularity of the employment relationship is such that it is not, by virtue of the common law doctrine of delectus personae, possible for either party to it to assign the performance of the rights and obligations under the contract to any third party. Thus, purely contractual disputes an employer (whether in the public or private sector)
and employee would not, on the application of the tripartite analysis, be amenable to judicial review. The proper remedies of the parties would lie in the courts' ordinary breach of contract jurisdiction and/or, depending on the facts of the dispute, within the statutory jurisdiction of the industrial tribunal system.  

1 For a survey of recent English decisions to like effect see Lidbetter and Frost 'Employment Protection and JR: a parting of the ways?' [1996] Judicial Review 98.

8.04 Despite this apparently unequivocal conclusion that judicial review should have no place in arguments over employment contracts, the case law shows that in certain circumstances, the Scottish courts have allowed employment law disputes to be brought to the courts by way of judicial review.

8.05 The older line of nineteenth century case law made a distinction between pure master and servant cases, governed simply by the common law of contract, and the relationship between the employing authority and the holder of a 'public office' (munus publicum). The holder of a public office was thought to owe duties to the public as well as to the authority which engaged his services. Public office holders included University Professors, Sheriffs, Judges, Town Clerks1 and until the Education Act 1872, parish schoolmasters in Scotland2. The status was associated with life appointment and irremovability except for fault (ad vitam aut culpam). The public office holder had freehold in his office and could insist on retaining office until legally dismissed therefrom3 Accordingly the remedies of judicial review were open to the public office holder to defend his position against the unlawful actions of the authority from which he derived his office.

1 Simpson v Tod 17 June (1824) 3 S 102.  
2 Duff v Grant (1799) M 9576.  
3 See generally Fraser on Master and Servant (3rd edition – 1882) at pages 55 and 162.

8.06 The trend for twentieth century employment law has been to move from consideration of status to the interpretation of contracts. The rights and obligations which pertain to the employment relationship are no longer to be found primarily in the unwritten common law but are set out in specific statutory provision. Nevertheless, echoes of the earlier status approach to public office may be seen in some of the more modern case law on judicial review and the rights of employees of public bodies. It is to that case law that we now turn.

Public bodies and employment contracts – a review of past case law in the light of West

8.07 In Malloch v Aberdeen Corporation1 the House of Lords considered an application by a party litigant, a teacher who had been dismissed by his education authority because of his failure or refusal to apply for registration with the newly constituted General Teaching Council. The teacher
had not been given the opportunity of a hearing, nor were his representations considered, prior to the decision to dismiss him. He therefore sought reduction of the resolution to dismiss him and of the notice of dismissal which followed from it. The House of Lords found this application for judicial review to be competent in that Mr. Malloch’s case was not to be considered one of ‘pure master and servant’ but that instead he held an office or status in Scotland defined and protected by statute, in particular Section 85(1) of the Education (Scotland) Act 1982. There is no suggestion in West that this case was wrongly decided.

1 Malloch v Aberdeen Corporation, 1971 SC (HL) 85.

8.08 In Connor v Strathclyde Regional Council\(^1\) it was held that it was not competent to challenge by way of judicial review the decision of a selection board of an education authority concerning the appointment of assistant head teachers in two schools, on the basis that there was an insufficient public law element in the matter to make it appropriate for judicial review. Although the reference to ‘public law’ was disapproved of by the First Division in West the decision in Connor seems to have been accepted by them to have been the correct one.

1 Connor v Strathclyde Regional Council 1986 SLT 530, OH.

8.09 In Tehrani v Argyll & Clyde Health Board\(^1\) the Second Division considered a judicial review application from a consultant surgeon who had been dismissed from his employment following the report of a committee of inquiry set up by the health board to investigate complaints relating to his treatment of a patient. The Inner House upheld a reclaiming motion by the respondent Health Board and dismissed the petition as incompetent, on the grounds that no issue of public administrative law was raised in the application\(^2\). In West the First Division, while accepting that the correct result had been achieved in Tehrani, observed that any reference to public law to define the scope of judicial review would be ‘in conflict with the long line of authority which proceeded the introduction of Rule 260B [the accelerated judicial review procedure]’ in that judicial review has always been competent in Scotland in the context of purely private law matters such as arbitrations or membership of voluntary organisations. The First Division concluded that, in the circumstances of the argument presented to the Second Division in Tehrani any acceptance by the court of the terminology of ‘public law’ was to be regarded as obiter\(^3\). Further, they unequivocally rejected the suggestion of Lord Wylie in Tehrani that developments in English law on the extent of judicial review should be mirrored in Scotland.

1 Tehrani v Argyll & Clyde Health Board (No. 2), 1989 SC 342, IH.
2 See also Criper v University of Edinburgh 1991 SLT 129, OH in which the public law/private distinction was also used by Lord Weir in dismissing as irrelevant a petition for judicial review in a matter concerning the employment conditions of a university lecturer.

8.10 In Watt v Strathclyde Regional Council\(^1\) the respondents as local education authority resolved to impose a new collective settlement unilat-
erally varying the pay terms and conditions of teachers in their employment. The teachers’ original pay and employment conditions were set out in a national agreement reached by the Joint National Committee for Teaching School Staff in Scotland, operating under and in terms of Sections 91 to 97A of the Education (Scotland) Act 1980. An application for judicial review of the council’s decision, seeking reduction of their resolution and interdict against its general implementation, was found by the First Division to be competent, notwithstanding the existence of the alternative individual remedies for breach of contract at common law, on the basis that the Council’s decision was clearly administrative in character and of general application taken in exercise of a statutory power or in implement of a statutory duty.  

1 Watt v Strathclyde Regional Council, 1992 SLT 324, IH.  
2 Compare with the decision of Lord Jauncey in O’Neill v Scottish Joint Negotiating Committee for Teaching Staff 1987 SLT 648, OH in which the appropriate way to challenge an individual decision of the SJNC was said to be by way of stated case to the Court of Session rather than by judicial review petition.

8.11 In Darroch v Strathclyde Regional Council the Lord Ordinary Lord Maclean considered the effect of Section 2 of the Local Government and Housing Act 1989. This provision determines that certain posts within a local authority are ‘politically restricted’ such as to prevent a person holding such a post from standing for election to the council. The petitioner held the positions of depute assessor, depute electoral registration officer and depute community charges registration officer to the Regional Council. He was advised by his employers that they considered his post to be a politically restricted one in terms of the 1989 Act. They took the view that he was accordingly subject to the disqualifications contained in the Act. Further regulations made under the 1989 Act by the Secretary of State relative to such politically restricted posts would henceforth be specifically incorporated into his contract of employment. The petitioner applied for judicial review of the council’s actions seeking declarator that he was not a depute chief officer in terms of s 2 of the 1989 Act, and an order quashing the council’s actions. The competency of the petition was challenged on, among other grounds, that the acts of the council related to the petitioner’s individual position and were not of general application and as such fell outwith the scope of the supervisory jurisdiction of the court. The court relied upon the decision in Watt v Strathclyde Regional Council and specifically observations of Lord Clyde at pp 331-332 to reject the competency challenge stating:

'I do not see this case as involving simply a contractual dispute between employee and employer. It is obvious that the decision made by the respondents, if not challenged, may have consequences for others in their employment, such as the assessor himself and other deputies. The restrictions placed upon the activities of the petitioner do in my opinion raise a matter of public law since they affect his freedom of speech and association as well as that of others. Although the decision appears to relate to one individual contract, circumstances do exist to warrant recourse to the supervisory jurisdiction of this court'.

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8.11 Judicial Review and Employment


2. Darroch v Strathclyde Regional Council, 1993 SLT 1111, OH per Lord Maclean at 11141-J.

8.12 In Jackson v Secretary of State for Scotland1 the dispute heard before the First Division in January 1992 concerned the proper construction of the Civil Service Code which constituted part of the contract of employment between a prison governor and the Secretary of State. Since no argument on competency was taken by the Secretary of State, the court in West stated that no point of general importance should be attached to this case on any questions of the competency of the procedure adopted. In West it was stated that in the event of any conflict in the suggested analysis of the supervisory jurisdiction between Watt and West, the latter was to be preferred.

1. Jackson v Secretary of State for Scotland 1992 SC 175, IH.

8.13 In West v Secretary of State for Scotland2 the First Division on 23 April 1992 dismissed as incompetent an application for judicial review of a decision by the Scottish Prison Service, apparently contrary to their employees' general terms and conditions of service, not to pay removal expenses to a prison officer designated as 'mobile staff' who had been compulsorily transferred from H.M. Young Offenders Institution Polmont to work in H.M. Prison, Edinburgh. The court held that the matter was not amenable to judicial review because it concerned a dispute over the contractual rights of employer and employee without any tri-partite element concerning the exercise of a jurisdiction, power or authority conferred on some third party who could be separately identified from the employer.2 Neither was there any question of any statutory or other restraint limiting the exercise of the respondents' discretion it the matter of payment of removal expenses.

1. West v Scottish Prison Service, 1992 SC 385, IH.

2. See Edwards v Potato Marketing Board, OH unreported decision of Lord Clyde 9 November 1993 for an example of a tri-partite relationship in the context of an employment disciplinary matter.

Public bodies and employment contracts – the case law since West

8.14 At the time of writing there had been no cases in the Inner House in which questions of the competency of judicial review procedure in employment law matters have been raised subsequent to West. All of the cases on the point to date have been Outer House decisions which have not been reclaimed against

8.15 In Blair v Lochaber District Council Lord Clyde, sitting in the Outer House, held that the attempt judicially to review the decision of a District Council to suspend its chief executive was incompetent in that the dispute related 'directly to the contractual relationship between the parties and the
rights and the obligations which they had thereunder’. Lord Clyde agreed with the submission of the Dean of Faculty that, as a matter of general principle, ‘there is no room for judicial review where there are contractual rights or obligations which can be enforced’. He noted that a local authority chief executive had no specific statutory protection and was not the holder of a public office in the sense of having an appointment outwith the ordinary nature of an employment contract. Lord Clyde concluded that the supervisory jurisdiction should normally only be available in the absence of any other available remedy and stated:

‘The priority to be given to a contractual remedy should be recognised equally in relation to contracts by public bodies as well as private ones and the ordinary judicial processes may be expeditious enough to provide rapid remedies’.  

1 See, too, Peace v City of Edinburgh Council, OH, unreported decision of Lord Penrose 2 February 1999 dismissing the objection to the competency of an action for interdict against a local authority unilaterally changing the disciplinary procedures applicable to teachers within their employment.


8.16 In Murray v Chief Constable of Strathclyde Police an application for judicial review was made by a police constable against a decision of his employers to refuse him rent and housing allowance payable under and in terms of the Police (Scotland) Regulations 1976 from August 1985 until April 1993 while his estranged wife occupied a police authority owned home. No objections were taken by the respondents either in respect of the apparent delay in raising proceedings or as to the competency of making a judicial review application. The application was refused by Lord Milligan on its merits.

1 Murray v Chief Constable of Strathclyde Police, 1997 SLT 1141, OH.

8.17 In Educational Institute of Scotland v Robert Gordon University an application for judicial review was raised by a trade union in respect of the terms and conditions of employment proposed to be offered to new appointments by the employers. A substantial number of the existing academic staff at Robert Gordon’s were members of this union. The union sought a declarator that the management of the University were bound, even in respect of future staff appointment, by the terms and conditions set out in a Circular originally promulgated by national Committee acting under and in terms of Section 91 to 97 of the Education (Scotland) Act 1980 as amended and suspension and reduction of any contrary decision by the management. The respondents pled that the petitioners had not title and interest to sue and that the petition was, in any event, incompetent. Lord Milligan rejected the respondents’ submissions and found that this was a particularly strong case for a representative body such as a trade union to challenge, on behalf of its members who are likely to be adversely affected by it, an *ultra vires* decision. On an analogy with *Watt* it also seemed to be an appropriate use of judicial review procedure and the remedies sought were granted.
8.18 In *Meechan v Secretary of State for Scotland*\(^1\) an application for judicial review was made of a decision by the Secretary of State as to the proper interpretation of the Teachers Superannuation (Scotland) Regulations 1992. The petitioner alleged that an additional payment made by his employers, the University of Strathclyde, in respect of his acting as departmental head should be included within his superannuable pay for the purposes of calculating his pension. No argument was advanced by the respondents as to the competency of proceeding by way of judicial review. The petition was, however, refused by Lord Rodger sitting in the Inner House on its merits on the grounds not argued before him that the collective agreement relied in support of the application upon was not a legally enforceable contract. It is, however, difficult to reconcile the judgment on this point with the decision of the Inner House in *Watt*.

\({\text{1}}\) *Meechan v Secretary of State for Scotland*, 1997 SLT 936, OH.

8.19 The facts in *Rooney v Chief Constable of Strathclyde Police*\(^1\) were that a police constable submitted a resignation form to his employers in terms of Regulation 13 of the Police (Scotland) Regulations 1976. The constable then sought a declarator that the respondent had acted unlawfully in accepting his resignation and in refusing to accept his subsequent withdrawal of resignation because the Chief Constable had not adhered to the Procedure Manual of Strathclyde Police Force by first giving the constable an opportunity of an interview with a senior police officer and secondly by ordering a report into the circumstances of the resignation. The respondents argued that the complaint did not properly fall within the supervisory jurisdiction of the court since the matter was simply one concerning the employment contract of the parties. Lady Cosgrove, relying in part on the decision of Lord Maclean in *Naik v University of Stirling*\(^2\), held that a sufficient tripartite relationship could be drawn between the Police Authority, the Chief Constable and the resigning police constable to bring the case within the *West* criteria. She went on to hold, however, that the Chief Constable had not acted *ultra vires* or unlawfully in breach of legitimate expectations and dismissed the case on its merits.

\(1\) *Rooney v Chief Constable of Strathclyde Police* 1997 SLT 1286, OH.

\(2\) *Naik v University of Stirling*, 1994 SLT 449.

8.20 In *Maclean v Glasgow City Council*\(^1\) the respondents purported to terminate the employment of the petitioner, who was a stipendiary magistrate within the city, on grounds of redundancy. A judicial review was taken of this decision relying upon, among other statutory provisions, the terms of Section 455 of the Burgh Police (Scotland) Act 1892, Section 12 of the Sheriff Courts (Scotland) Act 1971 and Section 5 (1) of the District Courts (Scotland) Act 1975. It was held by the Lord Ordinary, Lord Eassie, that the respondents had no power to terminate the petitioner’s appointment as a stipendiary magistrate on the grounds of redundancy and the
decision was therefore reduced. This case seems to fit into the older status paradigm approach to holders of public office which we have already outlined above.

1 Maclean v Glasgow City Council 1999 SLT 11, OH.

8.21 And in Macleod v Lothian Health Board\(^1\) the decision by a health board to remove the petitioner’s name from their medical list thereby effectively preventing the petitioner from carrying on any NHS medical practice within that area was found to be subject to judicial review by the courts. Although the removal decision was stated to be *intra vires* the health board, the Lord Ordinary found that it was on its merits *Wednesbury* unreasonable and accordingly granted declarator to that effect.

1 1999 SLT 163, OH.

Conclusion on the post-West case law

8.22 It is noteworthy that judicial review cases concerning teachers’ pay and conditions have all been accepted to have been competent appeals to the supervisory jurisdiction despite the difficulties in fitting these cases within the *West* tri-partite analysis. There is similar difficulty in the analysis of the relationship of the police constable to the employing authority in Rooney. Although Lady Cosgrove fits the situation of the police constable in *Rooney* into the tri-partite test, she does so in reliance upon the case of *Naik* which concerned a petition for judicial review of a decision to expel a student from her university course. The situations in *Naik v University of Stirling*\(^1\) and *Joobeen v University of Stirling*\(^2\) were indistinguishable on their facts (the parties being respectively girlfriend and boyfriend who had been dismissed simultaneously from participation in the same University course). In the former case, however, Lord Maclean held that there was a tripartite relationship such as to make the matter suitable for judicial review, while in the latter case Lord Prosser held that the dispute was essentially a contractual one for which the ordinary causes of action were appropriate and judicial review inappropriate.

1 *Naik v University of Stirling*, 1994 SLT 449.
2 *Joobeen v University of Stirling*, 1995 SLT 120.

8.23 The better analysis of the post-*West* employment case law would seem to be that the Outer House decisions to hold complaints about teachers’ pay and police constables’ terms and conditions amenable to judicial review reflect an earlier ‘status paradigm’ still evident in *Malloch* whereby judicial review is open to the holders of a public office, regardless of any tri-partite relationship with the employing authority\(^1\).

1 See, for an example of the status paradigm in employment, *Stewart v Secretary of State for Scotland* 1998 SLT 385, HL, a judicial review of the order for removal from office of a sheriff by reason of his ‘inability’ to perform his functions.

8.24 The decision of Lord Clyde in *Blair*, on the other hand, seems to reflect the new analysis which no longer privileges public office holders,
but instead holds that that all employees, whatever their position, are to be treated in the same way: that is to say in accordance with the rights and obligations and with the standards of reasonableness and procedural fairness as set out in their employment contracts and as embodied in general employment protection legislation. The Industrial Tribunal system is then seen to be the appropriate forum for the employee to seek remedies in the event of a breakdown in the employment relationship.1

1 See, for example the decision of Lord Davidson to this effect in Nahar v Strathclyde Regional Council 1986 SLT 570, OH.

Whether these two approaches can co-exist will be a matter for the appellate courts ultimately to decide. Lord Hope has noted that 'there has been no opportunity for Inner House to re-examine the opinion in West in the light of subsequent developments'.2 Academic opinion seems to favour as the better and more coherent approach one which relies on a renewed public/private law distinction in Scots law.2

1 Lord Hope of Craighead 'Helping each other to make law' 1997 Scottish Law and Practice Quarterly 93 at 102.

EUROPEAN UNION LAW AND EMPLOYMENT RIGHTS

Conflict between European Union law and national law is inevitable. Across the whole range of Community legal regulation individuals find that their rights and duties under national law are less than wholly consistent with the rights and duties laid down in Community law. According to Community law, the solution to any such conflict is clear – Community law takes precedence over national law in all situations.3 The plain text of any domestic provision is therefore no longer to be seen as the final word in any situation since Community law can be used to re-interpret the domestic legislation in new and perhaps unexpected ways.2 In circumstances where the domestic legal provision cannot be re-interpreted so as to reach the same result as would be achieved by the Community law provision, Community law may require the national court to suspend or dis-apply the conflicting provisions of national law and apply the Community law provision directly.3 As we have seen in Factortame 24 the European Court of Justice held that the principle of the full and effective protection of rights under Community law required that courts in the United Kingdom should be able to set aside any potentially conflicting national laws and administrative practices ad interim, pending a final decision by the Luxembourg Court on the relevant Community law.

1 See Case 6/64 Costa v ENEL [1964] ECR 585.
2 Case C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR 1-4135. See also Case C-32/93 Webb v EMO Air Cargo (UK) Ltd. [1994] ECR I-3567, ECJ and Webb v EMO Air Cargo (UK) Ltd. (No. 2) [1995] ICR 1021, HL.
4 Case C-213/89 R v Secretary of State, ex parte Factortame Ltd. (No. 2) [1990] ECR 2433.
8.27 It is therefore necessary for legal advisers, at the outset of their consideration of any legal problem brought to them, to have regard to any relevant Community law provision before reaching a view on possible course of action. This advice applies with particular force in the field of domestic employment law since Community law has had a profound effect on the rights and remedies available to the individual employee before the domestic courts.

8.28 Article 136 of the post-Amsterdam Treaty of Rome (formerly Article 118) provides that the Commission has the task, in conformity with its general objectives and without prejudice to the other provisions of the Treaty, of promoting close co-operation between Member States in the social field, more particularly in matters relating to employment, labour law and working conditions, the right of association and collective bargaining between employers and workers. In June 1997 all the Member States of the Community agreed to amend the former Articles 117 to 122 (now Articles 136 to 145) of the Treaty of Rome so as to incorporate within the *acquis communautaire* the Community Social Chapter which had formerly been appended as an 'Agreement on Social Policy' to Protocol 14 to the Maastricht Treaty. The self-imposed isolation of the United Kingdom from developments in European Social Policy was thereby brought to an end.

8.29 The principles of European Union Social Policy are set out in the EC Social Charter which was originally concluded in 1989 among all of the then Member States of the European Community with the sole exception of the United Kingdom. This was a political declaration with no binding legal force or effect, which enumerated a series of social and labour rights for workers. These rights included the following: freedom of movement throughout the Community; freedom to choose and to engage in an occupation and to be fairly remunerated for it; the improvement of living and working conditions of all workers including rights to paid annual leave and weekly breaks; the right to an adequate level of social security benefits; freedom of association in trade unions and the right to strike and to negotiate and conclude collective agreements; access to vocational training; equal treatment between men and women; the right to information, consultation and participation in decisions involving major changes in the workplace and/or the workforce changes; satisfactory health and safety conditions in the working environment; the protection of children the young, the elderly and the disabled.

1 Community Charter of Fundamental Social Rights of Workers, 9 December 1989 COM (89) 471.

8.30 The institutions of the European Union have been criticised for doing 'little to promote the rights to organise, to bargain and to strike, the three basic human rights of modern democratic labour law which find expression in ILO standards', but such apparent inactivity may have been due to the blocking activities of the United Kingdom's then Conservative
government in preventing the adoption of any such Community wide legislative measures. Until the Amsterdam amendments to the Treaty of Rome, European Union legislation in the area of the rights and interests of employed persons still required the unanimity of the Member States’ representatives on the Council of Ministers. The Treaty of Amsterdam amendments provide that the procedure of qualified majority voting could henceforth be used in relation to provision concerning the improvement of the working environment and workers health and safety, information and consultation of workers, equality between men and women in the workplace and the integration of persons excluded from the labour market.


8.31 There is still relatively little European Union legislation in the field of employment protection proper. Directives have been adopted by the European legislature in the following areas: collective redundancies; the rights of workers on the transfer of a business; the protection of workers’ rights in the event of their employer’s insolvency; written particulars to be given in employment contracts; the regulation of hours of employment; the establishment of works councils; a framework directive on parental leave; and a directive on the protection of part-time workers. There is also a directive on the protection of self-employed commercial agents which, although not strictly a matter of employment law as traditionally understood in the United Kingdom, gives commercial agents rights comparable to, and in some respects greater than, those given employees under domestic employment protection legislation. In the area of combating sex discrimination in the work place, in addition to Article 141 (formerly 119) of the Treaty guaranteeing equal pay for equal work, there were some seven directives: the Equal Pay Directive; the Equal Treatment Directive; the Social Security Equal Treatment Directive; the Occupational Pensions Directive; the Self-employed Equal Treatment Directive; the Pregnant and Nursing Mothers Directive; and the Directive on the Burden of Proof in Sex Discrimination Claims.

5 Working Time Directive 93/104/EC OJ 1993 L307/18. In R v Attorney General for Northern Ireland, ex parte Shirley Burns [1999] IRLR 135, QB a declaration that the UK was in breach of its obligations under Community law in failing timeously to implement the Working Time Directive was granted in the course of a Northern Irish judicial application which also sought Francovich damages for the loss and damage which the applicant who had been required by her private employer regularly to work night shift and whose health, it was claimed, suffered as a result.
7 Parental Leave Framework Directive 96/34/EC.
European Union law and the judicial review of UK employment law and practice

8.32 Given that there is no constitutional or dedicated administrative court structure in any of the jurisdictions of the United Kingdom, in those cases in which the provisions and general principles of European Community law have been used to challenge the interpretation or application of national employment law there is evidently a tension as to whether such matters, potentially of national importance and constitutional significance, properly belong within the province of judicial review, or whether these cases fundamentally come down to the private employment rights of individuals and are therefore best dealt with within the industrial tribunal system.

8.33 As we noted in Chapter 6 at paragraph 6.22, there has only been one case to date in Scotland which has to sought the judicial review of domestic legislation on the grounds of its incompatibility with European Community law. In National Union of Public Employees and Phyllis Kelman v Lord Advocate an attempt was made to have the courts review the validity of the Transfer of Undertakings (Protection of Employment) Regulations 1981 on the grounds of their failure properly to implement the Community Acquired Rights Directive 76/207. The first petitioner as the trade union of the second petitioners was conceded to have no title or interest separate from that of Mrs. Kelman. At the time at which the Scottish judicial review petition was presented the implementing UK regulations excluded from their ambit undertakings which were ‘not in the nature of a commercial venture’. A declarator was sought from the Court of Session that, in the light of the case law of the European Court of Justice on the purpose and effect of the Acquired Rights Directive, the exclusion of non-commercial ventures from the scope of the national regulations was contrary to Community law. Lord Cameron of Lochbroom dismissed the petition holding that the proper remedy lay in Mrs. Kelman, the second petitioner, making an application to the Industrial Tribunal for unfair dismissal compensation. Subsequent to this decision the Court of Justice found that the commercial ventures exclusion in the Transfer of Undertakings Regulations was indeed contrary to the requirements of the Directive and European Community law and in 1995 the regulations were amended to remove the reference to commercial ventures.


8.34 In England, judicial review procedure has been used successfully in the area of employment law to challenge the compatibility of national
provisions and practices with the requirements of European Union law. In particular, in the early 1990s the Equal Opportunities Commission also embarked on a series of direct actions for judicial review of national employment legislation, which it considered, contravened Community law principles on sex discrimination.¹ In R v Secretary of State for Employment, ex parte the Equal Opportunities Commission² a challenge was brought by way of judicial review as to the validity under Community law of provisions of the Employment Protection (Consolidation) Act 1978 which differentiated between part-time and full-time workers. Under the qualifying provisions of the legislation, part-time workers (defined as those working between 8 and 16 hours per week) had to work in one job for five years before becoming entitled to statutory employment protection whereas full-time workers were required only to work for a continuous period of two years before they gained the right not to be unfairly dismissed.

¹ See, for example, Case C-9/91 R v Secretary of State for Social Security, ex parte the Equal Opportunities Commission [1992] ECR I-4297.
² R v Secretary of State for Employment, ex parte the Equal Opportunities Commission [1995] 1 AC 1, HL.

8.35 The EOC was found to have sufficient standing and interest as a representative body to bring the judicial review application but the associated application by an individual public sector employee, a Mrs. Patricia Day, was dismissed on the grounds that her claim should have proceeded by way of application to the Industrial Tribunal. Statistical evidence produced to the court showed that the vast majority of those employed in the United Kingdom on jobs of less than sixteen hours per week were women. It was argued on behalf of the EOC that the disparity in treatment between part-time and full-time workers indirectly discriminated against women. The House of Lords accepted these arguments and found that the Secretary of State had failed to provide any objective justification for this difference in treatment. They therefore granted a declaration to the effect that the relevant provisions of the 1978 Act (under which employees who worked less than 16 hours each week were subject to different conditions from those who worked more than 16 hours per week in respect of their qualification for redundancy payments and entitlement to unfair dismissal compensation) were incompatible with the Article 119 of the Treaty of Rome (now article 141 post-Amsterdam) and the requirements of the Equal Treatment Directive 76/207/EEC.

8.36 In R v Secretary of State for Employment, ex parte Seymour Smith and Another³ the House of Lords considered an application brought by two legally aided individuals who sought judicial review of the 1985 decision of the then Secretary of State for Employment to extend the qualifying period for statutory employment protection from one year to two years. Both the applicants were women. They had been dismissed from their private sector employment in 1991. At the time of their dismissal they had both worked for between one and two years and were therefore, by virtue of the Unfair Dismissal (Variation of Qualifying Period Order) 1985, unable to bring a claim for unfair dismissal to the Industrial Tribunal within the statutory three month notice period.
8.37 The applicants claimed that the increase from the one year to the two year qualifying period indirectly discriminated against women, contrary to Article 119 of the Treaty of Rome (now article 141 post-Amsterdam) and to the Equal Treatment Directive 76/207/EEC, in that in 1991 women were statistically more likely than men to be employed for a period of between one and two years. The House of Lords held that the application by the individuals was properly to be understood as a claim to equal pay under Article 119 since the Community doctrine of ‘vertical direct effect’ meant that they could not directly rely upon the provisions of a directive against their private sector employers. They decided to refer the question as to whether or not the Article 119 reference to ‘equal pay’ covered unfair dismissal compensation to the European Court of Justice. The Court of Justice found that a judicial award for compensation for breach of the right not to be unfairly dismissed did indeed constituted ‘pay’ within the meaning of Article 119 and that the applicants could therefore rely directly upon Community law, with the provisions of Directive 76/207 applying where the applicant sought not simply compensation but re-instatement or re-engagement.


8.38 It should be noted that although the House of Lords held that this application was, in effect, an equal pay claim by the two individuals and should properly have been brought as a private law claim before an Employment Tribunal, they allowed it to continue as a judicial review petition. After the Employment Tribunals at first instance had declined to hear the applicants’ claims for unfair dismissal on the grounds of lack of jurisdiction, the cases became applications for judicial review that the domestic law was incompatible with the provisions of the Equal Treatment Directive and that the 1985 Order should therefore be quashed by the court. The Article 119 point had arisen only in the Court of Appeal. It was, however, thought contrary to the interests of justice to require the applicants to re-commence their claim at this stage before an Employment Tribunal.

8.39 In R v Secretary of State for Trade and Industry, ex parte UNISON a judicial review was brought of the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 which had been enacted in order to give effect to the finding of the Court of Justice that the United Kingdom had failed properly to implement two European employment directives: namely the Collective Redundancies Directive 75/129 and the Acquired Rights Directive 77/187. The applications for judicial review, brought by three trades unions raised a number of issues: notably, the powers of the Secretary of State under the European Communities Act 1972 to alter or amend primary legislation.

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1 R v Secretary of State for Employment, ex parte Seymour Smith [1997] 2 All ER 273, HL.
which gives rights greater than required by Community law; and the power of Member States to reduce or diminish national employee protection after the date of the implementation of a European directive in that area.\(^3\)

1 [1997] 1 CMLR 459, QBD.
3 It is understood at the time of writing that judicial review proceedings were intended to be brought over alleged inadequacies in the United Kingdom's implementation of the Working Time Directive, in particular the three month time limit imposed by the 1997 regulations before employees gained a right to annual leave.

8.40 In dismissing the judicial review application on its merits, Lord Justice Otton observed that, in his view, the power granted to the Secretary of State by Section 2(2)(b) of the European Communities Act 1972 to make regulations 'for the purpose of dealing with matters arising out of or related to' any Community obligations was wide enough to allow the Secretary of State to amend existing primary legislation in a manner which 'levels down' the rights conferred thereunder to a Community base level. The correctness of this observation has been doubted in subsequent cases, notably by Lord Johnstone chairing the Employment Appeal Tribunal in Scotland, when he stated:

'We confess considerable concern with the general approach of Otton LJ if he is seeking to suggest that 'related to' in Section 2(2)(b) of the European Communities Act 1972 can be used to enable a Minister to widen, by Regulation, the main thrust or effect of the Directive it is seeking to implement.'\(^4\)


8.41 Judicial review has also been used to challenge the employment policy of the Ministry of Defence as regards its compatibility with European Community law on sex discrimination. In R v Secretary of State for Defence, ex parte Leale, Lane and the Equal Opportunities Commission\(^1\) a challenge to the lawfulness under Community law of the statutory blanket exclusion of the armed forces from the provisions of the Sex Discrimination Act 1975 was conceded by the Ministry of Defence, with the result that some 5,500 service women who had since the coming into force of the Equal Treatment Directive been dismissed from the forces as a result of their falling pregnant were able to bring compensation claims against the Ministry. Section 85(4) of the Sex Discrimination Act has subsequently been amended\(^2\) by the UK Government so that it now provides that 'nothing in this Act shall render unlawful an act done for the purpose of ensuring the combat effectiveness of the naval, military or air forces of the Crown'. The compatibility of this new 'combat effectiveness' criterion with Community sex equality law is itself subject to a further challenge which as at the time of writing was before the European Court of Justice for consideration.\(^3\)

1 R v Secretary of State for Defence, ex parte Leale, Lane and the Equal Opportunities Commission, QBD, unreported decision of 17 December 1991.
3 Sirdar v Army Board and Secretary of State for Defence, opinion of Advocate General Pergola issued 18 May 1999. The judgement of the court was awaited at the time of writing.
8.42 The Ministry of Defence’s policy to the effect that being homosexual is incompatible with life in the services has also been challenged before the courts by way of judicial review. One argument on this issue canvassed in the literature and pursued in the courts is that discrimination in the workplace on grounds of sexual orientation is already prohibited under national sex discrimination law, if only the courts would realise it. The argument is that when considering the treatment meted out by an employer to, say, a lesbian the appropriate comparator to determine whether or not this conduct is sex discriminatory is to consider what treated the employer accords to his male employees who also sleep with women, rather than to the treatment he would afford any male homosexual employees. If there should be different treatment of an employee dependent on the gender of the person with whom they are sleeping, then this should be sex discrimination, because it is gender (albeit of a third party) which determines the treatment.¹


8.43 In R v Ministry of Defence, ex parte Smith and Grady¹ judicial review was sought of a statement made by the Ministry of Defence in 1994 reaffirming its policy that homosexuality was incompatible with service in the armed forces and that personnel known to be homosexual or engaging in homosexual activity would be administratively discharged. The four applicants for judicial review had all been administratively discharged from the forces between November 1994 and January 1995 on the sole ground of their homosexual orientation. In their application for judicial review, each applicant challenged the decision to discharge them as well as the policy on which the decisions were based, on the grounds of irrationality, breach of Articles 8 and 14 of the European Convention on Human Rights and breach of Articles 2 and 5 of the Equal Treatment Directive 76/207/EEC. Despite attracting the sympathy of courts, the applications were unsuccessful on all grounds both at first instance and before the Court of Appeal. The Court of Appeal also refused leave to appeal the case to the House of Lords. No question was raised by the Crown as to the competency of proceeding by way of judicial review, presumably on the basis that the applications raised matters of, in English terms, public law interest.²

¹ R v Ministry of Defence, ex parte Smith and Grady [1996] QB 517, CA.
² In Smith v Gardner Merchant Ltd. [1998] IRLR 510, CA the English Court of Appeal applied the views of the court set out in ex parte Smith that discrimination on grounds of sexual orientation as such fell outside the scope of the Equal Treatment Directive but held that a private law claim by an individual that he had suffered sexual harassment and discrimination because of his homosexual orientation might be competent if it could be shown that his employers would not have treated a lesbian in the same manner.

8.44 On 30 April 1996 in an eleven judge decision the European Court of Justice held in P v. S and Cornwall County Council¹ that the right not to be
discriminated on grounds of sex constituted a fundamental human right protecting the dignity and freedom of the individual. Accordingly a broad interpretation was accorded to the Equal Treatment Directive 76/207 and the directive was held to give employment protection to transsexuals on the argument that to dismiss an individual on grounds that he or she had undergone a sex change is to treat him or her unfavourably by comparison to persons of the sex to which he or she was deemed to belong before the operation.


8.45 In the light of this broad interpretation of the Equal Treatment Directive, a new attempt was made to have the United Kingdom’s blanket ban on homosexuals in the armed forces judicially reviewed. R v Secretary of State for Defence, ex parte Perkins1 held that in the light of the decision of the European Court in P v S, it was clear that the Equal Treatment Directive was not as limited in the scope of its application as the Court of Appeal judges in ex parte Smith had assumed. Accordingly, the judge decided to make an Article 177 reference (now article 234 post-Amsterdam) to the European Court of Justice on the specific question as to whether or not the Equal Treatment Directive gave protection against discrimination on grounds of sexual orientation. This reference was, however, subsequently withdrawn by the referring court2 in the light of the decision of a thirteen judge Court of Justice to the effect that neither the Equal Pay provisions of the Treaty of Rome (formerly Article 119, now Article 141) nor of the Equal Pay Directive prevented an employer refusing travel benefits associated with employment to an employee’s same sex partner, where their policy was to grant such benefits to unmarried heterosexual couples.3 The European Court of First Instance has in a separate case re-affirmed that, notwithstanding the position in the laws of other Member States, notably Sweden and Denmark, Community law does not yet consider that stable relationships between two persons of the same sex are to be equated with the relationship between married persons.4

1 R v Secretary of State for Defence, ex parte Perkins [1997] IRLR 257, QBD per Lightman J.
2 R v Secretary of State for Defence, ex parte Perkins (No. 2) [1998] IRLR 508, QBD per Lightman J.
3 Case No. C-249/96 Grant v South West Trains [1998] All ER (EC) 193, ECJ.

EUROPEAN HUMAN RIGHTS LAW AND EMPLOYMENT ISSUES

8.46 There are a number of distinct European-wide agreements (both Council of Europe and European Union) which raise issues of social and economic rights. For the avoidance of confusion it is necessary to set out what these instruments are, although since this section is concerned with the implications for national practice of the incorporation of the European Convention on Human Rights into our domestic law, it is the case law emanating from that Convention that will be focussed upon.1

8.47 The European Convention on Human Rights was ratified by the United Kingdom in March 1951. It seeks to protect individual’s civil and political rights, but inevitably some of these rights have a social dimension and economic implications. This Convention, as presently advised, is due to be incorporated into domestic law some time in 2000 when the Human Rights Act 1998 is brought into force (see Chapter 3 above and also Appendix 2 which contains the ‘Convention rights’).

8.43 The European Social Charter is a quite separate treaty which was also concluded under the auspices of the Council of Europe in 1961. This treaty was ratified by the United Kingdom in July 1962. It guarantees, among other social and economic rights, employment protection rights, such as the right to work in a safe working environment under just conditions for fair remuneration and the right to organise and collectively bargain in trade unions, welfare rights such as the protection of health, access to social and medical assistance, social security and social welfare services and special social legal and economic protection for the disadvantaged and potentially socially excluded such as children, mothers and families, the disabled, the old, and migrant workers and their families. There are apparently no plans for its incorporation into the domestic law of the United Kingdom. There is, in any event, no procedure for individuals to make complaints of breach of its provisions by a Member State, although since June 1995 a protocol has been added to the Charter allowing for the possibility of collective complaints being made by international and national organisations of employers and of trade unions to the Social Charter’s Committee of Independent Experts.

1 The labour law of the United Kingdom has been regularly criticised by the International Labour Organisation (an arm of the United Nations established in 1919 by the Treaty of Versailles to set global minimum labour standards) for its failure to accord with ILO Conventions. See S. Mills ‘The International Labour Organisation, the United Kingdom and Freedom of Association: an annual cycle of condemnation’ [1997] European Human Rights Law Review 35.


European Convention on Human Rights and Trade Unions

8.49 Among the rights included in the ECHR is the right, under Article 11.1, to form and join trade unions for the protection of the individual’s interests. It might be argued, and indeed was accepted by the Commission on Human Rights, that the right to join a trade union includes a concomitant right to formal recognition and consultation of such unions by the State and by employers for the purposes of collective bargaining. Only in this way would the right be an effective one. However, in three cases before the European Court of Human Rights these arguments as to an implicit right to union recognition have been unequivocally rejected. The Court of Human Rights stated:‘Article 11.1 does not guarantee any particular treatment of trade unions or their members, by the State, such as the right to be consulted by it. Not only is the latter right not mentioned in Article 11.1, but neither can it be said that all the Contracting States in general incorporate it in their national law or practice, or that it is indispensable for the effective enjoyment of trade union freedom. It
is thus not an element necessarily inherent in a right guaranteed by the Convention…

In addition, trade union matters are dealt with in detail in another convention, also drawn up within the framework of the Council of Europe, namely the Social Charter of 18 October 1961. Article 6.1 of the Charter binds the Contracting States ‘to promote joint consultation between workers and employers’. The prudence of the terms used shows that the Charter does not provide for a real right to consultation.’

1 National Union of Belgian Police Case (A/9) (1979-80) 1 EHRR 578; Swedish Engine Drivers’ Union Case (A/20) (1979-80) 1 EHRR 617; Schmidt and Dahlstroem Case v Sweden (A/21) (1979-80) EHRR 632.

8.50 Thus, former workers at GCHQ who had had their rights to trade union membership withdrawn, along with any statutory protection against unfair dismissal or action short of dismissal for being members of an independent trade union, were unsuccessful in their application to the Strasbourg institutions alleging violation of Article 11. Their application was declared inadmissible by the Commission on Human Rights on the grounds that they fell within the category of workers engaged in the administration of the State who could lawfully be excluded from trade union membership under the Convention. Conversely, in Sibson v United Kingdom it was held that compulsion to join a trade union is not necessarily contrary to the Convention


8.51 In Gustaffson v Sweden, however, the complaint was made by a youth hostel owner that the campaign of boycotting organised against him by trade unions, and his expulsion from the national youth hostel association, all because of his failure to be accede to a collective agreement which he was in any event not obliged to follow under Swedish law because of the small size of his operation, violated his own freedom of association under Article 11, as well as his right peacefully to enjoy his own possession under Protocol Article in conjunction with Article 17 of the Convention. The Court held that in view of the sensitive political and social issues involved in question of industrial relations, the Contracting States enjoyed a wide margin of appreciation and Article 11 did not guarantee a right not to enter into a collective agreement. Finally since the actions complained of were not the acts of a government authority, but exclusively concerned relationships of a contractual nature between private individuals, it could not be said that there was any unlawful interference by the State in the peaceful enjoyment of his possessions.


8.52 It would appear from the foregoing case law, that the Strasbourg court is wary of involving itself in the industrial relations culture of the various Contracting States to the Convention. Thus the incorporation of the
Convention rights is unlikely to give any major fillip to trade union activists seeking to challenge for example: the lawfulness of the post-Miners Strike anti-union provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (Sections 64-67 TULReCA) which prevent trade unions from disciplining those members who refuse to participate in lawful strikes or industrial action decided upon after balloting the membership or who seek to persuade fellow member not to participate in such action; or the provision of the Trade Union Reform and Employment Rights Acts 1993 (TURERA) which, by Section 15, makes the deduction of union fees from member’s pay slip unlawful unless the individual written consent of each employee concerned is supplied to the employer; or Sections 226A to 234A of TULReCA 1992 which renders strikes illegal unless after a postal ballot of the membership seven days written notice of official industrial action is given to the employer together with a description of the employees likely to be involved and the date of commencement of the action.¹

¹ See Application No. 28910/95 National Association of Teachers in Further and Higher Education v United Kingdom, Admissibility decision of 16 April 1998, European Commission of Human Rights where a claim by a trade union that the pre-strike balloting provisions of Sections 226A to 234A of the Trade Union and Labour Relations (Consolidation) Act 1992 contravened Article 11 was unanimously declared by the Commission to be ‘manifestly ill-founded’. For comment on the decision see [1998] European Human Rights Law Review 773.

8.53 Further, individuals can under United Kingdom law lawfully be dismissed because they are on strike and will have no statutory redress against their employer for unfair dismissal, provided that all strikers are dismissed and none selectively re-engaged within three months.¹ And workers who insist on the maintenance of collective bargained terms and conditions can lawfully paid less than those who agree to agree relinquish collective representation in favour of individual negotiation.² None of these provisions would appear to be deemed adversely to affect those individuals civic and political rights guaranteed under the European Convention. Instead these provisions apparently encourage a flexible labour market in the United Kingdom.³

¹ Section 238 TULReCA 1992.
² Section 13 TURERA as interpreted in Associated Newspapers Ltd. v Wilson and Associated British Ports and Palmer [1995] IRLR 258, HL.

European Convention on Human Rights and Whistleblowing in the Workplace¹

8.54 Article 10.1 of the Convention gives everyone the right to freedom of expression, subject to various safeguards set out in Article 10.2 allowing for legal formalities, conditions, restrictions and penalties as prescribed by law to be placed on freedom of expression by Convention States insofar as these are necessary in a democratic society.² This reference to ‘necessary in a democratic society’ means that the courts have to apply the proportionality test to the State action in question. Proportionality is a complex test, used in much European jurisprudence although originally derived from Prussian
administrative law. As we have seen, proportionality requires the complained of action to be subject by the courts to three distinct questions, failure in any of which means that the measure is disproportionate: is the action aimed at a legitimate or lawful end? will the action in fact achieve that end?; and is the action the least restrictive alternative to achieve that end?


2 See Barholt v Germany (1985) 7 EHRR 383 at paragraph 55 on necessity meaning 'a pressing social need'.

8.55 Article 10.2 explicitly sets out a number of legitimate ends in respect of which freedom of expression might be restricted by the national authorities. Thus, the right to free expression may still lawfully be restricted 'for the protection of the reputation and rights of others' (defamation) and 'for preventing the disclosure of information received in confidence' (confidentiality and privacy rights). National authorities are also empowered to restrict freedom of expression 'in the interests of national security, territorial integrity or public safety (official secrets), for the prevention of disorder or crime (incitement and hate crimes), for the protection of health and morals' (obscenity) and 'for maintaining the authority and impartiality of the judiciary' (murmuring the judges).

8.56 In the context of employment law, the question is, does this protection of freedom of expression extend to protect employees who alert fellow employees and/or the public to wrongdoing on the part of their employer: for example an abattoir worker speaking out about breaches of health and safety regulations in his place of work; a nurse complaining of her experience of the suffering caused to patients by severe underfunding of health provision; a civil servant who leaks sensitive official secrets to the press; a police woman who complains about a culture of sexual harassment and/or sexual discrimination within the police force; oil workers complaining of lax safety standard on board rigs.

8.57 In domestic employment law, without reference to the European Convention, such behaviour would appear to be a breach of duties of mutual trust and fidelity owed to the particular employer and therefore potentially a disciplinary offence warranting dismissal. Interdicts may be granted against talkative employees on the basis of their obligations owed to their employer in respect of confidential information gathered in the course of employment.

1 See Ticehurst v British Telecommunications plc [1992] IRLR 219. The position would appear to be the same under Community law, see Case T-34/96, T-163/96 Connolly v Commission (19 May 1999, unreported) where the Court of First Instance upheld the lawfulness of the dismissal of a senior Commission official who published a book critical of economic and monetary union.

8.58 In the 1985 application Van der Heijden v The Netherlands the European Commission of Human Rights accepted that dismissal from employment for exercising the right to free expression could constitute a penalty or restriction on that freedom, just as much as a specific prohibition on free
speech. The Strasbourg Court disagreed, however, stating in 1986 that the Convention protect freedom of expression, not a right to job security.²

1 Van der Heijden v The Netherlands (1985) D & R 42.
2 See the German Probationary Teachers cases Kosiek v Germany [1986] 9 EHRR 328 concerning a physics teacher who was also a member of the neo-Nazi German National Democratic Party (NPD) and Glasenapp v Germany [1987] 9 EHRR 25.

8.59 The jurisprudence has apparently altered since then, however, and in the 1995 decision in Vogt v Germany the Court of Human Rights held by the narrowest of margins (10 against 9) that dismissal by the German authorities of a State employed teacher in a permanent post by reason of her membership of the German Communist Party (DKP) constituted an unlawful interference with her right to free expression. This case was distinguished by the majority from the earlier authorities on the basis that the earlier case law concerned probationary teachers who had been refused permanent positions, rather than as here, a teacher who was in a permanent position who was dismissed because her political affiliations and activities demonstrated a lack of loyalty to the State, her employer, and to the Constitution resulting in a breakdown of the mutual trust and fidelity owed between employer and employee.¹


8.60 Even if the Vogt case does indeed represent a new strand of European Human Rights jurisprudence recognising that freedom of expression need not end once one enters the workplace, an employer may still lawfully dismiss an employee exercising his or her free expression rights if the employers can show that their response is proportionate to their employee’s (mis)conduct. The proportionality test takes into account the particular circumstances of the case before it, for example: the duties and responsibilities of the particular post; the nature of the employing organisation; whether or not the complained of action touches on matters of public concern; the manner of the expression; the extent to which the accusations made are well founded; the means of communication used by the individual; what sanctions on the expression, if any, are imposed by the Contracting State.

8.61 Thus, the acceptance of public office, such as becoming a judge¹ or a senior civil servant² may bring with it certain restrictions on free speech which at least the Commission on Human Rights will accept as a legitimate of State power. The Commission indeed held that a Belgian teacher was lawfully dismissed after she appeared on television to complain about State discrimination against homosexuals, citing her own case in which she ascribed her failure to be promoted to head teacher to the fact that she was herself gay.³

2 B. v United Kingdom (1985) 45 D & R 41.
3 Morissens v Belgium (1988) 56 D & R 127.
The question of what responsibility if any the State has to ensure that there is respect of the individual employee's freedom of expression by private, i.e. non-State, employers is a vexed one. In Rommelfanger v Germany¹, the applicant, a doctor was dismissed from his position in a Catholic hospital after expressing views on abortion in print and on television, which views were not in conformity with official Church teaching. The Commission held that the State might be in breach of its obligation to respect free speech rights if it permitted a situation in which there was no 'reasonable relationship between the measures affecting freedom of expression and the nature of employment as well as the importance of the issue for the employer'. It held on the facts that views on abortion were important enough within a Catholic context to justify the dismissal of a physician from his employment with the Church.

¹ Rommelfanger v Germany (1989) D & R 42.

There is, then, no clear protection granted to the whistleblower under the European Convention. Everything appears to depend on the facts of the individual cases, for example the terms of the employment contract, the extent of duties of loyalty and confidentiality to the employer, the medium in which complaints were raised and the manner in which they were couched, the degree to which the complainer could substantiate or justify the complaints, the question as to whether or not the complaints raised matters of public interest.

Privacy in the Workplace and the European Convention

In the case of Alison Halford v United Kingdom¹ the Court of Human Rights recognised that the individual has rights of privacy even within the workplace which require to be protected and respected by her employer. The Strasbourg Court held that telephone taps carried out on both her office and home telephones by her employer to gather material to assist in their defence against sex discrimination proceedings brought by her were an unlawful violation of her Article 8 Convention rights.

¹ Alison Halford v United Kingdom (1997) 24 EHRR 253, [1997] IRLR 471, E Ct HR.

It might be argued that this case could provide a basis for an alternative line of jurisprudence in relation to a prohibition on sexual orientation within the workplace based on the principle 'Don't ask, don't tell', to the effect that what an employee may do in his or her private life is of no concern or business of his employer.¹ It is unlikely that such arguments will find favour among those pushing for a recognition and open acceptance of gay rights in the workplace. The emphasis made in support of such a position is on equality of treatment of homosexuals and heterosexuals, rather than on privacy issues.

Equality and Discrimination Issues under the European Convention

8.66 In October 1997, the Commission for Human Rights reversing its earlier case law\(^1\) upheld a claim brought by Euan Sutherland that the present unequal age of consent as between homosexual and heterosexual activity violated his Article 8 rights to privacy and his Article 14 rights against discrimination, and stated that 'no objective and reasonable justification exists for the maintenance of a higher minimum age of consent to male homosexual than to heterosexual acts.' By this decision the Commission of Human Rights moved further than the Court of Human Rights, in that it has for the first time accepted equality arguments in relation to homosexuality and not simply the privacy arguments heretofore accepted by the court.\(^2\) In February 1999 the post-Protocol 11 Court of Human Rights declared admissible the applications by Duncan Lustig-Prean and others seeking to challenge on human rights grounds the United Kingdom's continued ban on persons of homosexual orientation serving in the British armed forces.\(^3\)

1 See X v Germany Application 5935/72 (1976) 3 D & R 46 in which a claim that the German Criminal code criminalising male homosexual relationship with those under 21 was contrary to Article 8 and Article 14 was rejected as inadmissible by the Commission on Human Rights, accepting the German Government's argument that young males had to be protected in a way in which young women did not. In similar vein see Application 7215/75 X v UK (1978) 11 D & R 36, (1980) 19 D & R 66 and Application 9721/82 X v UK (1985) 7 EHRR 145.

2 In Dudgeon v United Kingdom (1981) 4 EHRR 149 the Court held that the blanket criminalisation of homosexual conduct in Northern Ireland only violated the individual's Article 8 right to respect for his private life. See also Norris v Ireland (1991) 13 EHRR 186.

3 Application 31417/96 Duncan Lustig-Prean v United Kingdom decision of the Third Section of the European Court of Human Rights, 23 February 1999. The decision on the merits of this case was awaited at the time of writing.

8.67 The jurisprudence of the Strasbourg court to date has tended to limit the impact of the European Convention on employment issues. There is enough in the case law however for practitioners to pick up and develop these issues before the domestic courts so that workplace rights may be more fully protected once incorporation of the Convention is in place. Such developments will lead the national judiciary into dangerous political waters. It remains to be seen whether they will be willing to enter them.
Chapter 9

Environmental Protection, Planning and Judicial Review

ENVIRONMENTAL LAW

Introduction

9.01 Environmental law is concerned with the protection of the physical environment for the benefit of the public at large. There are a multiplicity of statutes concerning the environmental responsibilities of public bodies. These include the Public Health (Scotland) Act 1897, the Deposit of Poisonous Wastes Act 1972, the Control of Pollution Act 1974, the Control of Pollution (Amendment) Act 1989, the Environmental Protection Act 1990, the Clean Air Act 1993, the Noise and Statutory Nuisance Act 1993 and the Environment Act 1995. There are also numerous statutory instruments promulgated by the Secretary of State as well as circulars produced by the Scottish Office Agriculture, Environment and Fisheries Department (SOAEFD) giving guidance to public authorities on the exercise of their environmental functions.

9.02 Paradoxically, with the growth in regulation in this area, the role of local authorities in the application and enforcement of environmental regulation has been markedly decreased since the 1980s. This withdrawal of direct local government involvement in environmental regulation is a result of two factors: the creation of specialist central bodies, in particular the Scottish Environment Protection Agency (SEPA); and the hiving off and privatisation of many of the functions formerly the responsibility of local authorities, such as the provision of sewage services and the collection and deposit of waste. In many areas, the role of local authorities has been reduced to one of a watchdog or pressure group, ensuring that other bodies in the public and private sector are properly carrying out their environmental functions. Local authorities have standing to raise court actions in matters of concern to their council taxpayers.

9.03 Much of the existing national regulation in the area of environmental protection have been introduced in implementation of secondary European Community legal provisions contained in directives. It should always be borne in mind that even where a national law or regulation does not specifically implement a provision of a Community law, the principle of indirect effect of Community law requires that all national laws in the area of environmental protection have to be read in the light of applicable
provisions and principles of European Community law in this field. Further the European Court of Justice has held that when the terms of the directive are regarded as sufficiently precise and unconditional and leave no discretion with the member states as regards their implementation, these provisions may be relied upon directly by litigants before national courts. This is potentially of particular importance in the judicial review of the environmental activities of public bodies such as local authorities and SEPA which as ‘emanations of the state’ are liable to find provisions of Community law directives being pled against them directly, without reliance upon implementing national legislation.

1 Case 41/74 Van Duyun v Home Office [1974] ECR 1337.

9.04 The Court of Justice has held, in any event, that local authorities of the member states have a duty directly under article 5 of the Treaty of Rome to ensure that in their activities they respect and apply the relevant Community law, no matter the position in national law. There remains some controversy, however, as to whether or not local authorities may themselves rely on the direct effect of directive as against other emanations of the state, such as the Secretary of State.


9.05 Environmental protection, including the regulation of air, land and water pollution, water supplies and sewerage, the promotion of sustainable development and the preservation of the ‘natural heritage’ (responsibility for which lies with Scottish Natural Heritage) and ‘built heritage’ (for which Historic Scotland has responsibility) are all matters which have been made the responsibility of the Scottish Parliament and any legislation resulting from that body may also be subject to competency and human rights challenges.

ENVIRONMENTAL PROTECTION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

9.06 There is no direct and explicit right to the protection of the environment contained within the European Convention on Human Rights. The right to private and home life guaranteed under article 8, the right to the peaceful enjoyment of one’s possessions protected by article 1 to Protocol 1, both of which have been incorporated into domestic law by the Human Rights Act 1998, may have certain implications in matters of the environment, however.

1 See Powell and Rayner v United Kingdom (1990) 12 EHRR 355, an unsuccessful attempt to claim breach of environmental human rights in respect of noise pollution emanating from aircraft using Heathrow Airport.

2 As to the ‘Convention rights’, see Appendix 2.
Thus, in *Lopez Ostra v Spain* the Court of Human Rights awarded compensation against the Spanish authorities for their failure to enforce applicable environmental standards. The case involved a claim that the operation of an unlicensed, privately run, waste treatment plant which had been subsidised by and built on land owned by the local council and gave off fumes and smells, causing loss of amenity and potentially causing health problems for local inhabitants was a contravention of the applicants right under article 8 of the Convention to respect for private and family life. 1

In *Guerra v Italy* persons resident near a chemical factory in Italy which had previously caused severe environmental pollution and consequent health problems among individuals in the locality after an explosion and fire claimed to be entitled under article 8 of the Convention to obtain from the state authorities information about their assessment of the risks of further environmental pollution emanating from the factory, together with details of the emergency plans and measures to be adopted in the event of another accident. The court found that article 10 of the Convention did not impose any positive general obligation on the state to obtain and disseminate to their citizens information in the field of health and safety matters. However it held that in the circumstances of these individuals, the article 8 right to respect for their private and family life contained implicit within it a right for them to obtain such environmental information from the authorities. 1

The first European Community directive dealing with environmental protection (concerning oil waste disposal!) was adopted in 1975. Notwithstanding the lack of any explicit legal provision at that time giving the Community competence in this field, environmental protection was declared by the Court of Justice to be ‘one of the Community’s essential objectives’. 2 More than one hundred Community instruments dealing with environmental protection had been adopted before the Single European Act 1986 introduced three new articles into the Treaty of Rome, that is articles 130r, 130s and 130t, which made the achievement of a high level of environmental protection a legitimate end in itself for the Community. These articles have since been expanded by amendments introduced in the 1994 Maastricht Treaty and the 1998 Amsterdam Treaty. The Amsterdam amendments have resulted in the re-numbering of the Treaty articles dealing with the environment as articles 174 to 176 of Title XIX to the Treaty of Rome.

2 Case 240/83 *Procureur de la Republique v ADBHU* [1985] ECR 531.
9.10 Article 174 (formerly 130r) Treaty of Rome now sets out the objectives of and principles to be followed by the Community in the area of environmental protection. These include preserving, protecting and improving the quality of the environment; encouraging prudent and rational utilisation of natural resources; protecting human life and promoting international measures where appropriate to deal with trans-national environmental problems. The principles to be applied by the Community in this area include that there be a presumption in favour of precautions, that a preventive strategy is to be preferred to a remedial one, that environmental damage should be rectified at source, that the polluter should pay and that the requirements of environmental protection should be wholly integrated into the definition and implementation of other Community policies. The revised article 130s (now 175) also makes it clear that the Community has competence to adopt measures relating to town and country planning and land use matters.

9.11 Article 175 (formerly 130s) of the Treaty of Rome also sets out the procedure to be followed in realising the objectives of the environmental policy as set out in Article 174 (formerly 130r). In EC Commission v EC Council ('Titanium Dioxide')¹ the Court of Justice held that whenever a proposed Community measure could be said to promote the establishment and functioning of the internal market (even while relating to the environment) then the general harmonising procedure laid down in Article 100a (now article 95) should be used rather than the article 130s (now article 175) procedure which requires the Council to act unanimously after merely consulting the European Parliament. However article 175 of the post-Amsterdam Treaty of Rome now states in unequivocal terms the circumstances in which particular procedures may be used in environmental matters. The Titanium Dioxide decision is thus probably no longer good law. In any event in EC Commission v EC Council ('Waste Directive')² the Court of Justice held that a directive on the disposal of waste, the main object of which was the protection of the environment, was properly adopted by the Council under the then article 130s procedure. Similarly, EC Council regulation 259/93 on the supervision and control of shipments of waste within, into and out of the Community was held by to have been properly adopted under that procedure³.


9.12 Article 176 (formerly 130t) of the Treaty of Rome allows member states to maintain or introduce more stringent environmental protection measures provided that these are compatible with the general free movement principles of the treaty. In EC Commission v Denmark ('Danish Bottles')¹ the Court of Justice held that member states may only introduce a limited range of measures which might affect the free movement of goods within the Community even when such measures achieve a ‘very considerable
degree of protection of the environment.' National environmental protection measures which seek to set a higher standard of protection than the base-line required by Community law must, by virtue of post-Amsterdam articles 176 and 95(4) (formerly articles 130t100a(4) respectively) of the Treaty of Rome, be duly notified to the European Commission. Finally, article 6 (formerly article 3c) of the Treaty of Rome provides that 'environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in article 3, in particular with a view to promoting sustainable development'.


9.13 The 1979 Berne Convention on the Conservation of European Wildlife and Natural Habitats has formed the basis for a number of secondary Community law provisions in the area of nature conservation, notably EC Council Directives 79/409 (the 'Wild Birds' directive) and 92/43 (the 'Habitats and Species' directive) which require the member states to delimit Special Protection Areas for birds and Special Areas of Conservation for habitats and species in general. Any project which might damage a site so designated can only be permitted if there is no suitable alternative to it and the impact is justified by 'imperative reasons of over-riding public interest'.

1 See Case 57/89 EC Commission v Germany ('Leybucht Dykes') [1991] ECR I-883 and Case C-355/90 EC Commission v Spain ('Santoña Marshes') [1993] ECR I-4421 for confirmation from the Court of Justice as to the stringency of this test and the narrowness of the possibility of national derogations.

9.14 A Community directive also provides for public access to environmental information held by public authorities in the member states. Under the United Kingdom regulations implementing this directive the public have a right to information contained on public registers such as the pollution consent registers of HM Inspectorate of Pollution, the National Rivers Authority and local authorities. In addition, environmental information not held on the statutory registers is to be made available to the public, subject only to confidentiality based on commercial, personal or national security considerations.


9.15 Access to general Copenhagen based environmental information and monitoring will also be improved by the European Environmental Agency which was set up by a Community regulation to create an information network, provide a report on the state of the environment every three years and otherwise collate, record and assess environmental data.

1 EC Council Regulation 1210/90.

9.16 The Community legislation in the area is vast and constantly changing; there now being literally hundreds of directives, regulations and
decisions concerning environmental matters currently in force. A full list of the relevant provisions as they have been amended over time is published every six months by the Commission in the Directory of Community Legislation Currently in Force. Details of the applicable legislation and recent case law may also be obtained from the Internet at specialist European environmental law sites, such as the European Environmental Law Homepage (http://www.eel.nl) and in relation to the question of environmental impact studies in particular, the United Kingdom 'PENELope' website (http://www-penelope.et.ic.ac.uk).

AN OVERVIEW OF NATIONAL LAW ON ENVIRONMENTAL PROTECTION

9.17 The principal United Kingdom statute which sets out the main framework for the responsibilities of public bodies in the area of the protection of the environment is the Environment Act 1995. This Act heralded a significant shift in the responsibilities of local authorities in relation to the environment, with the creation of new national environmental agencies and of National Parks authorities independent of local government. The most significant new body created by the 1995 Act was the Scottish Environment Protection Agency (SEPA), created to ensure protection of the environment north of the Border. In England and Wales with effect from 1 April 1996 the new Environment Agency (EA) took over the functions previously exercised there by HM Inspectorate of Pollution and by the National Rivers Authority.

9.18 SEPA has a very broad range of responsibilities, broader indeed than that of the Environment Agency. It is now responsible for ensuring proper environmental protection as regards, among other matters, water resources, water pollution control, flood defence and land drainage, fisheries, navigation and harbours, waste regulation and disposal, contaminated land, abandoned mines, the disposal of radioactive wastes, and the pursuit of integrated pollution control. In contrast to the position in England and Wales, all of the local authorities air pollution control functions have been absorbed into SEPA. Its decisions are in principle subject to the supervisory jurisdiction of the court, and hence susceptible to judicial review1.


9.19 Local authorities in Scotland retain some powers and responsibilities in the area of environmental management, protection and regulation. These are to be located in a wide variety of statutory provisions which have been implemented over the years. For ease of exposition of the statutory rights and duties of public bodies in the area of environmental law it is proposed to deal with the area under five headings: planning and environmental impact; the identification and control of contaminated land; the control and regulation of waste; water quality and sewerage regulation; statutory nuisance; and nature conservation.
The identification and control of contaminated land

9.20 Local authorities have a duty to identify any ‘contaminated land’ within their area which represents an actual or potential hazard to health or the environment as a result of current or previous use. Contaminated land is such land which, as a result of pollutants, might adulterate controlled water or cause significant harm (or give rise to the significant possibility of significant harm) to the health of humans or of other livings organisms, or to property. If the pollution or harm risk is considered to be serious, the contaminated land becomes a special site under the control and jurisdiction of SEPA. Otherwise the enforcement of adequate environmental protection in respect of such land remains the responsibility of the local authority.

9.21 A public register of the contaminated land which has been identified by the local authority within its territory has to be maintained. This register must identify the land in question, state whether or not it has been declared a special site, specify whether any ‘remediation notice’ has been served in respect of this land and set out any remedial measures which have been taken in response to such a notice.

9.22 As the enforcing authority it is the responsibility of the local authority to determine what remedial measures need to be undertaken in respect of this land and to identify the appropriate person to undertake these remedial works. Under the ‘polluter pays’ principle, the appropriate person is the person who caused or knowingly permitted the relevant contaminants on to the land. If no such person can be identified, however, then the owner or occupier of the land is considered to be the appropriate person.

9.23 The enforcing authority is required to serve a remediation notice on each appropriate person specifying the necessary clean-up measures and requiring that person to undertake (a proportion) of these remedial works. Failure to comply with the remediation notice is a criminal offence. Further, if the remediation notice is not complied with the enforcing authority is entitled to undertake the measures itself and recover the cost of this from the appropriate person by serving a charging order. There is an appeal procedure against both the serving of a remediation notice and any charging order. In situations of emergency or where no ‘appropriate person’ can be identified, the enforcing authority also has power to carry out the necessary remediation works directly.

The control and regulation of waste

9.24 The legislative framework regarding the regulation of waste disposal was, until the passing of the Environment Act 1995, to be found in a
patchwork of statutes which imposed a variety of duties on different local authorities. With the re-organisation of Scottish local government and the creation of unitary authorities by the Local Government etc (Scotland) Act 1994 and the setting up of SEPA by the Environment Act 1995 the overall division of duties and responsibilities has been much simplified. The responsibility of local authorities as regards waste can be divided into waste collection, waste disposal and waste regulation. The responsibilities of waste collection include the duty of collecting household waste, collecting commercial waste on request and the collection and management of litter. Waste disposal duties include preparing waste disposal plans for the disposing of controlled waste in their area, the issuing of waste disposal licences, the monitoring and control the disposal of waste in their area and the operation of waste disposal facilities. Local authorities must also maintain places at which persons resident in their area might deposit their household waste and arrange for the disposal of this waste. Although waste disposal remains the formal responsibility of local authorities, the actual carrying out of waste collection operations comes under the compulsory competitive tendering regime so that it is either normally contracted out to the private sector or is performed at arm’s length by local authority waste disposal companies.

9.25 The establishment of the SEPA saw the transfer of many but not all of the waste regulatory functions previously exercised by local authorities. Thus the responsibility of local authorities under section 50 of the Environmental Protection 1990 to draw up local waste management plans has been superseded by the section 92 of the Environment Act 1995 which empowers the Secretary of State in England and Wales and SEPA in Scotland to produce national waste strategies. The Secretary of State also has power to introduce regulations regarding producer responsibility for certain specified products or materials to encourage their re-use, recovery or recycling if such operations would be likely to produce significant environmental or economic benefits when weighted against the costs of carrying out such operations. Further, the government came to the view in the course of the 1990s that the establishing of voluntary regional groupings of waste regulations authorities was insufficient to provide a properly integrated approach to waste regulation. Accordingly with effect from 1 April 1996 the waste regulation authority functions set out in the Environmental Protection Act 1990 and the remaining waste disposal authority functions contained in the Control of Pollution Act 1974 (for example in licensing operators and in setting conditions for landfill sites and other waste facilities) were transferred to SEPA. The principal provision setting out the procedure for the granting and supervision of waste management licences by SEPA are to be found in the Waste Management Licensing Regulations\(^1\) which seek to implement the relevant European directives concerning the control, management and disposal of waste.

1 SI 1994/1056.

9.26 EC Council directive 75/442 has, in annex 1, a list of waste substances which are subject to regulation and control\(^1\). The definition of
‘waste’ has also been authoritatively considered by the European Court of Justice on a number of occasions: it has been held not to exclude as a matter of principles products which are tradable and capable of economic re-use or which form an integral part of the production process. Steps are to be taken to minimise the need to dispose of waste by developing clean technologies, as well as new techniques to dispose of dangerous by-products in dangerous waste. Member states are encouraged to develop recycling policies. Any waste which unavoidably arises has safely to be disposed of in a way which does not imperil human or animal health or damage the physical environment. To this end, member states are required to establish an integrated waste disposal network to dispose of waste as near as possible to the production site. The cost of such waste disposal falls to be borne by the producer of the waste. The Court of Justice has held in Comitato di Co-ordinamento per la Difesa della Cava v Regione Lombardia, however, that the provisions of EC Council Directive 75/442 are neither unconditional nor sufficiently precise to have direct effect and so confer enforceable rights on individuals.

4 Case C-129/96 Inter-Environnement Wallonie ASBL v Région Wallonne [1997] ECR I-7411.

9.27 The cross-border transport of waste is covered by the Community provisions on the free movement of goods, but given its particular nature as an undesirable product and on the basis of the general principle that waste should stay as close to its sources as possible, the Court of Justice has held that, in the absence of specific Community secondary regulation, member states authorities may properly restrict its import into their territory. Hazardous waste as specified in the hazardous waste list is governed by specific Community secondary provision, namely EC Council Directive 91/689 but this directive does not apply to non-hazardous domestic waste, for which a new separate directive was promised. Periodic inspection of the premises of hazardous waste producers is required under the Directive.

2 See the definition of ‘controlled waste’ in the Environmental Protection Act 1990, s 75(4) which includes household waste.

Water and sewerage

9.28 The former responsibilities of local authorities in Scotland regarding the maintenance of the water supply and the provision of adequate sewers and drainage have largely been transferred to the three regional authorities: East of Scotland Water, West of Scotland Water and North of Scotland Water. In contrast to the situation in England and Wales, these Scottish authorities currently remain within public hands and have not been privatised. Local authorities have little or no enforcement powers relating to the duty of the water authorities to supply wholesome water within their area. The residual duty of the relevant unitary authorities in relation to
water supply is to take such steps as it considers appropriate to keep itself informed as to the wholesomeness and sufficiency of supplies provided to premises within its jurisdiction. The local authority and the water undertakers are obliged to inform one another of any threats to the water supplies. Failure by the undertaker to provide appropriate remedial measures to maintain an adequate and wholesome water supply allows the local authority simply to report matters to the Secretary of State for such enforcement order as he thinks appropriate. SEPA remains the main agency dealing with water pollution matters in Scotland.

9.29 Under the European Urban Waste Water directive, EC Council Directive 91/271, discharges into estuaries of household and industrial sewage over a certain concentration or amount are required to be subject not only to primary treatment but also to additional secondary treatment. In defining the outer limits of the Humber and Severn Estuaries for the purpose of the directive and its implementing regulations, the Secretary of State for the Environment purported to take into account the additional cost of this secondary treatment to ensure that the excess sewage did not flow into the estuaries as defined. In R v Secretary of State for the Environment ex parte Kingston upon Hull City Council the English High court held that it although member states had a discretion as to the criteria to be applied in defining outer estuarine limits, that discretion did not extend to taking into account the additional secondary treatment costs which might result, depending on where one drew the line.

1 [1996] Env LR 49, QB.

9.30 European Community legislation has sought to prevent the discharge of dangerous substances into water and to set minimum quality standards for the water available to the consumer. Such standards obviously vary depending on how the water is intended to be used. Thus the Surface Water directive, EC Council Directive 75/440 deals with fresh water from which drinking water is intended to be taken; the Bathing Water directive, EC Council Directive 76/160 applies to sea water as well as to running and still water where bathing is authorised or permitted; the Fresh Water Fish directive, EC Council Directive 78/659 regulates the quality of inland fishing waters; the Shellfish directive, EC Council Directive 79/293 deals with shore water quality; the Drinking Water directive, EC Council Directive 80/778 applies to water intended for human consumption and sets out various parameters (as regards constituent elements, colour, temperature) which constitute the maximum concentrations of each of these which member states may lawfully permit, which may only be derogated from for limited period in situations of extreme urgency. The Urban Waste Water directive, EC Council Directive 91/271 sets out detailed requirements regarding the collection and treatment of urban waste water. The Ground Water directive, EC Council Directive 80/68 is intended to control pollution of underground water in direct contact with the earth against discharges or seepage into it of certain specified ‘dangerous substances’. Appendix 1 of that directive sets out a list of substances, discharges of which should, in general, be banned. Appendix 2 sets out a list of substances, discharges of which should be limited.

1 See Case 228/87 Turin Magistrates v Persons Unknown [1990] 1 CMLR 716, ECJ.
9.31 As has been noted, local authorities have little direct involvement in ensuring that these water quality parameters laid down in European law are indeed complied with. However, since the question of the specific enforcement of these standards is a matter for the Scottish Office Agriculture, Environment and Fisheries Department and SEPA, in carrying out their duty to monitor the quality of the water supplied within their districts, local authorities should properly refer to the terms of the relevant directives since the presiding duty of the courts and national authorities is to ensure that the provisions of European law are respected in their letter and spirit, whatever the position taken under national law and central government policy. The decisions of SEPA and SOAEFD in this area would potentially be subject to judicial review and to the direct effect of suitably precise and unconditional provisions of Community law.

Statutory nuisance

9.32 Under section 79 of the Environmental Protection Act 1990 local authorities have a duty to investigate any deposit or accumulation prejudicial to health or constituting a nuisance. Once such a statutory nuisance is found, the local authority then has a duty, by virtue of section 80 of the 1990 Act to serve a notice either requiring abatement of the nuisance or that appropriate steps to be taken by the person or persons responsible for the situation. In R v Carrick District Council, ex parte Shelley¹ a judicial review was taken of the council’s decision simply to continue to monitor the sewage contamination of a local beach which was popular among surfers. The beach had been assessed by the National Rivers Authority in 1990 as being in the worst category for sewage contamination. In granting the application for judicial review, the court held that the local authority had a statutory duty to take active steps to tackle the problem identified.


9.33 In Scotland, local authorities have the right under section 179 of the Town and Country Planing (Scotland) Act 1997 to serve 'adverse amenity land notices' (formerly waste land notices) as regards land or property deposited thereon² which through either inaction or action on the part of the owners or occupiers is causing adverse effects on the local amenity³. The power to serve a notice may be exercised by the planing authority even where there has been no breach of any specific planing controls. If the notice is not duly complied with, the authority may authorise entry on to the land for the necessary remedial work to be carried out. There is a right of appeal under section 180 of the 1997 Act to the Secretary of State against the service of such a notice. There is no specific clause seeking to oust the jurisdiction of the court to question the validity of such a notice³ accordingly the vires and questions of procedural propriety of the authority in making the notice may be challenged by way of judicial review, provided that the available statutory rights of appeal have been duly exercised. Judicial review will not normally be regarded as available where specific alternative remedies has been provided either elsewhere in statute⁴ or, indeed, in the Rules of Court⁵.

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Standing to Challenge and Environmental Law

9.34 Environmental law, as opposed to say the law of nuisance, is concerned with the protection of collective rights to the environment. The environment is, by definition, public space. The question arises as to how the environmental rights guaranteed by law might be enforced, both against the authorities of the national state and private parties and in particular whether or not an individual Community national may derive a judicially protected right or interest from the interest, within the Community legal order, in conservation of the environment.

9.35 It is clear from the specific provision made for environmental protection which were included in the Treaty of Rome after the Maastricht and Amsterdam revisions that protection of the environment is a Community interest, the protection of which is the responsibility of the member states and of the Community institutions within the economy of the Treaty. The Community legal order does not, of itself, recognise an actio popularis. It is only where rights are given to individuals by the particular provisions of secondary Community legislation that redress may be sought from the courts.

9.36 One author has suggested that where a Community environmental measure can be said to have direct effect in the sense of (i) being precise and unconditional; (ii) leaving no margin of discretion in its performance to the member states; and (iii) designed or intended to protect individuals or associations or their rights in the field of health and welfare, then any individual affected by the failure of the appropriate authority to enforce such rights will have a right of action under Community law which the national courts require to uphold. These measures might include those which: limit values for concentrations of particular substances in the environment; prohibit certain activities or the use of certain substances; or specify that individuals or interests groups have a right to be informed or consulted. Thus, in any case where an ‘emanation of the state’ is a defending party to an action (which will be the situation in most judicial review applications) and the Community legal provision is suitably precise and unconditional, any substantive or procedural legislative, administrative or judicial provisions made under national law and which are contrary to the obligations imposed under the Community directive must be suspended.

1 See Lawrie v Edinburgh Corporation 1953 SLT (Sh Ct) 17.
2 See eg Stevenson v Midlothian District Council 1983 SLT 433, HL.
3 Cf the ouster clause in relation to ‘enforcement notices’ proper in the Town and Country Planning (Scotland) Act 1997, s 134. See however McDaid v Clydebank District Council 1984 SLT 162.
or dis-applied, if the effect of its application is to contravene an individual's public or private law Community rights.


9.37 In EC Commission v Germany: re Groundwater1 the Court of Justice held that the provisions of the Groundwater directive, EC Council Directive 80/68 which set limits on the discharge of specified substances, was to create rights and obligations for individuals. Advocate General Van Gerven observed that:

'clear and precise implementation of the directive's provisions may also be important for third parties (for instance environmental groups or neighbourhood residents) seeking to have the prohibitions and restrictions contained in the directive enforced as against the authorities or other individuals'2.


9.38 In EC Commission v Germany: re Air Pollution the Court of Justice stated:

'[W]henever the exceeding of limit values [on air pollution as laid down in the directive] could endanger human health, the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights'1.


9.39 More recently, in Associazione Italiana per il World Wildlife Fund v Regione Veneto1 the court held that the general prohibition on hunting wild birds contained in the Wild Birds directive, EC Council Directive 79/409 had direct effect so that it could be prayed in aid and relied upon by the charity in seeking relief before the national courts. Member states could only rely upon the derogation allowing for continued hunting of protected species set out in article 9 of the directive if these national measures set out in sufficient relevant detail their purpose in allowing such hunting to continue.

1 Case C-118/94 [1996] ECR I-1223, EC.

9.40 As regards a claim based purely on possible environmental damage, the suggestion has been made1 that in order for an applicant to demonstrate sufficient locus standi to challenge the environmentally offensive measure the following should be offered to be shown:

- that he or she has personally suffered or is likely to suffer some actual or threatened detriment, such as a violation of his or her substantive or procedural environmental rights or interference with his or her environmental interests, as a result of the conduct alleged to be in contravention of a Community provision;
that the detriment can be traced to the act which is challenged;
that the detriment is capable of being redressed by a favourable judgment².

1 See the arguments of the applicants in Case C-321/95 P Stichting Greenpeace Council v EC Commission [1998] All ER (EC) 620, ECJ as noted in the Advocate General's opinion at para 29, 23.

2 Compare with the approach taken by the English courts in R v Secretary of State for Trade and Industry, ex p Duddridge [1995] Env LR 151 where the parents of children residing in an area where new electricity cables were being placed were held to have sufficient standing to challenge the decision of the public authority not to limit by regulation electromagnetic emission therefrom.

9.41 This reference to the direct effect of environmental directives clearly envisages that they might be sought to be enforced before the courts by private parties. In Stichting Greenpeace Council v EC Commission¹ the court rejected the appeal by Greenpeace International against the decision of the Court of First Instance² to dismiss their application for judicial review of a decision by the Commission to fund a construction project on the Canary Islands which had major environmental impact. The Court of First Instance had held that Greenpeace were not directly affected by or concerned in the decision and therefore were did not have sufficient standing to challenge before the Community courts the validity of a measure adopted by a Community institution.

1 Case C-321/95 P [1998] All ER (EC) 620, ECJ.

9.42 In any event, a purposive approach has to be taken to the interpretation of the relevant Community provision, whether or not it has direct effect¹. National legislation requires to be read, as far as possible, in a way which conforms to the result sought by the Community directive. Further, the Court of Justice has recently held in an environmental law case that although member states are only required to have a directive implemented by the transposition date set out in the instrument, between the date of the adoption of the directive at Community level and its implementation into national law, the member states have an obligation to refrain from taking measures which are liable ‘seriously to compromise the result prescribed’ by the Community provision in question². And as we noted above, the duty under article 10 (previously article 5) of the Treaty of Rome to give full effect to Community law applies not simply to the national courts of the member states but also to national administrative authorities who are equally required to observe (and give precedence to directly effective) provisions of Community law³. Enforcement of this duty might also be sought directly before national courts.

THE ENVIRONMENTAL ASSESSMENT DIRECTIVE AND INDIVIDUAL RIGHTS

9.43 The Environmental Assessment Directive\(^1\) requires that consideration to be given to the effects on the environment of both public and private development projects before planning or development consent may be granted. The appropriate authority with responsibility for development control must consider the environmental impact assessments produced, together with any representations from environmental bodies and the general public, before determining whether or not consent should be given to the project in question.


9.44 The directive fell to be implemented in national law by 3 July 1988. The United Kingdom failed to implement it fully by this date and produced a lengthy series of statutory instruments in the course of 1988 and 1989 which were intended to cover the various types of developments encompassed by the directive. These included afforestation, land drainage schemes, salmon farming, the building and extension of harbours, road construction, electricity and pipe-line works as well as general town and country planning developments. A new series of implementing regulations, including the Environmental Assessment (Scotland) Regulations 1999, was to be produced in the course of 1999 to take account of the updating and amending of the original 1985 directive by Directive 97/11.

9.45 Questions arose before the courts in England and Scotland respectively, firstly, as to whether or not the directive could be directly effective (that is to say whether its provisions could be prayed in aid against any state emanation to over-ride any contrary provisions of national law) and secondly, whether, on its proper construction, it applied to projects which were already in the pipeline but for which no final approval had been given as at the date of its due implementation.

9.46 In Twyford Parish Council v Secretary of State for Transport\(^1\) it was held that the directive was unconditional and sufficiently precise to have direct effect after the time limit for its implementation had expired in relation to the types of development set out in its Annex I. It could therefore be relied upon to seek an environmental impact report as regards a proposed motorway extension even in the absence of appropriate national regulations. However, it was also held that on a proper construction of the directive any project which had been beyond the initial planning stage as at 3 July 1988 fell outside its scope. No environmental assessment was therefore required in the case of the M3 motorway extension at Twyford Down\(^2\).


9.47 In Kincardine and Deeside District Council v Forestry Commissioners\(^1\) Lord Coulsfield, sitting in the Outer House of the Court of Session, held that the same directive could not be directly relied upon in the case of a...
grant application for an afforestation project. He held that it gave member states a discretion as to whether or not environmental impact assessments were required for the developments listed in its Annex II which included 'initial afforestation where this may lead to adverse ecological changes'. Accordingly, since no implementing national regulations were in force at the time of the initial application for the afforestation grant, there was no obligation to seek an environmental impact report.

9.48 These findings both as to direct effect and application to pipeline projects were provisional in the sense that it is the European Court of Justice alone which has final say in interpreting and in determining the direct effect of Community provisions. The requirements of direct effect are that the provision in question is unconditional and sufficiently precise so as to be capable of conferring rights on which the individual may rely upon as against the state.

9.49 In EC Commission v Germany the court found, in an action brought by the Commission under article 169 of the Treaty of Rome, that the granting by Germany of authorisation for the construction of a new section of a power station without a prior environmental impact assessment as required by EC Council directive 85/337 was contrary to Community law and found that the terms of articles 2, 3 and 8 of the directive were sufficiently clear and precise as unequivocally to lay down specific obligations binding the member states. The court stated:

'Article 2 of the directive lays down an unequivocal obligation, incumbent on the competent authority in each member state for the approval of projects, to make certain projects subject to an assessment of their effects on the environment. Article 3 prescribes the contents of that assessment, lists the facts which must be taken into account in it, and leaves the competent authority a certain discretion as to the appropriate way of carrying out the assessment in the light of each individual case. Article 8 further more requires the competent national authorities to take into consideration in the developing consent procedure the information fathered in the course of the assessment.

Regardless of their details, those provisions therefore unequivocally impose on the national authorities responsible for granting consent an obligation to carry out an assessment of the effect of certain projects on the environment.'

9.50 The question as to whether or not these obligations on the part of the member states arising from the Environmental Assessment Directive, EC Council Directive 85/337 gave rise to co-relative rights owed to individuals was specifically asked of the Court of Justice in a reference for a preliminary ruling from the Netherlands Raad van State, the highest
administrative law court, in a case known as Dutch Dykes. The case was an action for annulment of a decision of a public authority in the Netherlands to approve works planned under a local authority zoning plan in connection with dyke re-enforcement. Because the size of the proposed works under the plan was lower than the minimum specified in the national implementing legislation, there was no requirement under national law for any environmental impact study to be carried out as a pre-requisite to the adoption of the plan.


9.51 The Court of Justice was asked, firstly, for its views on the proper interpretation of articles 2(1) and 4(1) of EC Council Directive 85/337 and, in particular, whether these gave the member state unlimited discretion, in effect, to exclude whole categories of projects from the requirement of producing an environmental impact report. Sitting as a grand plenum of 11 judges, the court replied that the member state would be exceeding the limits of its discretion unless all the projects excluded could, when viewed as a whole, be regarded as unlikely to have significant effects on the environment.

In response to the question from the Netherlands court as to whether or not the member state's obligations under the directive could be relied upon by an individual before the national court, Advocate General Elmer proposed that the unequivocal answer that articles 2(1) and 4(2) of the directive, in conjunction with article 6(2) do confer rights on individuals. The court, however, gave a more circumspect answer, stating that if a member state has exceeded the limits of its discretion granted under articles 2(1) and 4(1), then the offending national provision should be 'set aside'. The court went on:

'[W]here the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying upon it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to form and methods for implementation, has kept within the limits of its discretion set out in the directive'.

1 Case C-72/95 [1997] 3 CMLR 1, ECJ, at para 56. See also Case 51/76 Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijzen [1977] ECR 113 at paras 22–24 (emphasis added).

9.52 The following propositions can be derived from this case:

- As a matter of Community law, the discretion conferred upon member states by article 4(2) of EC Council Directive 85/337 (that is to specify national criteria or thresholds which should apply to projects listed in Annex II, such as 'initial afforestation where this may lead to adverse ecological changes and land reclamation for the purposes of
conversion to another land use’ before such projects should be subject to an environmental impact assessment) is not unlimited but is subject to review by the courts;

- As a matter of Community law, the discretion granted to member states under article 4(2) of EC Council Directive 85/337 to establish criteria, specification or thresholds in order to determine the types of projects to be subject to an assessment cannot be used to exempt in advance entire classes of projects listed in Annex II, ‘unless all such projects could, when viewed as a whole be regarded as not likely to have significant effects on the environment’;

- As a matter of Community law, the discretionary power granted in article 4(2) of EC Council Directive 85/337 in relation to Annex 2 projects is subordinate to the general provision of article 2(1) which requires that all projects liable to have a significant effect on the environment should be submitted for environmental impact assessment.


9.53 It follows from the foregoing that, as a matter of Community law, member states’ authorities cannot choose to exempt from an environmental assessment, an project specified in Annex II of EC council Directive 85/337 such as afforestation, except on the basis that this project has failed to achieve the particular threshold, criteria or specification set out in the national implementing regulation.

1 It is interesting in this regard to note the terms of EC Council Directive 97/11 of 3 March 1997 which amends EC Council Directive 85/337 by allowing member states to determine by case by case examination and/or the application of national thresholds or criteria whether the project should be made subject to an EIA assessment. This directive was due to be implemented by 14 March 1999 but has not yet been at the time of writing, at least in Scotland, due to delays ascribed to the coming into force of the new devolutionary settlement.

DUTIES OF NATIONAL COURTS IN RELATION TO COMMUNITY ENVIRONMENTAL RIGHTS

9.54 Advocate General Cosmas has suggested that the vertically effective Community rights conferred on the public by the Environmental Impact Assessment directive, EC Council Directive 85/337 and which fall to be safeguarded by the national courts are as follows:

‘first, the requirement that the projected interference with the environment be submitted for appraisal of its impact before authorisation is granted; secondly, projects for works impacting on the environment, namely those mentioned in Annex I to the directive or, under certain conditions, in Annex II thereto, must be drawn up in accordance with the procedure described in Articles 5 to 10 of the directive; … that procedure gives the right, first, for information to be made available to the public, secondly, to provide the public with the possi-
bility of expressing its opinion before the project is started and thirdly, to require that opinion to be taken into account in the context of the procedure for granting authorisation'.


9.55 While even the precise and unconditional provisions of directives may not be relied upon directly against private individuals1 measures which have been adopted by the member state in contravention of provisions of a directive may for that reason be invalid and unenforceable and consequently such defective national measures may not be relied upon even by third parties2.

1 See eg Case C-168/95 Arcaro [1996] ECR I-4705 where the lack of horizontal direct effect for directives is re-affirmed.

9.56 In the Dutch Dykes case the Court of Justice reiterated that national courts have a duty under Community law 'to ensure the legal protection which persons derive from the direct effect of the provisions of Community law'1 and it was accordingly for the authorities of the member states, including their courts 'to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment'2.


9.57 In the absence of procedural harmonisation at Community level, the domestic legal systems of the member states may designate which of their courts have jurisdiction in, and what procedural conditions apply to, actions seeking to invoke Community law directly1. This procedural autonomy is, however, limited in certain respects by Community rules:

- national procedural rules should not be applied in such a manner as to make the enforcement of Community rights more difficult than the enforcement of analogous national rights. That is, there should be no procedural discrimination between national law and Community law rights2.
- Even where they apply equally to national and to Community law rights, national procedural rules should not have the effect of making it impossible in practice3, or even excessively difficult4 to exercise rights guaranteed under Community law;
- the Court of Justice has stated that the Treaty of Rome was not intended to create new remedies in the national courts to ensure the observance of Community law5. The 'no new remedies' principle is not, however, a serious obstacle to procedural effectiveness since, as in
Factortame, the creation of a new remedy can be treated as simply the extension of an existing one.


9.58 The effective protection of Community law rights may require national courts to modify or suspend aspects of their existing national procedural rules. This power to modify or suspend rules of national procedure is not based on national law, but results instead from the national court's application of the Community law principle of the effective protection of Community law rights.


9.59 The effective protection by national courts of the individual environmental law rights granted them under the Environmental Assessment directive, EC Directive 85/337 and guaranteed them under Community law means that the national court must firstly, ensure that projects falling within the terms of the directive are made subject to an environmental assessment. Arguably, this may require courts to order the Secretary of State to make specific performance of a statutory duty and to do all in his powers to ensure that the project in question is indeed made subject to an environmental assessment.

1 See A Ward 'The Right to an effective remedy in ECL and Environmental Protection: a case study of United Kingdom Judicial decisions concerning the EIA directive' (1993) 5 Journal of Environmental Law 221.

ENVIRONMENTAL JUDICIAL REVIEW CASE LAW IN SCOTLAND

9.60 The inter-relationship between the requirements of, in particular, Community law in the area of environmental protection and the alleged failure by the national authorities and legislature to meet those standards has been the focus of a number of judicial review applications brought before the Court of Session in recent years. A number of complex legal issues have in theory been raised in these applications, but the tendency in practice has been for these issues not to be decided upon either way and instead a decision has been reached on the particular facts or pleadings of the application. In particular, questions as to the extent of the title and interest needed to give an individual sufficient standing to be able to challenge national measures on environmental law grounds before the Scottish courts have not yet been satisfactorily addressed or answered.

9.61 Thus, in England, a generous approach to concepts of standing has meant that environmental charities and pressure groups such as Green-
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peace¹, the World Development Movement² and Friends of the Earth³ have all been recognised as having sufficient legitimate interest in environmental matters as to give them standing to challenge the legality of a variety of types of administrative or executive decisions which have an actual or potential impact on the environment. In Scotland the position of the standing of such groups remains unclear.

1 See R v HM Inspectorate of Pollution, ex p Greenpeace Limited (No 2) [1994] 4 All ER 329.
2 R v Secretary of State for Foreign Affairs, ex p World Development Movement Limited [1995] 1 All ER 611.

9.62 In Scots law the formal requirement to establish sufficient locus to bring a court action remains that that a litigant can show both title to sue in the sense of being a ‘party ... to some legal relation which gives them some right which the party against whom he raises the action either infringes or denies¹ and to have ‘a material or sufficient interest² in the outcome of the action. In Kincardine and Deeside District Council v Forestry Commissioners³ however, the submission that a directive could be enforced by an individual only where it conferred rights on that individual was rejected by the Lord Ordinary, Lord Coulsfield. In the English case of Twyford Parish Council v Secretary of State for Transport⁴ it was suggested by the court that any person actually prejudiced by the failure to respect a directive would have sufficient title to raise an action for its breach. As has been stated by one author:

‘The essence of the direct effect doctrine is the principle of justiciability which in public law is subject to different considerations than in private law. ... Indeed it is arguable that a failure to apply the [Environmental Impact Assessment] directive properly is in itself the violation of a public law right to an assessment and subject to locus standi fully justiciable in public law without further prejudice being required⁵.

1 D & J Nicol v Trustees of the Harbour of Dundee, 1915 SC (HL) 7.
3 Kincardine and Deeside District Council v Forestry Commissioners, 1992 SLT 1180, [1993] 1 Env L R 151.

9.63 Contrary to the foregoing national authorities, it might be argued that it is only where rights conferred under Community law are being violated that Community principles of effective protection of those rights or interests by national courts comes into play. Where, however, the Community law in question does not confer or create individual rights or recognise individual interests, then the only remedy is that which is provided for by articles 226 and 227 (formerly articles 169 and 170) of the Treaty of Rome: that is, for one of the privileged parties, the European Commission or another member state, to bring a direct action against the
offending member state before the Court of Justice for failure to fulfil an obligation under the Treaty. On this view the questions to be asked in relation to judicial review applications brought before the Scottish courts which claim the protection of Community environmental law are as follows:

- firstly, does the Community legal provision in question confer Community law rights upon individuals and are those individuals among the present petitioners?;
- if so, are those Community law rights being violated by the action complained of in the present petition?;
- if so, what action does the Community principle of effective protection of Community law rights require of the national court in these circumstances?

9.64 In a number of recent cases in Scotland involving challenges made by neighbouring proprietors to land affected by a particular environmental decision, those representing the Secretary of State have apparently made a tactical decision to defend environmental challenges on their merits or on the basis of other preliminary points (for example, relevancy or taciturnity or delay in challenge) and not to challenge the petitioners’ title and interest to sue so as to avoid ‘the possibility of an unwelcome precedent’. This tactic has, however, left the law in Scotland on the question of individuals’ necessary or sufficient title to raise environmental law challenges in a state of uncertainty. This question is, however, logically prior to any other in litigation, and is one which should properly be dealt with before any other in the such challenges. It is arguable that logically what has to be clarified as the first issue in any such environmental law challenge is whether or not these particular applicants to the court have rights which are being violated by the actions of the defending party called before it. The question of delay in challenge would only come into play when it is accepted that rights have been granted but, by acquiescence in their breach, these particular individuals are now held to be personally barred from now insisting on their enforcement.

1 See case note on the decision in first instance in Swan v Secretary of State for Scotland in [1997] Environmental Law Management 211 at 213. For the subsequent decision on the merits dismissing the petition, see the unreported decision of Lord MacFadyen of 23 April 1999, OH.

9.65 In Swan v Secretary of State for Scotland the Inner House considered a reclaiming motion against a decision of the Lord Ordinary to dismiss an application for judicial review of a decision of the Secretary of State not to call for an environmental assessment before giving a grant to allow a forestry project to proceed. The application for judicial review was presented by neighbouring proprietors and users of the moor-land surrounding the project after the saplings had been planted. The respondents contended that in these circumstances the matter came too late to the court and that the petitioner’s delay in raising proceedings had robbed the matter of any practical content. In allowing the appeal against the decision of the Lord Ordinary to dismiss the action on grounds of mora taciturnity and delay the Inner House found as a matter of fact that the planting of the trees did not render the making of an environmental impact report imposs-
ible and that no prejudice would result to the Secretary of State if such were ordered. Furthermore, the petitioner's delay in raising proceedings was, given that they had had contact with the European Commission on the matters, excusable. As a result of these factual findings, it was not necessary for the court to decide upon the submissions of the petitioners that the respondents admitted failure properly to transpose the Environmental Impact directive (EC Council Directive 85/337) in relation to afforestation projects meant that the court was required to dis-apply the national procedural rule anent time bar and delay, following the decision of the Court of Justice in Emmott. Since the respondent had not yet advanced any arguments in support of their plea of no title to sue, neither the Lord Ordinary at first instance nor the Inner House made any observations on that matter.

1 1998 SC 479.

9.66 In World Wide Fund for Nature and the Royal Society for the Protection of Birds an attempt was made by wildlife conservation groups to challenge the decision to allow the building of a funicular railway on Cairngorm on the grounds of alleged breaches of European Community provisions on nature conservation, in particular the Wild Birds directive (EC Council Directive 79/409) and the Habitats and Species directive (EC Council Directive 92/43). The Lord Ordinary rejected the challenge on the facts. He also held that the petitioners' failure to intervene within the planning process to set out their contention that the ski-ing areas affected by the proposal should have been included within the boundaries of the proposed special protection areas and candidate special areas of conservation constituted mora such as to bar them from raising the matter by way of judicial review. Questions of the standing of the interest groups to bring the proceedings does not appear to have been a matter at issue before the court.

1 27 October 1998, unreported, OH.
2 This action was raised following the decision of the European Court of Justice that national decisions on the designation of special protection areas under the relevant directives should be made on the basis of scientific criteria alone without regard to commercial or economic considerations: see Case C-44/95 R v Secretary of State for the Environment, ex p the Royal Society for the Protection of Birds [1996] ECR I-3805, [1997] 2 WLR 123.

9.67 The lack of any sustained discussion or clear decision in the case law on the question of the standing of pressure groups to make environmental law based challenges in Scots law has a potentially damaging effect on the development of the law in Scotland. The lack of certainty as to their standing to challenge may discourage such groups from taking judicial review challenges before the Scottish courts and may instead cause them to seek remedies before the courts in England, even where the issues in questions concern matters with a more immediately Scottish than English connection (for example the scuttling of the Brent Spar rig within the Scottish sector of the North Sea). A clear statement is needed from the Inner House on the issue if the Scots law of environmental protection is to be
properly developed, as it must be given the potential human rights implications in this area and the fact that these matters are now within the devolved responsibility of the Scottish Parliament.

PLANNING LAW

9.68 Within the Environment Chapter XIX of the Treaty of Rome, article 1751 provides, at paragraph 2, that the Council of Ministers acting unanimously after consultation with the European Parliament, the Economic and Social Committee and the Committee of the Regions shall adopt measures concerning town and country planning.

1 As amended by the Treaty of Amsterdam. Previously art 130s.

9.69 Planning law and environmental law may be seen as simply two sides of the same coin. Planning law is specifically related to the regulation of individual property rights with a view to ensuring the preservation of some idea of the common good. The classic definition of ownership of property in Roman law, emphasising its absolute and individualistic nature, was ‘ius utendi, fruendi, et abutendi’ – the right to use, to enjoy and to abuse it. Planning law in effect seek to removes from the general cluster of rights associated with the ownership of property, any right to abuse it. Ownership of property is now seen to involve as well as rights, obligations and responsibilities owed to one’s immediate neighbours, to the wider community and to future generations. Planning law lays down and enforces those obligations.

9.70 Planning law is, then, essentially a matter of public law, since the particular specification of duties owed and their application is a matter for the public authorities. Where there is a lacuna in the statutory appeal process against planing decisions of the authorities, judicial review is naturally resorted to. Between 1988 and 1993, petitions concerned with planning and land use issues were found to have constituted just over 8% of the total applications made for judicial review, making it the fourth largest subject area for review in Scotland after immigration at 27.9%, licensing at 16.4% and housing at 15.9%1.


PLANNING JUDICIAL REVIEW CASE LAW IN SCOTLAND

9.71 As with all judicial review petitions, it is only disputes over the law and not on the facts as found which will, in general, form the basis for a relevant challenge before the courts in planning matters1. Many of the judicial review applications in the context of planning law are concerned
with narrow points of textual interpretation of the provisions or scheme of the town and country planning legislation, local plans, guidelines and agreements; for example the competency or reasonableness of an authority considering a re-newed application from the same party in respect of the same subject matter while an appeal against the decision in the original application has still to be determined. Broader constitutional issues have also, however, been raised in the context of planning judicial reviews. These include: the possible conflict between the quasi-judicial and administrative roles of the Secretary of State in planning matters and his activities and duties as a constituency member of Parliament; and the susceptibility of the Crown to statutory planning regulation. Other more generally administrative law issues have also been highlighted in planning cases. These include and the adequacy of reasons given for decisions made, the need for exhaustion of statutory remedies in judicial review; title and interest to sue and the inter-action between private law remedies (contract and delict) and judicial review. It is with such issues, rather than particular points of statutory construction, that the following brief survey of the case law in this area will be concerned.

1 See eg Bonnes v West Lothian District Council 1997 SLT 398, OH per Lord Osborne and Noble Organisation v Falkirk District Council 1994 SLT 100.
3 See Strathclyde Regional Council v Secretary of State for Scotland 1991 SLT 796.
4 See London and Clydeside Estates Ltd v Secretary of State for Scotland, 1987 SLT 459.
6 Wording Property Co Ltd v Secretary of State for Scotland 1984 SLT 345.

9.72 In McIntosh v Aberdeenshire Council an applicant for judicial review sought reduction of a decision by a local authority not to grant a discharge of an agreement entered into in 1988 between the authority's statutory predecessor and the petitioner under section 50 of the Town and Country Planning (Scotland) Act 1972 whereby, in return for being granted planning permission in respect of a development, the petitioner agreed to construct a road and footpath providing access to any future housing development. In 1997 planning permission was granted to the petitioner's neighbouring proprietor to develop her land for housing. The petitioner then sought to repudiate his road construction obligation under the section 50 agreement on the grounds that it was intended only to apply in the case of a housing development by the local authority and not by another private developer. The petition for judicial review was dismissed as incompetent in that it raised issues of contractual right and obligation and not matters of any abuse or excess of jurisdiction suitable for review under the court's supervisory jurisdiction.

1 1999 SLT 93, OH per Lord MacLean.

9.73 In Bondway Properties Ltd v Edinburgh City Council a petition for judicial review of the local authority's grant of planning permission for an edge-of-town cinema and leisure complex was brought by a company who had earlier been granted outline planning permission by the same authority
for a city centre cinema and leisure complex. The petitioner argued that the subsequent grant of planning permission to their commercial competitor contravened the council’s own policy guidelines and failed to take into account that commercially the town-centre development could not proceed if the out-of-town complex were given the go-ahead. The judicial review petition was dismissed as incompetent on the grounds that a commercial competitor had no legal (as opposed to commercial) interest in another’s grant of planning permission and could not challenge it before the courts where it could not be said that their own legal rights were infringed.

1 1999 SLT 127, OH per Lord Phillip.

9.74 To similar effect was the decision of the Inner House in Asda Stores Ltd v Secretary of State for Scotland¹ that an unsuccessful applicant for planning permission had no right of appeal against the grant of permission to any other applicant and a petitioner could not complain of unlawful or prejudicial treatment simply arising from the manner in which another’s application has been treated. By contrast in Lakin Ltd v Secretary of State for Scotland² judicial review was sought by the petitioner whose application for permission to build a superstore had been called in and rejected by the local regional council and was currently under appeal to the Secretary of State. The petitioner sought reduction of a decision of the Secretary of State for Scotland declining to call in a commercial rival’s planning application for a superstore which had been granted by the regional council contrary to the local structure plan. The petition was found to be competent at first instance³ and it was held by the Inner House that, in considering the merits of the competing applications before deciding not to call in the competitors’ application, the Secretary of State had deprived the petitioners of their legitimate expectation of having their appeal determined at a public local inquiry and had prejudged that issue and pre-empted the appeal in the petitioner’s case. It was further held that the procedure adopted by the Secretary of State was improper and unfair. The petitioners’ were found to have title to sue by virtue of their legal relationship with the Secretary of State occasioned by their pending appeal and the infringement of their rights connected with that appeal.

1 1998 SCLR 246.
2 1988 SLT 780.
3 See London and Clydeside Estates Ltd v Secretary of State for Scotland 1987 SLT 459.

9.75 In Pollock v Secretary of State for Scotland¹ the Lord Ordinary, Lord Cameron of Lochbroom, considered the effect of an ouster clause which purported to exclude the court’s jurisdiction to question the validity of certain decisions made under the Town and Country Planning (Scotland) Act 1972, except where application was made to the courts under the Act within six weeks of an action complained of but only on the bases that either the action was not within the ambit of the Act, or that a relevant requirement has not been complied with. The jurisdiction of the courts in respect of any refusal or failure on the part of the Secretary of State to take certain actions was preserved by section 231(4). The petitioners, who were
owners of land adjacent to a quarry, were not notified, due to inadvertence or oversight by the applicants, of an application for planning permission to tip waste in the quarry. Nor were they advised of an inquiry into the matter by a reporter appointed by the Secretary of State after the local authority failed to determine the application within the prescribed time. Since they knew nothing of the application or the subsequent decision of the reporter to grant it in accordance with the terms of an agreement reached between the local authority and the owners of the quarry which regulated the management of the waste disposal site, the petitioners did not exercise their statutory right of appeal to the courts within the time provided by the statute. The petitioners, however, raised proceedings for judicial review, seeking reduction of the reporter's decision on the basis that it was ultra vires as a result of procedural irregularity and also that they had a legitimate expectation to have their objections heard which had unlawfully been denied them and that their failure to use the statutory appeal procedure was, in the circumstances, excusable. In dismissing the petition on grounds of competency, the court held that where the parties concerned had acted in good faith, the decision of the reporter was not void but at best voidable and that the failure to challenge it in the statutorily prescribed period and manner rendered the decision unchallengeable in law.

9.76 In Lochore v Moray District Council\(^1\) the failure duly to notify a co-terminous proprietor of a planning application for a chalet development was discovered by the neighbour prior to the application being granted and was raised by him with the local authority when advising of his wish to object to the granting of the application. Rather than give formal notification of the application and thereby accord him standing to participate in the planning process as an objector, without informing the petitioner, the applicants simply amended their application so that the proposed development site no longer abutted the petitioner's property. The application as so amended was then granted by the local authority without notification to or the participation of the petitioner. He successfully sought judicial review of this decision, Lord Cullen held that although the it had not acted in a manner which could be formally stigmatised as *ultra vires* in granting the amended application by not giving the petitioner a fair opportunity to state his reasons after they allowed the amendment, [the local authority] failed in their duty to act fairly in the manner in which they arrived at their decision. In my view the denial of the opportunity to make representations in the particular circumstances of this case amounted in itself to substantial prejudice\(^2\).

1 1993 SLT 1173, OH.
2 1992 SLT 16 at 21.

THE OVERLAP BETWEEN PLANNING AND ENVIRONMENTAL LAW

9.77 The environmental impact caused by pollution from a proposed development may be a planning consideration relevant to location and a
direct bearing on land use\(^1\). Planning authorities accordingly require to consider the pollution implication of proposed developments, even where there are specific regulatory authorities concerned with the protection of the environment and hence an element of overlap with pollution control.


9.78 As we have seen, the Environmental Assessment directive (EC Council Directive 85/337)\(^1\) requires consideration to be given to the effects on the environment of both public and private development projects before planning or development consent may be granted. The appropriate authority with responsibility for development control must consider the environmental impact assessments produced together with any representations from environmental bodies and the general public before determining whether or not consent should be given to the project in question. There is a lengthy series of statutory instruments produced in the course of 1988 and 1989 and subsequently which are intended to cover the various types of developments encompassed by the directive. These include general town and country planning developments\(^2\).

2 See generally the Environmental Assessment (Scotland) Regulations 1988, SI 1988/1221. These regulations are to be consolidated in new regulations in implement of EC Council Directive 97/11, the Environmental Assessment (Scotland) Regulations 1999.

9.79 Section 36(2) of the Environmental Protection Act 1990 requires that appropriate planning permission be obtained before any waste management licence may lawfully be issued in respect of a particular site. The conditions which may be imposed in the granting of such planning permission and the reasons for refusal of permission must relate to proper planning matters\(^1\).

1 See Norfolk County Council v Green (E) & Son (1994) 9 PAD 79 for an English case decided under the corresponding provisions of the English planning legislation.

PLANNING LAW AND THE EUROPEAN CONVENTION

9.80 Case law of the European Human Rights Commission and the Court of Human Rights has highlighted the potential relevance in planning law cases of the right to peaceful enjoyment of possession embodied in article 1 of Protocol No 1 to the Convention on Human Rights as well as the right of access to a fair hearing before a court as set out in article 6.

9.81 In Sporrong and Lönnroth v Sweden\(^1\) the Court of Human Rights held that the long delay between the granting of authorisations to the City of
Stockholm for the compulsory purchase of properties with a view to the redevelopment of the city centre in itself constituted of an interference with the applicant's rights to peaceful enjoyment of their possessions. The applicants were prohibited from carrying out any further construction of their properties while the relevant expropriation permits were in force and had no proper legal remedy open to them before their national courts to allow them to resolve the uncertainty over the future of their properties. This was held to constitute an individual and excessive burden on the property owners which was not outweighed by general considerations of the public interest. The court awarded some 1.15 million Swedish Crowns to the applicants by way of just satisfaction of their claims.


9.82 By contrast in *Phocas v France* the court held that a restriction imposed as a preliminary to a possible compulsory purchase scheme on an individuals' right to develop his property was, in the circumstances, a proportionate interference with his right to his enjoyment of his possessions since he could require the authorities to effect the purchase of his property within a specified period.

1 1996 RJD 1996-II No 7.

9.83 In *Allan Jacobsson v Sweden* a prohibition by virtue of planning controls of which the applicant was aware when he purchased the property on the building of a second house on the plot where the applicant already had one home was held not to be a contravention of his rights under Article 1 Protocol 1 of the Convention, while in *Pine Valley Developments v Ireland* the lawfulness of a refusal of permission for commercial development within the designated green belt was upheld by the Court of Human Rights.

1 A/163 (1990) 12 EHRR 56.

9.84 Finally, in *Bryan v United Kingdom* the Court of Human Rights held that the procedures in planning appeals and inquiries from which decisions there is limited possibility of review by, but not de novo appeal on the facts to, the courts did not constitute a violation of the article 6(1) of the Convention which guarantees of access to the courts. The reporters, however, were themselves bound by the provisions of article 6(1) to reach their decisions in planning matters impartially and objectively and to ensure a fair hearing was give to all parties with an interest.

INTRODUCTION

10.01 Petitions for review of the decisions of the immigration authorities, particularly in relation to applications for asylum, have been one of the main areas of growth in judicial review in Scotland in recent years. Many of these petitions go no further than the stage of obtaining a first order, however, since their primary purpose is often simply to obtain the release from detention of persons detained by the immigration authorities pending either further investigations into their status, or the resolution of their statutory rights of appeal against orders for deportation.

10.02 There are few written decisions setting out the reasoning of the courts in granting or refusing the application for an interim liberation order. It has been stated that there is no presumption in favour of the courts in granting interim liberation in immigration matters. However, experience suggests that the Scottish courts will nonetheless normally grant an application for interim liberation of a petitioner under detention in an immigration or asylum matter, unless exceptional circumstances can be shown to justify continued detention by the Secretary of State.

10.03 Although rarely made explicit, the apparent disposition of the Scottish courts to grant such applications as a matter of course tends to suggest that there is a strong weight given by the courts to the preservation of the liberty of the individual. There would appear to be a marked difference in the approach taken in Scotland as compared to the English courts in the area of detention by order of the immigration authorities pending investigations or deportation, despite the fact that both are interpreting the same statutory provisions and it might be thought that Parliament intended the law in this area to be administered uniformly in both England and Scotland.

1 See R v Governor of Durham Prison, ex p Hardial Singh [1984] 1 All ER 983, R v Secretary of State for the Home Department, ex p Wasfi Suleiman Mahmoud [1995] Imm AR 311 and Tan Te Lam v
10.03 Judicial Review and Immigration and Asylum Law

Superintendent of Tai A Chau Detention Centre [1996] 2 WLR 863, PC for a review of the principles applied by the English courts in considering the lawfulness of administrative detention in immigration cases.

2 Thus, in Lord Advocate v Dumbarton District Council 1990 SLT 158 at 163, HL, Lord Reid stated:

There would appear to be no rational grounds on which a different approach to the construction of a statute [which applies uniformly to the whole of the United Kingdom] might be adopted for the purpose of ascertaining whether or not the Crown is bound by it according to the jurisdiction where the matter is being considered.

10.04 It may be that this difference in judicial attitude to detention in immigration and asylum cases is explicable by differences in criminal procedure north and south of the Border. There are strictly enforced time limits in Scots law on the periods for which persons may lawfully be kept in custody awaiting trial. By contrast, until recently, the position in England was that an accused in detention was only to be arraigned before the Crown Court within 112 days. Although the trial might not commence for some time, often a long time, after arraignment the accused could still lawfully be held in custody, notwithstanding the existence of the writ of habeas corpus. Other factors which may account for the Scottish approach to ordering interim liberation are that there are no specialist detention centres in Scotland for immigration detainees and prison conditions are thought to be ‘particularly uncongenial’ for people in their position; and, in the case of petitioners from the Indian sub-continent, the existence of a settled and close-knit community with individuals willing to stand surety and able to provide financial support and accommodation within Scotland to those released from detention.

1 In Scotland an accused person may not be detained on the basis of a warrant committing him for trial for any offence for a total period of more than 110 days. If the trial has not been commenced within that period, and no extension has been obtained, then the accused must be released forthwith and cannot face any further prosecution in relation to that offence. See the Criminal Justice (Scotland) Act 1995, ss 65(4)(b) and 147(1) and, generally, Renton & Brown Criminal Procedure (6th edn, 1996) at paras 9–27 to 9–31.


3 Sukhdev Singh (11 September 1995, unreported).

10.05 The line of unwritten and unreported decisions in the area of applications for interim liberation does seem to point to the development of a particularly Scottish approach in administrative law, which emphasises the protection of the fundamental rights of the individual (freedom of person) against the preferences of the government authorities concerned to ensure effective and efficient deportation procedures. Whether or not this concern with individuals’ fundamental rights might spill over into other areas of immigration law, and indeed administrative and constitutional law generally, remains to be seen.
UNITED KINGDOM STATUTORY FRAMEWORK FOR ASYLUM AND IMMIGRATION CONTROLS

10.06 The principal statutes governing asylum and immigration controls are the Immigration Act 1971, the Asylum and Immigration Appeals Act 1993 and the Asylum and Immigration Act 1996.

Immigration Act 1971 – powers of detention, removal and deportation

10.07 Paragraph 16 of Schedule 2 of the Immigration Act 1971 gives wide powers of detention to immigration officers in two circumstances: firstly, if the person is liable to examination he may be detained under the authority of the immigration officer until he has been examined and the results of the examination is notified; secondly, detention may be ordered of a person in respect of whom a direction for removal may be made until such directions are made and he is removed in pursuance of them. Any person detained under Schedule 2, paragraph 16(1) pending examination has, if seven days have elapsed since the date of his arrival in the United Kingdom, the right to apply to an adjudicator to be released on bail.

10.08 A person who had entered the United Kingdom otherwise than in accordance with the requirements of the Immigration Acts may be declared an 'illegal entrant'. Illegal entrants are liable to immediate removal from the United Kingdom by directions of an immigration officer or of the Secretary of State on the same basis as if he was a person who had been refused leave to enter. Where a person is initially a legal entrant who overstays he becomes a person who is potentially subject to deportation. Directions specifying the country to which the illegal entrant or deportee is to be removed (normally the country of citizenship) may be given by the immigration officer and by the Secretary of State.

10.09 In the case of applicants who are without national identity documents, the country of origin may refuse to accept their return from the deporting country until such time as replacement identity documents showing their nationality have been obtained from the appropriate local registry office in the country. In the case of re-applications for an Indian passport, this process can take up to one year and the applicant may be liable to be detained in prison in the United Kingdom throughout this period.

Applications for asylum

10.10 A person subject to deportation or removal may apply at any time, whether in custody or not, for asylum in the United Kingdom on the
grounds that he has 'a well founded fear of persecution in his country of origin for reasons of race, religion, nationality, membership of a particular social group or political opinion'. Under section 6 and Schedule 2 of the Asylum and Immigration Appeals Act 1993 applicants for asylum are protected from removal while their applications are being considered and during the period in which they either appeal or may appeal.

10.11 Once an application for asylum is made, the Secretary of State is bound to consider whether or not the applicant is a member of a persecuted group who, simply by virtue of their religion or national origins, have a claim to refugee status under the 1951 United Nations Convention Relating to the Status of Refugees (as amended by the 1967 Protocol). In the case of Sikhs in India, the Secretary of State's current finding is that they are not, as a group, persecuted for their religion or national origin. The Secretary of State is still obliged to consider whether the circumstances of the particular individual are such as may entitle him to asylum. The Secretary of State considers the overall consistency and makes an assessment of the credibility of the applicant's account of persecution and fear of mistreatment if returned to his home country. In the vast majority of cases the applications are refused. The government has estimated that some 75% of asylum applications are refused because they do not meet the requirements of refugee status or exceptional leave to remain. The vast majority of these unsuccessful applicants appeal against the initial decision but their is a success rate on appeal of only some 6%.

1 In Bila (3 March 1993, unreported) the Second Division refused a reclaiming motion which sought to challenge the Secretary of State's finding that Sikhs in India did not form a persecuted group having claim to refugee status under the 1951 UN Convention Relating to the Status of Refugees. See also Parminder Singh (10 July 1998, unreported) OH. Cf Jaswinder Singh 1998 SLT 1370 OH and Chahal v United Kingdom (1996) 23 EHRR 413, E Ct HR at 437, 445 and 457.

Asylum and Immigration Appeals Act 1993

10.12 Article 13 of the European Convention on Human Rights provides that:

'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by person acting in an official capacity'.

In Vilvarajah v United Kingdom¹ the European Court of Human Rights, finding in favour of the United Kingdom government and over-ruling the decision of the Commission of Human Rights, ruled that the powers of national courts in judicial review proceedings provided an adequate degree of control over the decisions of administrative authorities in asylum cases sufficient to fulfil the requirements of article 13

10.13 With the enactment of the Asylum and Immigration Appeals Act 1993 (AIAA 1993), asylum applicants' procedural protection was increased, in that they were given an automatic and suspensory right of appeal to an administrative tribunal to reconsider the refusal by the Secretary of State to grant asylum. Previously the appeal process by a refugee claimant who had been refused asylum could only be pursued after removal to the country of asserted persecution. In effect, AIAA 1993 assimilated the appeals procedure already available to persons subject to deportation orders as illegal entrants or overstayers with applicants for asylum.

10.14 This appeals procedure is kept within an administrative framework rather than within the general purview of the courts. Thus 'special adjudicators' hear appeals in the first instance against the following decisions of the Secretary of State:

- refusals of leave to enter or remain in the United Kingdom; or
- variations or refusals to vary limited leave to remain under the Immigration Act 1971 Act; or
- a decision to make, or to refuse to revoke, a deportation order on the grounds that such refusal would be contrary to the United Kingdom's obligations under the 1951 Convention relating to the Status of Refugees.

Appeal against the special adjudicator's decision lies, with leave, to the Immigration Appeal Tribunal. There is also provision, under AIAA 1993, for an appeal, with leave, from the Immigration Appeal Tribunal on a question of law material to its determination, to the Inner House in Scotland and the Court of Appeal in England.

10.15 The rationale for providing a dedicated administrative appeal system in immigration and asylum matters is that, given that asylum and immigration law is a specialised and highly technical area of the law, dedicated appeal tribunals will be more able speedily and efficiently to reach decisions at lower cost and with less need for formality. It should be noted that the members of the appeal bodies (the special adjudicators) are experienced lawyers, independent of the civil service and the Secretary of State and not infrequently reach findings which overturn the original decision of the Secretary of State to deport, to find that there is no well founded fear of persecution, or to refuse the applicant leave to remain within the country.

The Asylum and Immigration Act 1996

10.16 The Asylum and Immigration Act 1996 (AIA 1996) was said to supplement and amend both the Immigration Act 1971 and the Asylum and Immigration Appeals Act 1993. In fact, its purpose was to drastically
limits the appeal rights provided under these earlier Acts. AIA 1996, section 1 gives the Home Secretary the power 'to designate by order countries where there is in general no serious risk of persecution.' Asylum claims from these countries would be presumed to be unfounded and would be dealt with under an accelerated appeals procedure whereby the applicants would be given only 10 days in which to produce all necessary supporting documentation on which their claim to a well founded fear of persecution by reason of their race, religion, nationality, membership of a particular social group or political opinion was made.

10.17 AIA 1996, section 2 provides for the removal of any asylum claimant to a third country other than his country of origin where the Secretary of State has certified: (1) that his life and liberty would not be threatened in that country or territory by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and (2) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Convention relating to the Status of Refugees. Section 3 of AIA 1996 provides for an appeal against such certification by the Secretary of State that the third country is 'safe' but provides that any such appeal against certification will not suspend the deportation to the third country. Indeed, the appeal may, in cases in which the third country is a signatory state of the Convention or has otherwise been formally designated on a safe list by the Secretary of State, only be exercised from outside the United Kingdom.

10.18 Section 4 of AIA 1996 creates a new criminal offence of obtaining by deception leave to remain in the United Kingdom. Thus if the illegal entrant seeking asylum is not deported as an illegal entrant for such deception (because there is no suitable country to accept him) he may still be imprisoned in the United Kingdom. Section 5 makes it an offence for third parties to assist for gain in obtaining another's leave to remain in the United Kingdom 'by means which he knows or has reasonable cause for believing include deception' unless this assistance is offered in the course of his employment by a bona fide organisation whose purpose is to assist refugees. Section 5 also makes it a criminal offence for anyone to 'facilitate for reward ... the entry into the United Kingdom of anyone whom he knows or has reasonable cause for believing to be an illegal entrant ... [or] an asylum seeker'. Section 8 makes it a criminal offence, punishable by fine, to employ someone who has no immigration entitlement to work in the United Kingdom.

10.19 Section 9 of AIA 1996 gives the Secretary of State power to specify that certain classes of person who require leave to enter or to remain in the United Kingdom will not be entitled to housing assistance or any entitlement to council housing or other statutory protection for the unintentionally homeless. Section 10 provides that the Secretary of State may require that persons need leave to enter or to remain in the United Kingdom shall not be entitled to Child Benefit unless they satisfy certain
conditions to be specified in regulations. Section 11 allows regulations to be made to exclude asylum seekers from any entitlement to income support, housing benefit, council tax benefit or job-seeker’s allowance. In *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* the legality of some of the new rules restricting benefits for asylum seekers was successfully challenged before the courts by judicial review.

1 [1997] 1 WLR 275. See also *R v Secretary of State for the Home Department, ex p Salem (AP)* (11 February 1999, unreported) HL.

### The Special Immigration Appeals Commission Act 1997

10.20 The Special Immigration Appeals Commission Act 1997 (SIACA 1997) was introduced by the government in the wake of the finding by the European Court of Human Rights in *Chahal v United Kingdom*¹ that the United Kingdom was in breach of articles 3, 5(4) and 13 of the European Convention on Human Rights both in denying the applicant an effective remedy before the courts to challenge an order, made on grounds of national security, for his deportation to India and by failing to provide him with an effective opportunity to have the legality of his six year detention pending deportation tested before the courts. The applicant was a leading Sikh militant who claimed that there was a real risk that he might suffer torture or inhuman or degrading punishment or treatment if returned to India.

1 (1996) 23 EHRR 413.

10.21 SIACA 1997 established the Special Immigration Appeals Commission, chaired by a (former) judge, sitting with at least two others, one of whom should be a member or Chief Adjudicator of the Immigration Appeal Tribunal (IAT) and the other preferably having experience in national security matters, to consider on appeal the legality of orders for an individual’s exclusion, departure, removal or deportation from the United Kingdom made on the claimed basis of the public good or national security. A similar right of appeal is provided for those who claim enforceable Community law rights to enter the United Kingdom but are refused entry on the basis of the public good.

### The Role of the Courts in Judicial Review in Immigration and Asylum Cases

10.22 The failure by an applicant for judicial review to use the statutory appeal procedures provided under the AIAA 1993 may result in the courts in England¹ and Scotland² refusing to hear any application for judicial review of the decision complained of since the alternative avenue of appeal had not been exhausted. Exceptional circumstances have to be shown to excuse the failure to pursue an alternative statutory remedy. In *Mensah v Secretary of State for Scotland*³ Lord Coulsfield stated, after reviewing the authorities, as follows:
10.22 Judicial Review and Immigration and Asylum Law

'\[R\]ecourse to the Court of Session is not excluded in a case of ultra vires or similar fundamental invalidity of a decision or action, unless, of course, the particular statute does on its proper construction provide for such exclusion. Further, I can see no reason in the authorities to think that a person's right to challenge a decision in the court on the ground of fundamental invalidity should be lost because he has used the statutory remedy but not raised the issue of validity. If the decision is fundamentally invalid, I do not see why it should matter at what stage that is brought to light'.

1 See eg R v Special Adjudicator, ex p Arthur (Frank) [1994] Imm AR 246, QB.
2 Sangha 1997 SLT 545, OH per Lord Marnoch.
3 1992 SLT 177, OH.

10.23 In Alagon v Secretary of State for the Home Department\(^1\) Lord Prosser held that judicial review was available to review a decision of the special adjudicator, notwithstanding the failure to use the statutory appeal process to the IAT, since the facts of the case showed that there was both 'a demonstrable miscarriage of justice' and that exceptional circumstances existed for the court's involvement. The adjudicator's decision had deprived the applicant of entry clearance to which it was now known she had been entitled, but she had no statutory means of renewing her application since she was now over age and there had been a recommendation by the adjudicator that she be admitted notwithstanding his own refusal. Somewhat more controversially, in Cho\(^2\) Lord Cameron held that the accumulation of grounds of procedural impropriety and irrationality averred in the judicial review petition before him were capable of constituting special circumstances such as to be an exception to the general rule that judicial review was not available when a statutory remedy was otherwise available and had not been exhausted.

1 1995 SLT 381, [1993] Imm AR 336, OH.
2 1996 SLT 590, OH.

10.24 It is sometimes argued that in the judicial review of asylum and immigration decisions, the courts should exercise a particularly tight control over the decisions of the Executive\(^1\). As Lord Bridge of Harwich has stated:

'The limitations on the scope of the court's power of review are well known and need not be re-stated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the most rigorous examination to ensure that it is in no way flawed according to the gravity of the issue which the decision determines. The most fundamental of all rights is the individual's right to life and when an administrative decision under challenge is said to be which may put the applicant's life at risk the basis of the decision must surely call for most anxious scrutiny'\(^2\).

These remarks were echoed by Lord Templeman in the same case who stated:

'In my opinion, where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision making process'\(^3\).

1 See eg Jaswinder Singh 1998 SLT 1370, OH.
2 R v Secretary of State for the Home Department ex p Bugdaycay 1987 1 AC 514 at 531F per Lord Bridge of Harwich.
3 1987 1 AC 514 at 537H, per Lord Templeman.

10.25 The effect of the emphasis on the need to exhaust the available statutory remedies means, however, that the courts to which application for judicial review is made will rarely, if ever directly scrutinise the merits of the original decision of the Secretary of State, but will instead concern themselves primarily with procedural issues, particularly as to whether or not the administrative appellate process has been properly conducted.

1 Stewart v Monklands District Council 1987 SLT 630.

UNITED KINGDOM CASE LAW ON DETENTION IN IMMIGRATION CASES

10.26 In Singh v Secretary of State for the Home Department1 Lord Penrose accepted that the decision of an immigration officer on detention was an aspect of the general administrative power conferred upon the Secretary of State and that the power of the courts to review such decisions was limited to the general principles of administrative law. There was no additional discretionary power in the court to override administrative decision. Further, there was no onus on the Crown to satisfy the court of the substantial grounds for detention. Rather the onus remained on the petitioner to present a prima facie case which would justify further inquiry. Failure to present such a case would result in dismissal of the petition.

1 1993 SLT 950.

10.27 The Court of Appeal in England has also re-affirmed the principle that in order for the High Court to grant bail or interim liberation from detention by an immigration officer, the court must find that the decision of the Secretary of State was unreasonable or erroneous in law. This is a very high test which allows broad considerations to justify refusal to grant temporary admission (and hence interim liberation) including the fear that the illegal entrant might go into hiding if released from detention.

1 Vilvarajah v Secretary of State for the Home Department [1990] Imm AR 457.

10.28 In Secretary of State for Home Department v Rehmat Khan1, the English Court of Appeal considered the relationship between the detention provisions of paragraph 16 of Schedule 2 of the Immigration Act 1971 (IA 1971) and the protection from removal conferred by the Asylum and Immigration Appeals Act 1993. It was argued on behalf of the applicants that the fact that asylum applicants were protected from removal by AIAA 1993 meant that they were no longer persons in respect of whom directions for removal could be given under IA 1971. Accordingly any detention of an asylum seeker under paragraph 16 of Schedule 2 of IA 1971 Act was ultra
vires. It was contended by counsel for one of the asylum seekers that the Secretary of State was treating the legislation as 'a licence to keep the respondents without limit of time pending consideration of their application for political asylum'. The Court of Appeal, however, unanimously rejected the ultra vires argument and reversed the judgment of Dyson J at first instance who had found in favour of the asylum seekers. Sir Ralph Gibson held (at p 354) that the protection against removal given by section 6 of AIAA 1993 did not exclude the power to detain illegal immigrant under paragraph 16(2) of the IA 1971 while their applications for asylum were being considered if there was reason to fear that they might abscond. Leave to appeal to the House of Lords was refused.

1 [1995] Imm AR 348 at 352.

10.29 Given that the decisions of the English Court of Appeal are not directly binding on Scottish courts, attempts have been made in Scotland to run the same arguments as were successful before Dyson J at first instance in Rehmat Khan to the effect that, where an application has been made for asylum, it is ultra vires for an immigration officer to order the detention of the asylum seeker under paragraph 16(2) to Schedule 2 of the Immigration Act 1971. These attempts have, to date, failed at first instance in Scotland1.  

1 See Balvinder Singh, also known as Balvinder Singh Cheema 1997 SLT 194, OH per Lord Dawson.

SCOTTISH PRACTICE ON INTERIM LIBERATION IN ASYLUM AND IMMIGRATION CASES

10.30 If an illegal entrant or asylum seeker is without family or assets in the United Kingdom, immigration officers often consider that there is a high risk that, if released from custody pending the recovery of appropriate travel documents and or the resolution, after appropriate investigations, of the asylum application, the applicant will abscond and go underground and be unavailable to be deported. An order is therefore commonly made for his (continued) detention1.

1 See eg Zhu v Secretary of State for the Home Department 1998 SLT 1251, OH.

10.31 At this stage, an application is often made to the courts for liberation of the applicant from detention. The normal grounds for such an application are that it is prima facie unreasonable to detain in prison without any specific limit of time a person who has not been convicted of any crime. In the case of a petitioner in detention in Scotland, the court is generally asked at the stage of the presentation of the petition to it, to make not only a first order but also an order for interim liberation pending the first hearing into the matter. The reasons for seeking interim liberation from detention in Greenock Prison, which is the usual detention centre for asylum seekers and other immigrants detainees in Scotland, are often set out in almost standard form in the petition: racial abuse; unsuitable food; willingness to abide by reporting requirements to a local police office;
suitable alternative accommodation; ability of friends or relations to make payment of a sum by way of surety.

10.32 The Scottish courts rely on the ex parte statements of counsel appearing before them to come to a view as to whether interim liberation is appropriate in the circumstances of the case. There appears to be little or no attempt made by the court at the stage of granting a first order and considering an application for interim liberation to assess the strength of the legal case set out in the petition which might justify the court's overturning of the decision of the immigration officer. A general claim of irrationality, that is to say that no reasonable immigration officer would have reached the decision to detain the petition, appears to be enough to persuade the courts that there is a sufficient prima facie case alleged to justify a full first hearing before the court.

10.33 Despite the fact that it is regularly submitted on behalf of the Secretary of State that it would be contrary to the principles of administrative law for the court to make an order for interim liberation simply on the grounds that the court would, in the exercise of its discretion, have reached a different decision from that of the immigration officer, the Scottish courts regularly grant such orders on the grounds that it is satisfied that the petitioner has made out a prima facie legal argument and that the balance of convenience favours the making of such an order1.

1 See Hadji (10 May 1994, unreported) OH where Lord Caplan considered the question of the expenses to be awarded in the case of legally aided petitioner who successfully obtained an order for interim liberation but thereafter abandoned the petition for judicial review. In Balvir Singh (26 April 1996, unreported) OH Lord Gill considered the circumstances in which expenses might be awarded to an applicant for judicial review whose petition was no longer proceeded with following a change in circumstances which resulted in the petitioner being granted leave to remain.

10.34 The readiness on the part of the Scottish courts in applications for interim liberation to interfere in the exercise of the discretionary powers granted by Parliament to the Executive, by reversing the decision of the immigration authorities to order detention contrasts markedly with the situation in England where such a course is not lightly undertaken by the courts and rarely if ever, be embarked upon at an interim stage before proper argument and evidence has been heard1. In this, the English courts clearly see themselves as constrained by the basic principle of administrative law that judicial review should not be seen as an appeal to the judges to consider the substantive merits of a (discretionary) decision anew2.

1 See Swati v Secretary of State for the Home Department [1986] Imm AR 88.
2 See Bugdaycay v Secretary of State for the Home Department [1987] 1 All ER 940, HL per Lord Templeman at 955.

10.35 In one area, however, asylum applicants would appear to be in a stronger position if they seek to judicial review in England rather in Scotland of the Secretary of State’s decision to deport them. In the English
case of \textit{M v Home Office}, concerning a Zairian entrant who was served with a deportation order to return to Zaire, an interim court order was granted as a matter of urgency preventing the applicant from being forcibly deported pending consideration by the court of his claims that he would highly likely to be persecuted by the Zairian authorities on his return. This order was not complied with by the immigration authorities on the grounds that the courts had no power to order or to enforce prohibitory injunctions against the Crown. The applicant was, notwithstanding the court order faxed to the Secretary of State, still ordered to be placed on a plane from London to Paris and thence was forcible escorted onto a flight back to Zaire. He has never been heard of again.

1 [1993] 3 All ER 537, HL.

10.36 The Judicial Committee of the House of Lords held that the failure by the Secretary of State to conform to the court order amounted to contempt of court. Ministers of the Crown were held to be fully subject to the rule of law in England even when acting under the prerogatives of the Crown. It is, perhaps, unfortunate that leading judgment of Lord Woolf in this case formally justified this fundamental constitutional shift in the relationship between the Executive and Judiciary by construction of section 21(1) of the Crown Proceedings Act 1947 in the light of section 31 of the Supreme Court Act 1981, a provison applying only to England and Wales.

10.37 As a result of the decision in \textit{M v Home Office}, the Home Office has now undertaken, as a matter of policy, not to remove persons from the territorial jurisdiction of the courts when applications have been made for judicial review unless and until those proceedings have finally been determined in the Home Office’s favour. In Scotland, however, it has been stated by the Second Division of the Inner House that the courts have no power to interdict the Crown. The Home Office ‘undertaking’ would then apparently not be enforceable by court order in Scotland.

1 \textit{McDonald v Secretary of State for Scotland} 1994 SC 234, 1994 692 SLT, 2nd Div.
2 See on this point Singh (31 January 1996, unreported), OH.

10.38 We have the paradoxical situation that if an individual asylum applicant wishes to avoid detention pending consideration of his application, he would be well advised to make such an application from Scotland. Should the immigration authorities then decide to deport him, even in contravention of a court order in Scotland, he would not, however, be able to prevent this by application to the courts in Scotland for interdict. In England, by contrast, the asylum applicant is liable to be detained in prison but the courts will protect him from any deportation until his legal rights have been exhausted.

10.39 It is to be hoped that this disparity between Scotland and England between the protection afforded to the individual against the actions of the Crown will be resolved in time. It is unclear whether or not this will require
direct legislative action. It might be argued in judicial review proceedings that the remarks in McDonald on the (non-) availability of interdict however unequivocal were, strictly, obiter and hence not binding on lower courts. The remedies of declarator and or suspension of decisions in Scottish judicial review might also lead to a gradual convergence of court practice in Scotland and England. Further remedies might have to be sought in European law.

JUDICIAL REVIEW IN SCOTLAND WHERE DETENTION IS NOT AN ISSUE

10.40 As a general observation it might properly be said that in asylum and immigration cases in which the continued detention by the immigration authorities is not at issue, the Scottish courts seem to take a more robust approach to the petitioner’s claims of substantive injustice and, in line with the practice of the English courts, appear to show greater deference to the decisions of the administration. It has been observed in one case that where the statutory process of administrative appeals in immigration matters has been exhausted, it will only be in the most exceptional circumstances that the courts will intervene in the exercise of their extraordinary jurisdiction to grant an equitable remedy.

1 See eg Akram v Immigration Appeal Tribunal, 1990 SC 1.
2 Gurnam Singh [1995] Imm AR 616, OH.

10.41 Petitions for judicial review in substantive immigration matters in recent years in Scotland have concentrated on two main areas: firstly, the duties of the special adjudicator and the Immigration Appeal Tribunal in immigration and asylum appeals: and secondly, the interpretation and application by the Secretary of State of the policies adopted by him regarding the grant of exceptional leave to remain on the basis of marriage to a United Kingdom resident spouse.

Duties of the Immigration Appeal Tribunal within the statutory appellate process

10.42 There is no obligation in considering an application for leave to appeal from a decision of the special adjudicator, for the IAT on its own motion to request an oral hearing. There is no obligation on the IAT in considering an application for leave to appeal to scrutinise all the papers in order to identify, of its own motion, any factual errors committed by the special adjudicator. The IAT will not be expected in considering an application for leave to appeal to seek out points not put to it in the application for leave and/or not raised before the special adjudicator. The obligation to prevent injustice to applicants does not extend to a duty to comb through determinations in search of possible points in the applicants’ favour. The IAT’S duty extend only so far as to scrutinise the adjudicator’s decision to see that on the face of it, and in the context of the grounds of appeal to the IAT, the determination was a proper one. The IAT should take note only of
plain errors in construction of statute or the immigration rules, obvious unfairness in procedure and any factual contradictions in the adjudicator’s approach.

2. R v Immigration Appeal Tribunal, ex p Tenfik Bouhelal [1997] Imm AR 116, QB.
3. Tuan Farveez Packeer v Secretary of State for the Home Department [1997] Imm AR 110, CA.
4. R v Immigration Appeal Tribunal, ex p Mustafa Aslan [1997] Imm AR 63 at 73, QB.

The duties of the special adjudicator in immigration and asylum appeals

10.43 It is a general principle of administrative law that where reasons are given, whether they are formally required or not, they may be subject to attack in so far as they are bad or inadequate to support the decision in question. It is important to remember, however, that in analysing the determination of a special adjudicator, passages should not be taken out of context of the decision as a whole nor should the words in the determination be treated as if words of statute. As Lord President Emslie has stated in relation to administrative decisions generally:

‘The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons were for it were and what were the material considerations which were taken into account in reaching it.’

1 See eg Safeway Stores plc v National Appeal Panel, 1996 SC 37.
2 R v Secretary of State for the Home Department, ex p Guhad [1997] Imm AR 1, QB per Jowitt J at 4.
3 Wordie Property Company Ltd v Secretary State for Scotland 1984 SLT 345 at 348.

10.44 In a series of cases in relation to the application of the now abandoned primary purpose test to marriages, the courts stressed the need on the part of the special adjudicator to conform to standards of clarity and logic in the their decision making. In particular, it was suggested that adjudicators should indicate in their decisions the following: the evidence they accepted; the evidence they rejected; whether there was evidence on which they could not make up their mind, whether or not it was accepted; and what, if any evidence they regarded as irrelevant. It is, of course, possible for the adjudicator to be persuaded that, while the witness was untruthful in certain matters and exaggerated or underplayed certain other factors, he might still be found to be overall a credible witness and one whose evidence could be trusted on the substance or centre-piece of his claim.

3. See eg Secretary of State v Chiner [1997] INLR 212, IAT.

10.45 The test adumbrated in the context of the primary purpose rule are now often cited as the general standards to which the decisions of the
special adjudicators must in all cases conform to be lawful\(^1\). Thus, it has been stated that in the context of an asylum application, if there was a question of disbelieving anything the applicant has said, that ought to be specified\(^2\). It would, it is suggested, be unwise simply to apply *dicta* relating to the standards to be applied by special adjudicators in determining whether or not a marriage was genuine or subsisting or was instead a sham entered into to evade immigration controls to the whole of the decision making process of the special adjudicators. Where, for example, an application for asylum is made on the basis of persecution for political beliefs, it is arguably not necessary to consider the credibility of the applicant’s evidence if the application fails the first *pro veritate* hurdle. Thus, the assessment by the special adjudicator in asylum applications might properly reflect the following pattern: assuming the asylum applicant’s evidence to be true, does this form the basis for a well founded fear of persecution here and now should he be returned to his country of origin and alleged persecution (relevancy test)? On this test, the basis for the alleged persecution (political beliefs) is tested against the political beliefs of those now in power in the country of origin. If there is now concordance between the political beliefs of the applicant and the political beliefs of those now in power in the country of origin, there is no need for any further inquiry, assuming always that the rule of law prevails and is enforced in the country of origin and that the relevant governing bodies wield power *de facto* as well as *hold authority de iure*\(^3\).

1. See eg the decision of Lord MacFadyen in *Jaswinder Singh* 1998 SLT 1370, OH.
3. See *R v Secretary of State for the Home Department, ex p Adan* [1998] 2 WLR 702, HL.

10.46 Thus, in an application for asylum for political beliefs, the credibility of the applicant’s evidence of past persecution need only be examined in any detail if there is no concordance between the applicant’s political beliefs and those now in accepted in his country of origin, because the special adjudicator has to determine whether or not the applicant before him has a well founded fear of continued persecution should he be returned to that country. In determining whether or not the fear of persecution is well founded, an analysis must be undertaken by reference to the circumstances then prevailing in that country to see whether the subjective fears of the applicant are objectively justified\(^1\). In assessing whether or not there was actual fear on the part of the applicant, the special adjudicator is entitled to apply the normal civil standard of proof\(^2\). In relation to the estimate of possible future persecution, the special adjudicator should then consider whether there is a reasonable degree of likelihood (‘reasonable chance’, ‘serious possibility’) that that persecution was likely to continue if the applicant were obliged to return\(^3\).

1. *R v Secretary of State for the Home Department, ex p Shivakum* [1988] Imm AR 147, HL.
2. *R v Immigration Appeal Tribunal, ex p Christopher Babihu* [1995] Imm AR 173, QB.

10.47 It should always be noted that ‘[t]he adjudicator, like any fact-finding tribunal, can only act on evidence of the facts. In civil litigation, the
evidence required to be produced by the party upon whom the burden of proving the facts lies must be evidence which satisfies the tribunal on the balance of probabilities. Where on the conclusion of the evidence the special adjudicator fails to address in his decision the material issues which have been properly brought before him, this may constitute grounds for the courts to quash the decision as inadequately reasoned.

2 See eg Abigail Gertrude Kuma 1999 SCLR 148, OH.

10.48 It is the policy of the Crown to concede petitions for judicial review on the advice of counsel where there would appear to be good prospects of the petitioner succeeding in his application. Unsurprisingly, then, the vast majority of petitions for judicial review of decisions of the immigration appellate authorities which have actually been argued before the courts in Scotland, particularly since the coming into force of the Asylum and Immigration Appeals Act 1993, have been unsuccessful, as the following examples show:

- In Harpal Singh v Secretary of State for the Home Department Lord Cullen, sitting as a Lord Ordinary, rejected a claim that the manner in which the special adjudicator conducted an appeal against refusal of asylum, in particular in refusing the petitioner’s solicitor a full day’s adjournment in order to examine certain documents, did not constitute a breach of natural justice such as to invalidate the decision;
- In Azizan Bibi Lord Kirkwood found that there was no basis in the petition to indicate that the refusal of leave to appeal to the IAT was such that no reasonable IAT Chairman could have reached this decision;
- In Ouafi v Secretary of State for the Home Office Lord Johnstone dismissed a petition which sought to argue that, in the case of applicant’s for asylum from Algeria, the special adjudicator had to be satisfied that he would not be at risk of persecution should he be returned to his home country. Rather the court held that there has to be positive evidence that this particular applicant or petitioner was at risk to found the basis for an asylum claim;
- In Sangha v Secretary of State for the Home Office Lord Marnoch held that a party’s failure on the advice of an immigration counsellor to follow through the statutory appeal process against a refusal of asylum did not constitute exceptional circumstances such as to permit recourse to the courts by way of judicial review. There was no reason to depart from the general rule that a party and his agent be treated as one. Further, the Lord Ordinary expressed doubts as to the appropriateness of looking at the merits of a case before first deciding as a separate matter whether exceptional circumstances existed sufficient to excuse the failure to pursue the alternative remedy;
- In Dillon v Secretary of State for the Home Office the special adjudicator refused a motion by the applicant’s solicitor to have an asylum appeal hearing adjourned on the grounds that he had not had time to prepare his client’s case and instead proceeded with the hearing with the applicant unrepresented. It was held by Lord Marnoch that although he had given the wrong reason for refusing the adjournment (namely
that the applicant’s solicitor was experienced enough to present the case) a refusal was the only decision which could properly have been reached on the facts, given that there was no reasonable justification for the adjournment. The Lord Ordinary accordingly refused the applicant’s petition for judicial review of the adjournment decision;

- in *Kherkha*<sup>6</sup> Lord Milligan dismissed a petition for judicial review of the refusal of the petitioner’s application for political asylum and of the decision of the special adjudicator to refuse the appeal on the basis that the petitioner had failed to exhaust his statutory remedies in appealing to the IAT. It was noted that the applicant had previously applied for asylum under a different name and had given varying accounts of the circumstances supporting his application;

- in *Atwal v Secretary of State for the Home Department*<sup>7</sup> Lord Kingarth refused a petition for judicial review of the decision of a special adjudicator where it was alleged that his decision either failed to take account of all relevant factors or gave insufficient indication of this in his decision, holding instead that it was open to the Secretary of State to disbelieve the applicant’s claims to fear persecution on account of his religious/political views;

- in *Thandi*<sup>8</sup> Lord Kingarth refused a petition seeking judicial review of the decision of the special adjudicator to uphold the Secretary of State’s refusal of asylum and held that the special adjudicator is not obliged to address his mind to the question as to whether or not he agreed with the Secretary of State that there was no serious risk of persecution in India on the basis that imposing such an obligation would, in effect, require the re-writing of the applicable statutory provisions; and

- in *Hussain v Secretary of State for the Home Department*<sup>9</sup> Lord Nimmo Smith upheld the decision of the IAT to refuse leave to appeal against a decision of the special adjudicator in a refusal of asylum claim and held that the underlying decision of the Secretary of State was not itself susceptible to judicial review once the statutory appeals procedure had been embarked upon;

- in *Kumar*<sup>10</sup> Lord Kingarth found that the special adjudicator had given full and adequate reasons for coming to her view that the petitioner was not a credible witness in support of his application for refugee status and that the decision of the IAT to uphold this decision was accordingly well founded;

- in *Antonio*<sup>11</sup> Lord Eassie upheld the special adjudicator’s decision as making proper findings in fact and indicating with sufficient clarity what parts of the evidence he accepted and which he rejected, together with his reasons for so deciding;

- in *Parminder Singh*<sup>12</sup> Lord Penrose emphasised, in dismissing a judicial review application of refusal of asylum, that it was the function of the special adjudicator and of the IAT and not for the court to assess such evidence as is put before them and to make such finding in fact as they think appropriate having regard to the quality of the evidence and the credibility and reliability which they afford it;

- In *Johnson François*<sup>13</sup> Lord Johnston held that a person claiming to be a police informer did not qualify for refugee status as he could not on those grounds be characterised as a member of a persecuted social
group and further, that an asylum claim may properly be determined on the basis of findings as to the lack of credibility of the witness;¹⁴

- In Rachid Reganne¹⁵ Lord Cameron of Lochbroom held that the duty of the special adjudicator was to evaluate the evidence brought before him and to decide on that evidence, on the findings which he makes, whether or not the refusal of asylum is justified. The benefit of any doubt should only be given to the asylum applicant where the special adjudicator is satisfied as to the general credibility of the applicant and his witness on the basis that their statements are coherent, plausible and do not run counter to the generally known facts and all the available evidence has been obtained and checked. Demeanour and lack of coherence of the witnesses could properly form the basis for a finding by the special adjudicator of a general lack of credibility. Further, in the absence of any evidence to the contrary, the special adjudicator was entitled to find that the Algerian courts would provide the applicant a fair trial against any possible criminal charge brought against him.

1 18 January 1995, unreported, OH.
2 31 March 1995, unreported, OH.
3 1997 SLT 544, OH per Lord Johnstone.
4 1997 SLT 544, OH per Lord Marnoch.
5 1997 SLT 842, OH.
6 3 January 1997, unreported, OH.
7 1 April 1997, unreported, OH.
8 15 July 1997, unreported, OH.
9 31 July 1997, unreported, OH.
10 3 March 1998, unreported, OH.
11 12 March 1998, unreported, OH.
12 10 July 1998, unreported, OH.
13 1999 SLT 79, OH.
15 5 August 1998, unreported, OH. Cf the decision of Lord Kingarth in Sohail Kashmire (26 January 1999, unreported) OH.

10.49 It should be noted, however, that in a number of more recent cases before the courts, certain of the Outer House judges have been shown to be ready to quash decisions reached under the statutory appeals procedure. The cases in which the courts have been ready to find fundamental procedural errors in the approach or reasoning of the immigration appellate authorities have generally been ones which appear to be strong on their facts, so that the courts are more willing to subject the activities of the Secretary of State and the immigration appellate bodies to particularly anxious scrutiny. Thus:

- in Sindar Singh, Petitioner Lord MacLean found that the decision of the Secretary of State to refuse the petitioner's application for political asylum was 'incomprehensible and contradictory' and therefore 'Wednesbury unreasonable';¹⁶
- in Cheng (KM)² Lord Cameron granted reduction of a decision of the Secretary of State that the petitioner was an illegal entrant who had been granted indefinite leave to remain by deception on the ground that the lack of any entry stamp on his passport was not sufficient to show that he had entered the country illegally;³
- in Oghonogho\(^4\) Lord Cameron quashed a decision of the Secretary of State that the petitioner was an illegal entrant on the grounds that she had entered the United Kingdom as a visitor but had over-stayed;
- in Major Singh\(^5\) Lord Prosser held that while it might be open to him in appropriate circumstances to grant a positive declarator that a petitioner was not an illegal entrant, the normal course, which he would follow in this case, was to grant reduction of an illegal decision on the basis that when one looked at what the immigration officer had recorded, said and done, one could find no rational basis for the conclusion that was reached in the her report;
- in Mecheti v Secretary of State for the Home Department\(^6\) Lord MacLean held that the reasoning supporting a decision by a special adjudicator to refuse an Algerian national political asylum was 'seriously flawed', as was the decision by the Chairman of the IAT to refuse him leave to appeal: reduction of both of these decisions was therefore granted by the court;
- in Kriba v Secretary of State for the Home Department\(^7\) Lord Hamilton held that the special adjudicator had misdirected himself and erred in law in rejecting without giving the petitioner the opportunity to produce further supporting evidence, the unchallenged and un-contradictory evidence from Amnesty International, described as an apparently responsible source, concerning the dangers facing failed asylum seekers returned to Algeria in support of the applicant's claim for asylum; and
- in Chinder Singh\(^8\) Lord Kingarth found that the special adjudicator had failed to give clear and adequate reasons for his decision rejecting an asylum claim on the basis of a well founded fear of persecution of the petitioner if he were returned to the Punjab;
- in Jaswinder Singh\(^9\) Lord MacFadyen held that in failing to state intelligible and adequate reasons for rejecting as unreliable certain documentary evidence produced in support of an asylum application, the special adjudicator had erred in law such as to justify the reduction of the decision of the IAT chairman to refuse leave to appeal against this decision;
- in Abigail Gertude Kuma\(^10\) Lord Abernethy quashed a decision of the Secretary of State against which no appeal to confirm a deportation order against the applicant, a 58 year old Ghanaian women who had lived with her two children in the United Kingdom for some 12 years, on the grounds that in his decision letter the Secretary of State had apparently failed to consider all the information put before him by the applicant. Such information included the fact that her children were financially dependent on her and that she had no means of support in Ghana and no realistic means of obtaining it, and that the Secretary of State did not properly take into account a relevant change of circumstances, namely that the petitioner's children had both been granted indefinite leave to remain in the United Kingdom.

1 5 February 1993, unreported, OH.
2 15 April 1994, unreported, OH.
3 Cf Cheng (15 April 1994, unreported) OH which upheld the decision of the Secretary of State that she was an illegal entrant who had entered the United Kingdom by fraud.
4 1995 SLT (Notes) 733.
10.50 The Immigration Rules, para 284\(^{1}\) prevent the petitioner, as an illegal immigrant, from applying in this country for an extension of his stay as the spouse of a person present and settled here. The Secretary of State has, however, a general discretion to enforce or not to enforce that rule and may, where he is convinced that sufficiently compelling compassionate factors exist, allow an applicant to remain in the United Kingdom on an exceptional basis outside the Immigration Rules.

1 Immigration Rules (HC 395).

10.51 In 1993 the Home Office set out in a purely internal document a policy showing how the Secretary of State’s discretion would be exercised in the case of individuals seeking leave to remain in the United Kingdom on the basis of their marriage to a United Kingdom settled spouse. The purpose of this document, known as DP/2/93, was to ensure consistency as well as compliance with European Human Rights standards in this area, in the decision making of Home Office officials. In 1996 this policy was replaced with the effect that where a marriage came to the notice of the Secretary of State after 13 March 1996 the applicable policy statement was to be found in DP 3/96.

10.52 In *R v Secretary of State for the Home Department, ex parte Mohammed Hussain Ahmed and Idris Ibrahim Patel*\(^{1}\) the English Court of Appeal rejected an argument that the provisions of the as yet unincorporated European Convention on Human Rights had to be given greater weight in relation to decisions made by the Secretary of State in the exercise of extra-statutory discretion under the prerogative, as compared to the exercise of statutory discretion. The argument was that the prerogative act of entering into a treaty such as the European Convention gave rise to a legitimate expectation that any prerogative discretion would be exercised in accordance with the obligations assumed under that treaty\(^{2}\). While accepting the general validity of such a legitimate expectation argument, the court rejected its application to cases governed by DP2/93 and DP3-5/95 since the legitimate expectation in such cases was that the policies therein would be applied, rather than the Convention.

1 [1998] INLR 570, CA.
2 See the Australian High Court decision in *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] 183 Commonwealth Law Reports 273.

10.53 As Lord Woolf MR noted in his judgment in *Ahmed*
'But for the point as to the prerogative taken by Mr Khadri, it is difficult to see any basis on which any of the applicants could have been entitled to leave to apply for judicial review. These cases all require the court to interfere with the application of what (apart from the ECHR) is a perfectly proper policy. Any argument based on the failure of the Secretary of State to give sufficient weight to the ECHR will be met by reliance upon the speeches of the House of Lords in R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696. As Lord Ackner in that case stated, to require the Secretary of State to have to conform with the ECHR 'inevitably would result in incorporating the Convention into English law by the back door' (at page 761H-762A)\(^3\).

1 [1998] INLR 570, CA.

10.54 In Sukhdev Singh Johal v United Kingdom\(^4\) the European Commission for Human Rights held by a majority that the applicants who were respectively the husband and children of a woman ordered to be deported to India notwithstanding her post-enforcement marriage had an arguable case for unlawful interference in their family life contrary to article 8 of the European Convention on Human Rights. Further, in the absence of an effective remedy to challenge the deportation order on its merits it could also be argued that there was a breach of article 13\(^2\).

2 As to pre-enforcement action, see paras 10.55ff.

Pre-enforcement action marriages v post-enforcement action marriages

10.55 Currently, in order to fall for consideration under either DP/293 or DP3/96, the marriage in question must pre-date any enforcement action taken against the applicant whatever the legal status of the applicant, whether illegal immigrant or asylum seeker.

10.56 In the case of marriages which post date enforcement action, that is to say which were concluded at a time when the individual in question was aware of the likelihood of his deportation or removal from the United Kingdom the general policy of the Secretary of State is, other than in the most exceptional circumstances, to enforce the applicable Immigration Rules and order deportation even where the marriage is a genuine and subsisting one and not a marriage of convenience\(^1\). Where a post-enforcement marriage is a genuine one and where the wife and child of the illegal immigrant have a right of abode within the United Kingdom it is then open to the petitioner to apply from outside the country to obtain leave to remain in the United Kingdom\(^2\).

1 See eg R v Secretary of State for the Home Department, ex p Akdemir [1997] Imm AR 498, QB.
2 See to this effect Irfan Ahmed v Secretary of State for the Home Department [1995] Imm AR 210, OH.

10.57 The rationality of the Secretary of State's position in distinguishing in DP/2/93 between pre-enforcement and post-enforcement marriages
has been upheld in a number of recent English decisions. In both Scotland and England the same United Kingdom statutory provisions and extra statutory concessions and policies are being applied: there is therefore a presumption that Parliament intended the law in this area to be administered and interpreted uniformly in both jurisdictions.

10.58 Thus, in R v Secretary of State for the Home Department, ex parte Balwant Singh¹ an application for leave for judicial review of this interpretation of DP/2/93 was refused in the following terms:

'The rationale of the policy [DP/2/93] does not have to do with marriages of convenience. They do not seem to rank under the policy. It has to do with what is done in relation to people who have entered into marriages which are genuine and which are still subsisting when they were not lawfully in this country.

The policy selects as a cut-off point the initiation of enforcement action. It does so, it seems to me, for an intelligible reason. That reason is that from the point where enforcement action is initiated, the entrant cannot legitimately say that he has entered into the marriage in all innocence or in the expectation of being able to stay. What is implicit in any decision to marry or to settle down into a cohabitation relationship once enforcement action has been initiated is the risk, which is now manifest, that it will be disrupted by removal. Having children in such a relationship also unhappily, sometimes desperately unhappily, blights the children with the same risk.

It is therefore a harsh effect that the drawing of a line may have, but the rationale of it, which seems to me to be indisputable, is what I have attempted to describe.

If, however, a genuine marriage pre-dates the enforcement action, then the Secretary of State has set out a series of further policy criteria according to which it will be determined whether the marriage should be disrupted by deportation or removal. It is only therefore if Mr. Khadri [counsel for the applicant] can assimilate or arguably assimilate somebody in his client's position to somebody who has married before enforcement action was undertaken that he can succeed².

1 [1997] Imm AR 331, QB.
2 [1997] Imm AR 331, QB per Sedley J at 334 (emphasis added).

10.59 Just such an attempt to transform a post-enforcement marriage into a pre-enforcement marriage for the purposes of Immigration law, and so obtain the benefit of DP/2/93 was made in R v Secretary of State for the Home Department, ex parte Adebiyi³. The illegal entrant in that case married after he had been served with a deportation notice and then briefly left the United Kingdom to visit Ireland, before returning. It was argued that the date of any enforcement action would commence on his re-entry to the United Kingdom, so making his marriage pre-enforcement and to be considered on its merits under and in terms of DP/2/3. His argument was rejected by the English Court of Appeal, Hobhouse LJ stating:

'The criterion which has been the subject of submissions before us is the criterion which refer to 'the marriage pre-dates the enforcement action'. There is no identification of any particular enforcement action in that paragraph. It is
completely generally expressed. In general terms, the marriage of this applicant did not pre-date enforcement action. When he married Shona Hunt he was already the subject of enforcement action. As is said in one of the letters which I have quoted the applicant must have appreciated at the time of his marriage that he could not found on that marriage under this policy statement because it was a marriage which he undertook at a time when he was subject to enforcement action.

Therefore in my judgment, it is clear both on the overall spirit of the policy statement and on its strict wording, this applicant does not have an arguable case.\(^2\)

1. [1997] Imm AR 57, CA.
2. [1997] Imm AR 57, CA per Hobhouse LJ at 61.

10.60 To similar effect is the decision of Carnwath J in *R v Secretary of State for the Home Department, ex parte Watson*\(^1\) in which it was held that for the provisions of DP/2/93 to be applied to a marriage subsequent to a deportation order conclusive evidence of a pre-existing common law relationship was required. Further, there was no legal requirement upon the Secretary of State to give reasons for his decisions and so failure on his part to do so could not, of itself, form a ground for quashing the decision.\(^2\) Even where the Secretary of State has, after initial refusal of leave to remain in the case of a post-enforcement marriage, and after representations granted an interview regarding the circumstances of the post-enforcement marriage, he is still not bound to give full reasons relating to the matters explored at interview in his subsequent letter notifying the applicant of his refusal to alter the original decision to deport\(^3\).

1. 2 April 1996, unreported.
2. See *R v Secretary of State for the Home Department, ex p Patel (Bina Rajendra)* [1995] Imm AR 223, QB.
3. See *Togaci v Secretary of State for the Home Department* [1998] Imm AR 38, CA.

10.61 In summary, where either DP/2/93 or DP/3/96 apply to the situation of an applicant (that is where a genuine and subsisting marriage pre-dates the enforcement action) the decision by the Secretary of State to deport such a person is, in the absence of exceptional reasons, perverse and will be quashed.\(^1\) Where, however, a marriage which is sought to be relied upon post-dates any enforcement action, the matter of leave to remain is one wholly within the discretion of the Secretary of State only to be challenged on *Wednesbury* principles. For the purposes of DP/2/93 'enforcement action' includes the issuing of notice of illegal entry, and so any marriage contracted after the issue of such notice will not benefit from the terms of the policy.\(^2\)

1. See *R v Secretary of State for the Home Department, ex p Amankwah (Benjamin Yaw)* [1994] Imm AR 240, QB. Cf Singh 1988 SC 349, OH.
2. See *R v Secretary of State for the Home Department, ex p Adebiyi* [1997] Imm AR 57, CA.
3. See *R v Secretary of State for the Home Department, ex p Kumar (Ramesh)* [1996] Imm AR 190, QB.

10.62 In *Ravindra Singh*\(^3\) Lord MacLean accepted the correctness of this line of English case law and dismissed a petition for judicial review in
which the applicant contended that, unless neither party is settled in the United Kingdom or the marriage is one of convenience or the couple are separated, there is no presumption in favour of deportation, no matter the date of the marriage, and that the whole matter should be subject to some further investigation.

1 Ravindra Singh (11 November 1997, unreported) OH.
2 See to like effect the decision of Lord Nimmo Smith in Kultwinder Singh Jaini v Secretary of State for the Home Department (No 2) (12 March 1999, unreported) OH.

Is Policy DP/3/96 more restrictive than DP/2/93?

10.63 DP/3/96 makes no explicit mention of the case law under the European Convention of Human Rights. Further, it seems on the face of it to modify Home Office policy DP/2/93 by making it a requirement for consideration for leave to remain that not only did any marriage have to pre-date any enforcement action, but had to pre-date it by a period of at least two years. Paragraph 5 of DP3/96 specifically provides that, as a general rule, deportation or illegal entry actions should not normally be initiated, that is to say that the normal immigration rules be exceptionally dis-applied, in the following circumstances: where the subject has a genuine and subsisting marriage with someone settled in the United Kingdom where the couple has lived together continuously in the United Kingdom since their marriage for at least two years prior to any enforcement action; and where it would be unreasonable to expect the settled spouse to accompany his or her spouse on removal.

10.64 Thus, the Home Office initially interpreted DP3/96 as meaning that, unless a marriage has subsisted for two years before any enforcement action, it will not fall into the concession set out in paragraph 5 of DP/3/96 and accordingly it would only be where there were ‘wholly compelling reasons’ for not otherwise enforcing the applicant’s departure from the United Kingdom that leave to remain would be granted. Where no such exceptional factors are present the normal deportation or removal rule would apply to spouses of marriages of less than two years pre-enforcement action duration just as they would to post-enforcement marriages. It should be noted, in support of this interpretation of DP/3/96, that note (iv) to paragraph 5 of DP/3/96 refers to two years genuine and subsisting pre-enforcement marriage as a ‘qualifying period’ or ‘criterion’ for the paragraph 5(a) concession or presumption against deportation to be applied.

10.65 In Salah Abdadou v Secretary of State for the Home Department, however, Lord Eassie rejected that interpretation. Relying upon certain dicta of Sedley J in R v Secretary of State for the Home Department, ex parte Urmaza, the Lord Ordinary found that since the decision in question bore to be in implementation of DP/3/96 it was open to the court to decide upon the correct interpretation of that policy statement. He stated:

‘The apparent intention of DP/3/96 is simply to give some assistance in assessing the weight to be given to the circumstances that the person concerned has married a spouse settled in the United Kingdom. Paragraphs 5 and
8 respectively set out two points or categories in a spectrum or variety of possible situations and categories in which the framers of the document felt it possible to set out a general presumptive approach. Paragraph 5 deals with those who have been married for two years prior to the initiation of the enforcement action and as respects whom it would not be reasonable to expect the settled spouse to accompany the other spouse on his or her removal. In such a case the general rule or approach in the department’s policy is that removal or deportation should not be initiated and leave should be granted. Paragraph 8 on the other hand deals with marriages contracted after enforcement action has been initiated and sets out a contrary presumptive guide that in those circumstances the marriage will not in itself be considered a sufficiently compassionate factor to militate against removal and therefore compelling circumstances must be put forward. However it is clear that other cases (such as that of this petitioner) exist which fall between those two selected categories. For such in-between categories DP/3/96 does not give any more specific advice than the reminder that each case has to be decided on its merits and that— as indicated in paragraph 4—in every case a view must be formed as to the weight to be attached to the marriage as one of the several circumstances to which regard must be paid.

1 1998 SC 504.
3 1998 SC 504, OH per Lord Eassie at 512–513 (emphasis added).

10.66 It is noteworthy that Lord Eassie’s construction of DP/3/96 makes it more consistent with the DP/2/93 which provides at paragraph 2(b) that ‘it does not automatically follow … that deportation/removal is the right course where this test (or marriage or cohabitation for 2 years or more) is not met’ [emphasis added]. Further it is clear from paragraph 2(c) of DP/2/93 that where there is a genuine and subsisting pre-enforcement marriage of whatever duration deportation/removal should not be initiated or pursued where ‘the settled spouse has lived here from an early age or it is otherwise unreasonable to expect him/her to accompany on removal’. Accordingly, had Salah Abdadou fallen under DP/2/93 there would have been no question of the decision-maker, on the facts before her, reaching the same decision to deport as was done under the apparent application of DP/3/96. Lord Eassie’s broader interpretation of DP/3/96 would not seem to accord, however, with the approach taken by the English Court of Appeal to the interpretation and application of the new policy.

1 See, most recently, R v Secretary of State for the Home Department, ex p Mohammed Hussain Ahmed and Idris Ibrahim Patel [1998] INLR 570, CA.

EUROPEAN COMMUNITY LAW AND UNITED KINGDOM IMMIGRATION CONTROLS

10.67 The right of European Community nationals (or citizens of the European Union) to move freely between member states is a cornerstone of the Community project. The implementation of this right within the United Kingdom has necessitated significant changes not only to immigration law, so as to permit the entry and residence of those endowed with
Community law rights of movement, but also to a diverse range of other rules and regulations, such as those governing social security benefits and student grant allocation, so as to guarantee that Community nationals are treated equally once they have entered the United Kingdom. 

1 See generally the Immigration (European Economic Area) Order 1994, SI 1994/1895.

10.68 In R v Immigration Appeal Tribunal, ex parte Antonissen the European Court of Justice held that although Community nationals may move to other member states in order to find work for the first time, national authorities are entitled to put a reasonable time limit on the length of stay a person may make in order to find employment. A deportation order on a Belgian national who had entered the United Kingdom in 1984 and had still not found work in 1987 when he was arrested on drug offences was found to be compatible with Community law since the applicant had failed to provide evidence that he was continuing to seek work and had a genuine chance of securing a job.


10.69 Community law is directly concerned only with Community nationals. Nationals of states which are not member states of the Community cannot directly claim rights under Community law, even where they are lawfully resident within the Community. The English Court of Appeal has confirmed that the different treatment of Community and non-Community nationals does not contravene the existing United Kingdom immigration rules.

1 In Case 12/86 Demirel v Stadt Schwäbisch-Gmünd [1987] ECR 3719 the European Court of Justice held that it did not have jurisdiction to rule on the lawfulness of the expulsion from Germany of the wife of a Turkish gastarbeiter since the matter was covered not by provisions of the Treaty of Rome but by a separate Association Agreement concluded between the Community and Turkey.


10.70 In order to facilitate freedom of movement, however, of Community nationals, Community law grants dependent rights to the family of the person who is primarily entitled to them, regardless of their nationality. Family members include spouses, dependent children and grandchildren, and dependent relatives in the ascending line (parents, grandparents etc). In the case of students, only spouses and dependent children are covered. The status of dependency is to be determined objectively, by reason of the fact that the entitled person actually provided support before leave to enter is sought and intends and is able to continue to do so. There is, however, no need to investigate whether the recipient really needs such support. Large numbers of non-Community nationals are entitled to free movement rights under Community law on this basis of dependency.

10.71 In United Kingdom asylum and immigration cases, Community law must be considered in two main situations: firstly, where the individual concerned is either a national of another member state, or he claims to derive Community law rights from such a person; secondly, where the individual claims to derive Community law rights from a British national, and the circumstances of the case are such as to involve a cross-border Community element and are not wholly confined within the United Kingdom.

1 In R v Immigration Appeal Tribunal, ex p Cheung (Wai Kwan) [1995] Imm AR 104, QB the English courts considered the case of a Hong Kong citizen who applied for leave to remain in the United Kingdom after overstaying his original leave to enter on the basis of his marriage to an Irish national. The court held that a deportee is not entitled to claim the protection of Community law where he married a Community national for the purpose of evading the provisions of national legislation.

2 The attempt by a Nigerian citizen to claim Community rights of free movement by virtue of his marriage to a United Kingdom citizen in R v Secretary of State for the Home Department, ex p Tombofa, [1988] 2 CMLR 609 failed before the Court of Appeal as there was no cross-border element.

10.72 The degree of cross-border element needed to allow someone with rights dependent upon a Community national to be able to rely upon Community law derived rights against the government of the primary right holder depends on the circumstances of the case. Thus, in R v Immigration Appeal Tribunal and Surinder Singh ex parte Home Secretary the European Court of Justice considered the case of an Indian national, the former husband of a British national, who had gone with his wife to work for two years in Germany. After they returned to the United Kingdom to open their own business, the parties divorced. The husband was, however, held able to claim a right of residence in the United Kingdom under Community law, as the spouse of a Community national who had exercised her Community rights of free movement (former article 48 of the Treaty of Rome) and establishment (former article 52) (now respectively articles 39 and 43 post-Amsterdam). The Secretary of State was accordingly found unable to proceed with a deportation order against him.


10.73 The Court of Justice has not yet ruled on the issue of how substantial the emigration to another member state must be in order to trigger the
operation of Community law, but the English High Court has refused to apply Community law on the basis of a four month, non-working stay in Belgium. It is likely that courts in the United Kingdom will examine closely the facts of the case, and the motives of the applicants, before sanctioning the avoidance of British immigration rules in this type of situation.

1 R v Home Secretary ex p Ayub [1983] 3 CMLR 140.

10.74 In R v Secretary of State for the Home Department, ex parte Zeghraba and Sahota the Court of Appeal rejected the argument that a person who was not a European Union citizen but who married a United Kingdom national should, by virtue of the provisions on free movement of workers contained in EC Council Regulation 1612/68, have the same rights of residence in the United Kingdom as his spouse when the parties returned to live and work in the United Kingdom after a period spent in another member state (Germany and Ireland respectively). Lord Justice Judge opined that rights under Community law were not to be elided with those which arose under domestic law within the territory of the member states for their own nationals and their spouses. The Community regulation was held not to apply to the rights and entitlements of workers and their spouses while they were working within the member state of which they were nationals.

1 [1997] 3 CMLR 576, CA.

10.75 This interpretation of EC Community Regulation 1612/68 has been upheld by the European Court of Justice itself which, in Ücker and Jacquet v Land Nordrhein-Westfalen, stated that 'it has consistently been held that the Treaty rules concerning freedom of movement and regulations adopted to implement them cannot be applied to cases which have no factor linking them with any situations governed by Community law and all elements of which are purely internal to a Single member State' and that 'consequently, Community legislation regarding freedom of movement for workers cannot be applied to the situation of workers who have never exercised the right of freedom of movement within the Community.' The court concluded its judgment by noting:

'[C]itizenship of the Union, established by Article 8 of the EC Treaty is not intended to extend the scope ratione materiae of the Treaty also to internal situations which have no link with Community law. ... Any discrimination which nationals of a Member State may suffer under the law of that state fall within the scope of that law and must therefore be dealt with within the framework of the internal legal system of that State ...'.

2 As above, at para 23 of the judgment.

10.76 Somewhat paradoxically, however, it would appear that with the introduction of the Immigration (European Economic Area) Order 1994, nationals of other member states have greater rights to bring their non-Community spouses into the United Kingdom than British nationals do. However, it would appear to be easier for spouses of persons settled and
present in the United Kingdom to obtain indefinite leave to remain than for the spouses present in the United Kingdom by virtue of the Community law derived provisions, since the Immigration (European Economic Area) Order 1994 requires them to be United Kingdom resident for four years following admission before indefinite leave to remain can be sought.

1. SI 1994/1895.
4. See Fatima Boukssid v Secretary of State for the Home Department [1998] Imm AR 270.

Citizenship and free movement – the EC Treaty provisions

10.77 The basic principles that internal frontiers be abolished between the member states of the European Union and that the nationals of each member state have the legal right to move and reside freely within the territories of all the other member states are enshrined in the post-Amsterdam amendments to the Treaty of Rome as follows (emphasis added):

'14.2 The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.

...'

17.1 Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

17.2 Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

18.1 Every citizen of the Union shall have the right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.

The free movement rights of European Union citizens

10.78 It had been argued before the English courts that the effect of articles 14 and 18 of the Treaty of Rome (formerly articles 7a and 8a) was to extend the free movement rights of Community nationals, so that free movement need no longer be restricted to the pursuance of economic activities (such as taking up employment, setting up business, providing or purchasing services, and undergoing a course of vocational training) but was, instead, a free standing and unqualified citizenship right. These attempts have, however, been unsuccessful. In a series of decisions the Court of Appeal made it clear that it did not consider the Community law rights of European Union citizens to reside in another member state to be unlimited.

10.79 In R v Secretary of State for the Home Department, ex parte Vitale the Court of Appeal considered an application by an Italian national for
judicial review of a decision of the Home Secretary requiring him to leave the country on the grounds that he was not actively seeking and obtaining employment and had insufficient independent resources to avoid claiming from the social security system. He had obtained income support for the period from July 1993 to February 1994 when his entitlement was withdrawn as a result of the Home Secretary’s decision that he was no longer lawfully resident in the United Kingdom. This decision was challenged on the basis that article 18 (formerly article 8a) of the Treaty of Rome was said to give him, as a European Union citizen, a directly effective and unlimited right to reside freely within the United Kingdom, whether he was in work or seeking work or not. The court rejected this argument holding that article 18 had not increased the pre-existing rights under article 48 (now article 39 post-Amsterdam) of the Treaty which conferred free movement on workers for the purpose of seeking and taking up employment in other member states. The court also refused to make a reference to the European Court of Justice for a preliminary ruling on the scope of article 18. In dismissing the appeal, the court refused the applicant leave to appeal to the House of Lords.

1 [1996] All ER (EC) 461, CA.
3 An earlier reference to the European Court of Justice by the Divisional Court in R v Secretary of State for the Home Department ex p Gerard Adams [1995] All ER (EC) 177 QB on the scope of art 18 (formerly art 8a) specifically whether or not it prevented the United Kingdom from making exclusion orders against Irish citizens, was withdrawn from the court when the exclusion order in question was lifted. See R v Secretary of State for the Home Department ex p Gerard Adams (No 2) [1995] 3 CMLR 476, QB.

10.80 Applying these same principles, however, the Court of Appeal in R v Westminster City Council, ex parte Castelli held that an Italian national who had lawfully entered the United Kingdom with the intention of becoming a self-employed business man but whose subsequent illness consequent upon his HIV status prevented him from working was entitled to claim temporary accommodation from the local authority as a homeless persons under sections 62 and 63 of the Housing Act 1985. As a Community national he had no obligation to apply for leave to remain after he become disabled from working and he was therefore lawfully in the United Kingdom. Leave to appeal to the House of Lords was granted in this case.


The free movement rights of non-European Union citizens

10.81 Non-Community nationals have also sought to claim extended rights under the post-Maastricht European citizenship and free movement Treaty provisions of the Treaty of Rome. In R v Secretary of State for the Home Department, ex parte Dyleman Rizarni an application for habeas corpus was made on behalf of an Albanian national who sought asylum in the United Kingdom after arriving in Ramsgate from Germany. It was claimed that his examination and subsequent detention at United Kingdom border controls was illegal because contrary to article 14 (formerly article 7a(2)) of the Treaty of Rome. The court held that the Treaty did not confer rights on
individuals, but that if it had done so, any provisions of the Immigration Act 1971 under which the applicant had been stopped and detained which were contrary to it would be disapproved. Subsequently in R v Secretary of State for the Home Department, ex parte Flynn. McCullogh J in the High Court rejected the arguments of Mr Flynn to the effect that any internal frontier controls continuing after 1 January 1993 were rendered illegal by article 14, refused to make a reference to the European court of Justice on the point and dismissed the petition.

1 [1995] Imm AR 396.

10.82 And in R v Secretary of State for the Home Department, ex parte Phull the Court of Appeal rejected a claim by an Indian national that, by virtue of her marriage to a United Kingdom citizen, she now had a right under European Community law to reside in the United Kingdom by virtue of the former article 8a, now post-Amsterdam article 18 of the Treaty of Rome on the basis that the court held that non-Community citizens could not derive rights under the Treaty in the absence of secondary or subordinate legislation.

1 [1996] Imm AR 72, CA. See also Mouncife v Secretary of State for the Home Department [1996] Imm AR 265, QB applying the decision in Phull that article 18 (formerly art 8a) has no direct effect.

Public policy derogations

10.83 The European Court of Justice has recognised the need to protect fundamental rights to family life in the context of the immigration laws of the member states. It should always be noted that under Community law, member states can withdraw free movement rights from persons otherwise entitled to them under Community law on grounds of public policy, public security or public health. The proviso applies to all aspects of entry and residence under Community law, except partial residence bans, restricting movement within the territory of a member state. It covers workers, establishment and services. It should be noted that the grounds of derogation from the Community law free movement rights are to be interpreted strictly, and the exercise of member state discretion is further structured by directly effective secondary legislation.

2 See R v Secretary of State for the Home Department, ex p Launder [1997] 1 WLR 839, HL for a discussion of these issues in the context of the extradition of a businessman to the now Chinese administered Hong Kong.
3 Case 36/75 Rutil v Ministre de l'Intérieur [1975] ECR 1219.
4 Treaty of Rome, art 39(3) (post-Amsterdam).
5 Treaty of Rome, art 43 (post-Amsterdam).
6 Treaty of Rome, art 49 (post-Amsterdam).
7 Case 41/74 Van Duyn v Home Office [1974] ECR 1337.
8 EC Council Directive 64/221 on special measures concerning the movement and residence of foreign nationals.

10.84 As well as placing substantive limitations upon the discretion of member states in operating the public policy derogation, EC Directive
64/221 also lays down a number of procedural safeguards for individuals seeking immigration rights, including providing for a reference to a competent independent authority for review of the decision. Persons must be actually notified of any decision to refuse them entry or residence and provided with 'a precise and comprehensive statement of the grounds for the decision', unless this may prejudice state security.

1 See Case C-175/94 R v Secretary of State ex p John Gallagher [1996] 1 CMLR 543, ECJ, originally referred to the Court of Justice by the Court of Appeal at [1994] 3 CMLR 295 and reconsidered by the Court of Appeal at [1996] 2 CMLR 951 on the procedural safeguards imposed by Directive 64/221 on the granting of exclusion orders made under the Prevention of Terrorism (Temporary Provision) Act 1989 against Irish citizens preventing them from entering the United Kingdom.


10.85 In R v Secretary of State for the Home Department, ex parte Shingara and Radiom the European Court of Justice held that nationals of other member States, in casu a French Sikh activist and an Iranian consular official also holding Irish nationality, who were refused entry to the United Kingdom on grounds of public security considerations had the right to appeal against this decision on the basis of article 8 of EC Directive 64/221. Such individuals also had the right under article 9 to obtain an opinion from an independent competent authority where an administrative authority took a fresh decision on a new application after a reasonable time had elapsed since entry was last refused.


10.86 The Special Immigration Appeals Commission Act 1997 now provides a right of appeal to those relying on their Community law rights to those refused entry to the United Kingdom on the basis of public good considerations.

THE EUROPEAN CONVENTION AND ASYLUM AND IMMIGRATION LAW

10.87 The European Convention on Human Rights specifically allows, in article 5(1)(f) for the possibility both for the individual deportation of non-nationals and the prevention of their unauthorised entry to a Contracting State. Article 16 of the Convention authorises Contracting States to place restrictions on the political activities of non-nationals. Article 3 of Protocol 4 of the Convention, which prohibits the collective expulsion of aliens, has not been ratified by the United Kingdom and is not one of the Convention rights brought home by the Human Rights Act 1998.

10.88 Except where specifically modified by the Convention, the substance of the rights set out in that document apply to all persons within the jurisdiction of the Contracting State, regardless of their nationality or domicile. It has been held to be contrary to article 3 of the Convention, (which prohibits subjecting an individual to torture or to inhuman or
degrading treatment or punishment) for a Contracting State to expel an individual to another state if in so doing they expose that individual to a real risk of very serious ill-treatment, (for example, capital punishment in the United States) regardless of the prior conduct of that individual.\(^1\)

2. See also Chahal v United Kingdom (1996) 23 EHRR 413 and Ahmed v Austria (1997) 24 EHRR 278.

10.89 Even in cases where there is no real risk of extreme ill-treatment, deportation of a third country national from a Contracting State may be held to contravene article 8 of the Convention in so far as the action constitutes a disproportionate interference with the individual's private or family life. Article 8 is in the following terms:

'8.1 Everyone has the right to respect for his private and family life, his home and his correspondence.

8.2 There shall be no interference by a public authority with the exercise of right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

10.90 The European Court of Human Rights has held that deportation, or refusal of leave to enter, may constitute a violation of article 8 of the Convention if it separates an existing family, including an engaged couple: there is, however, no right to enter a country to found a new family. Where a case concerns immigration, the Court of Human Rights has held that the extent of a state's obligation to admit relatives of settled immigrants will vary according to their particular circumstances and to the general interest. Article 8 does not, then, impose on a state a general obligation to respect the choice of married couples of the country of their matrimonial residence and therefore to authorise or facilitate family reunion on to its territory. And in determining whether or not there may have been a violation of article 8 in deportation cases, the Court of Human Rights and the Commission on Human Rights consider whether or not it is practicable and reasonable to expect the deportee's spouse or family following them abroad to live together safely in a country with which they have real connections.\(^4\)

3. DR 60/284.
4. DR 24/98.

10.91 Deportation after a divorce, where there has been significant contact between the proposed deportee and children of his former marriage may violate article 8 of the Convention. An order for deportation to Morocco of a nineteen year old youth who had lived in Belgium from the age of three and whose whole immediate family still resided there, follow-
ing the completion by him of a prison sentence of 26 months for a series of minor offences, was held to be disproportionate and hence contrary to article 8. In Beldjoudi an order for deportation to Morocco of an individual who had been born in France, had lived all his life there and had been married for over 20 years to a French woman was also found by the court to be a disproportionate interference with family life. Similarly, in Nasri the court held that the deportation from France of a deaf mute and illiterate Algerian national who had lived with his family since the age of 4, following his conviction of participation in, but not instigation of, a gang rape, was disproportionate in the light of expert evidence that he would only be capable of maintaining psychological and social equilibrium if he remained with his family in France.

2 Moustaquim v Belgium (Ser A No 193, Judgment, 8 February 1991) (1991) 13 EHRR 802.

10.92 Interference with rights under article 8 of the Convention, even when this results in the disruption of an existing family and the separation of spouses may however be justified, in sufficiently serious circumstances. Thus deportations for trading in heroin; unlawful possession of drugs and conspiracy; armed robbery; living on the earnings of prostitution; and after a conviction for rape, violence and theft have been upheld by the Court of Human Rights as justified and necessary for the prevention of disorder and crime, notwithstanding the long residence of the individuals within the contracting states.

1 El Boujaïdi v France (26 September 1997, RJD 1997-VI, No 51. See also Appeal 27269/95 Doignis v Switzerland (1995) EHRR-Commission Digest 129. Cf Mehemi v France, (26 September 1997, RJD 1997-VI, No 51) where the exclusion of an Algerian national convicted of drug trafficking who had been born in France, lived there for 33 years with his siblings and parents and had a French resident wife and three French children was held to be a disproportionate interference with his family life.
3 Boujilfa v France [1998] HRCD 21, E Ct HR.

10.93 An attempt by the United Kingdom government to justify on grounds of ‘national security’ an order for the deportation of a militant Sikh nationalist who had lived lawfully in the United Kingdom with his wife for almost twenty years and who had two teenage children born and brought up here, was held by the Court on Human Rights to constitute an ex facie violation of Article 8 of the Convention.

1 Chahal v United Kingdom (1996) 23 EHRR 413.
CONCLUSION

10.94 In Tong v Secretary of State for the Home Department¹ the English Court of Appeal considered an application for judicial review of a refusal by the Secretary of State to grant an illegal overstayer leave to remain on the grounds of his marriage to a British citizen and the birth to them of a daughter. The basis for the judicial review was that the applicant wished to rely on evidence that he and his wife had been living together as man and wife prior to the marriage and prior to the service on him of any deportation order. The applicant also relied upon article 8 of the Convention and on policy guidance DP/2/93 to argue that the immigration authorities required to give great consideration to the maintenance of family unity. In refusing the application for judicial review the court held that it was not unreasonable of the Secretary of State to conclude that there was insufficient evidence to show long pre-marital cohabitation between the applicant and his spouse.

The decision letter from the Secretary of State intimating that leave to remain was refused was said to be as explicit as it might have been and it was clear from it that all the relevant factors had been considered. The court noted, however, that it would be desirable in cases where article 8 of the Convention was of relevance if the Secretary of State were to set out in detail all the factors which had been taken into account in reaching the decision. Similarly in R v Secretary of State for the Home Department, ex parte Watson² Carnwath J observed that although the Convention was not part of domestic law, infringement of the fundamental rights enumerated therein required formal justification.

¹ [1996] Imm AR 551, CA.
² In R v Secretary of State for the Home Department, ex parte Iye [1994] Imm AR 63, CA the court upheld a deportation order in relation to a Nigerian illegal entrant who had been sentenced to two years imprisonment for a fraud offence, notwithstanding that he had a resident British cohabitee and child.

10.95 Thus, in R v Secretary of State for the Home Department, ex parte Zighem³ the decision of the Secretary of State to deport an Algerian illegal immigrant was quashed on the grounds that his removal would prevent or impede contact with his daughter and as such appeared on the face of it to be contrary to article 8 of the Convention. The Secretary of State’s assertion in his decision letter that there was no such breach did not give reasons for this view and so it could not be ascertained whether he was claiming that there was no interference with family life or that such interference was justifiable. The further assertion by the Secretary of State that contact could be maintained by an application to return to the United Kingdom under the Immigration Rules (HC 251), para 246 was held to be misconceived since this rule applied only to the case of a married parent now divorced or legally separated from the other parent.

¹ [1996] Imm AR 194, QB.
³ [1996] Imm AR 194, QB.

10.96 In R v Secretary of State for the Home Department, ex parte Dinc⁴ it was held that the Secretary of State had contravened article 8 of the Convention
in a manner which could be characterised as *Wednesbury* unreasonable. He had confirmed the deportation to Turkey of a Turkish national whose wife was a long term United Kingdom resident and by whom he had a child, the deportation to be carried out following his release from prison for possession of heroin with intent to supply. It was held that in reaching his decision, the Secretary of State had given disproportionate weight to the trial judge’s recommendation and had failed to make his own judgment on all the factors (including the fact that the applicant’s house in Turkey had been sold in order to obtemper a confiscation order of £30,000 imposed by the trial judge) and in so doing the Secretary of State had acted unlawfully.


10.97 In *R v Secretary of State for the Home Department*, *ex parte Gangadeen*¹ the English Court of Appeal re-affirmed that the Secretary of State’s policy on deportations which might result in family separation (from spouse or children) was an extra-statutory concession and the Secretary of State had a wide measure of discretion in its application. Accordingly the courts could only in exceptional circumstances interfere with his decision on these matters, where this decision appeared irrational or where the Secretary of State appeared to have departed from his stated policy. Decisions of the Court of Human Rights could be of assistance to the national courts in determining how the Convention rights are to be protected, but these decisions were not ultimately binding since the Convention had not yet been incorporated into national law.

1 [1998] Imm AR 106, CA. See also *R v Secretary of State for the Home Department, ex p Danaei* [1998] Imm AR 84, CA, [1997] Imm AR 366, QB.

10.98 As we saw in *Salah Abdadou*¹ Lord Eassie also held that he was not bound by the deference paid by the Court of Human Rights to the *marge d’appréciation* of the Contracting States in the matter of their treatment of aliens in determining whether or not there could be said to a disproportionate and unjustified interference with the substance of the rights guaranteed under the Convention. On Lord Eassie’s analysis, the case law of the court can therefore be seen as setting the minimum standard which the national courts will uphold against the actions of the Executive and administration, leaving open the possibility for the national courts to develop higher standards of respect for human rights.

170 *Salah Abdadou v Secretary of State for the Home Department* 1998 SC 504, OH.

10.99 We noted at the outset of this chapter the tendency of the Scottish courts to insist on the liberation of immigration and asylum detainees pending the determination of their applications for judicial review. This is a policy which appears to differ from the English courts, in that the Scottish courts shown an apparent readiness to over-rule the Executive’s decisions on detention almost as a matter of course and with little regard to the usual self-denying ordinances regarding the court’s role in judicial review. The decision in *Salah Abdadou* seems to mark a growing self-confidence in the Scottish judiciary, and a willingness to extend the scope of judicial protection of fundamental rights, already shown in their readiness to order
interim liberation, to the substantive decisions of the immigration authorities.

10.100 With the new constitutional settlement in Scotland created by the return of a Parliament to Edinburgh it may that these higher standards of human rights protection demanded of the Executive and administration continue to diverge between Scotland and England. It is suggested, however, that a stable devolutionary polity would require each of the national court hierarchies to set common standards of human rights protection in both jurisdictions, if the country is to remain a United Kingdom.
Chapter 11

Judicial Review of Legal Aid and Compensation for Criminal Injuries

LEGAL AID

Introduction

11.01 In Reynolds v Christie\(^1\) the Lord Ordinary, Lord Morison, held that it was not competent to seek judicial review under the supervisory jurisdiction of the Court of Session of the decision of a stipendiary magistrate to refuse an accused legal aid to defend a criminal charge. He rejected the submissions on behalf of the petitioner that the judicial review proceedings were concerned with 'a civil right, that is to say the right of all persons to be awarded legal aid if the necessary qualifications for such an award were met'. Instead, in Lord Morison's view the stipendiary magistrate in refusing the petitioner legal aid was not adjudicating on the general availability to the petitioner of that right but was instead 'purporting to exercise his power to refuse legal aid in the particular circumstances of the case as an incident of the criminal charge brought against the petitioner'. He considered that it would be 'illogical' if the Court of Session were held able to supervise the exercise of a function which is governed by constraints imposed by the High Court of Justiciary in an Act of Adjournal. He concluded that in these circumstances the supervisory jurisdiction lay exclusively with the High Court and judicial review in the Court of Session was incompetent\(^2\).

1 1988 SLT 68, OH. See also Application 1171/85 McDermitt v UK 15 May 1987 52 D&R 422, an application to the Commission of Human Rights following a stipendiary magistrate's refusal to allow the accused criminal legal aid in summary proceedings concerning breach of the peace and assault of a police officer.

2 See HM Advocate v Birrell 1994 SLT 480 for an example of the High Court exercising such a supervisory jurisdiction in relation to the assessment by the auditor of fees properly due to counsel under the criminal legal aid scheme.

11.02 In a judgment given the following year, K v Scottish Legal Aid Board\(^1\) Lord Cullen sitting in the Outer House affirmed the competency of a petition for judicial review of a refusal of criminal legal aid against a changed statutory background from that in effect when Lord Morison decided Reynolds v Christie. Lord Cullen noted:

'Under the Legal Aid (Scotland) Act 1986 ... a number of important functions are entrusted to an independent board whose procedures are laid down by regulations made by the Secretary of State for Scotland. I am satisfied that it is competent for judicial review to be used in order to challenge an adverse decision of the respondents in a case such as the present'.

1 1989 SLT 613, OH.
Statutory framework for civil and criminal legal aid decisions

11.03 Section 14(1) of the Legal Aid (Scotland) Act 1986 (LA(S)A 1986) provides, insofar as material, that:

'[C]ivil legal aid shall be available to a person if on an application made to the Board –
(a) the Board is satisfied that he has *probabilis causa litigandi*;1 and
(b) it appears to the Board that it is reasonable in the particular circumstances of the case that he should receive legal aid.'

1 See eg *Fife Regional Council v Scottish Legal Aid Board* 1994 SLT OH, where it was held that the notice to an opponent served in connection with an application for legal aid need not set out *probabilis causa*.

11.04 Section 14(4) of LA(S)A 1986 provides that where legal aid has been refused by the Board in relation to a proposed action against the Board itself, where that refusal is challenged the case should be referred to the Sheriff of Lothian and Borders at Edinburgh for a decision.1 The English Court of Appeal has recently held that applicants for legal aid were in a similar position as applicants for insurance and had a like duty to disclose all material facts, failing which the Legal Aid Board had a right to revoke a legal aid certificate on grounds of material non-disclosure.2

1 For reported examples of this procedure, see *Scottish Legal Aid Board’s Reference (No 1 of 1995)* 1995 SCLR 760, Sh Ct upholding the Board’s refusal; *Dryburgh Scottish Legal Aid Board* 1997 SLT (Sh Ct) 55, overturning the Board’s refusal.


11.05 Section 22(1) of LA(S)A 1986 sets out the circumstances in which and stages at which criminal legal aid is required be made available to an accused person, subject to regulations made by the Secretary of State under section 21(2) which can prescribe any class or stage of proceedings in connection with which it shall, or shall not, be granted. Section 23 also empowers the court to grant legal aid in solemn proceedings or in summary proceedings where there is a prospect of imprisonment in the case of a person who has not previously been sentenced to imprisonment or detention. In summary proceedings generally, section 24(1) provides that legal aid should be granted where the Board is satisfied (a) after consideration of the accused’s financial circumstances, that the expenses of the case cannot be met without undue hardship to him or his dependants, and (b) that in all the circumstances of the case it is in the interests of justice that it should be made available to him.

11.06 Section 41 of LA(S)A 1986 provides that ‘person’ does not include a body corporate or unincorporate, except where such a body is acting in a representative, fiduciary, or official capacity, so as to authorise legal aid or advice and assistance to be provided to such a body. Section 1(1) of the Partnership Act 1890 defines partnership as ‘the relation which subsists between person carrying on a business in common with a view of profit’ and while section 4(2) provides that in Scotland a firm is a legal person distinct from the partners of whom it is composed, section 9 provides that every partner is jointly and severally liable for the debts of the firm.
Accordingly the general rule is that partnerships and companies are not eligible for either criminal or civil legal aid in Scotland.

11.07 Although it is now established that it is competent to seek judicial review of decisions of the Scottish Legal Aid Board in relation to both criminal and civil proceedings, in practice the courts have appeared reluctant to over-turn decisions of the Board, reflecting perhaps an unwillingness to be swamped by applications for judicial review in an area such as this where decisions will in part by influenced by considerations of limited financial resources.

Intensity of review of criminal legal aid decisions

11.08 In *K v Scottish Legal Aid Board* an attempt was made to challenge the Board’s decision to refuse criminal legal aid to an individual charged on summary complaint. As we have seen, section 24(1)(b) of LA(S)A 1986 requires the Board to be satisfied, inter alia, that in all the circumstances of the case it was in the interests of justice that legal aid be made available. Section 24(3) sets out a number of factors which the Board should take into account in determining the interests of justice. Lord Cullen, sitting in the Outer House, held that whether or not a particular factor was satisfied and the weight to be attached to it was a matter within the Board’s discretion. The fact that a number of heads might have been satisfied, however, created no presumption that the interests of justice required legal aid to be granted. Further, the decision was held not to be so outrageous as to fall within the definition of *Wednesbury* unreasonableness. The petition was, accordingly, dismissed.

1 1989 SLT 617, OH.

11.09 In *AB v Scottish Legal Aid Board* the Board’s decision to refuse sanction for senior counsel to act along with junior counsel in a High Court trial on an indictment involving serious drugs charges was challenged on judicial review. One of the grounds of complaint was that sanction for senior counsel had been granted to one of the applicant’s co-accused indicted on identical charges in the same trial. The matter again came before Lord Cullen who held that such inequality of treatment did not necessarily involve irrationality since considerations mentioned by counsel for the Board such as cost and, notwithstanding subjective ill-feeling, apparent lack of objective conflict of interest among the parties could explain the decision. Whether or not these were the reasons for the Board’s decision was left unanswered, however, since the court refuse to require the Board to provide the reasons for their decision as there was no prima facie case of unreasonableness.

1 1991 SCLR 703, OH.

Intensity of review of civil legal aid decisions

11.10 In *Drummond & Co v Scottish Legal Aid Board* the House of Lords upheld the decision of the Board to refuse to pay for any additional work
done by solicitors before the date of a decision of the Board authorising increased expenditure. Their authorisation could not, in effect, be back-dated by the solicitor to cover work already carried out by him. The wording of the statute and relative secondary regulations were said to be unequivocal on this point, although it was observed that this construction might well involve some anomalies and possibly unsatisfactory results.

1 1992 SLT 337, HL.

11.11 In Venter v Scottish Legal Aid Board¹ the petitioner applied for judicial review of a decision of the Scottish Legal Aid Board refusing to grant authorisation for expenditure for an open commission to take evidence in South Africa in relation to proceedings for variation of an award of custody. At first instance, the Lord Ordinary, Lord Prosser, granted the petition and reduced the Board’s decision. This decision was reclaimed to the Inner House which allowed the reclaiming motion and, in recalling the interlocutor of the Lord Ordinary and dismissing the petition, made a number of findings setting out the respective boundaries of the role of the courts and the Board in such decisions. Firstly, as a matter of practice the Inner House observed that, in all legally aided cases where the court was to be asked to authorise a course of action for which the Board’s prior approval was required, the proper procedure was for the Board’s approval to be sought before an application was made to the court. While a refusal would not necessarily be conclusive of the question it was clear that the court had no jurisdiction to order the Board to grant such prior approval. In such prior approval decisions the question for the Board was whether or not the anticipated unusually large expenditure could be justified as a charge on the legal aid fund. In answering this question the Board had to consider, firstly, whether there was any other reasonable alternative to the expensive course proposed and, secondly, if there was such an alternative, whether or not the proposed step should be approved in preference to the available alternatives. In the present case it was clear the taking of evidence on interrogatories was an available alternative. Further when the Board was considering the request, the Inner House noted that what private litigants could reasonably be expected to do in similar circumstances was a relevant factor for the Board in coming to its decision. There was also held to be duty on the applicant to explain the basis of the request, and the Board could call for such information as it might require. Where the petitioner’s solicitors failed to provide any reasoned explanation of why the proposed alternative would not be satisfactory, the Board was entitled to take the view that it had not been shown that it was essential (in this case that it was not essential for evidence to be taken on open commission). The Inner House conclude that in the whole circumstances of the case the decision of the Board could not be said to have been unreasonable or perverse.

1 1993 SLT 147.

11.12 In McTear v Scottish Legal Aid Board¹ Lord Kirkwood, sitting in the Outer House, considered another petition for judicial review of the decision of the Legal Aid Board. The Board had refused legal aid to enable
the widow of a smoker who had died of lung cancer to continue the personal injuries reparation action originally raised by him against a tobacco company whose brand of cigarettes he had smoked and to which she ascribed his illness and consequent death. The Lord Ordinary dismissed the petition holding that even where it could be said that the petitioner had *probabilis causa litigandi*, it remained open to the Board to consider the prospects of success in such an action as well as issues of *volenti non fit iniuria* and contributory negligence in the context of determining whether or not it could be said to reasonable in all the circumstances to grant legal aid. Further, while the likely costs of the litigation could not lawfully be the sole basis for coming to a decision on reasonableness, it was certainly a relevant consideration given that the Board had limited public funds available to it. In the whole circumstances, given that the litigation was likely to be long, complex and difficult and of uncertain outcome, it could not be said that the decision of the Board to refuse legal aid could be characterised as so irrational or *Wednesbury* unreasonable as to justify its reduction by the court.

1 1997 SLT 108, OH.

Potentially relevant Convention rights in relation to legal aid

11.13 While there is no explicit right under the European Convention on Human Rights to legal aid in civil cases, article 6(1) of the Convention does provide that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’ in relation to the determination both of his ‘civil rights and obligations’ and of any criminal charge laid against him. If it can be said that the lack of legal aid has in the circumstances deprived an individual of effective access to the courts, then there may be the claim to breach of the Convention.

11.14 In *Airey v Ireland*¹ the European Court of Human Rights considered a claim to denial of effective access to the courts in the context of a judicial separation action in the Irish High Court before divorce was permitted in Ireland¹ which on the facts was found to necessitate familiarity with complicated procedure, mastery of difficult points of law, the capacity dispassionately to marshal and deploy intricate and potentially emotionally factual matters of a highly personal nature, and the ability effectively to use and questions expert evidence. The court held that in such circumstances, the fact that the applicant was able to conduct the proceedings on her own behalf was insufficient to provide her with effective access to the courts. The non-availability of legal aid for these proceedings was held to be a breach of article 6(1) of the Convention.

1  A/32 (1979) 2 EHR 305.

11.15 The European Commission of Human Rights has in practice, however, applied a wide margin of appreciation to contracting states civil legal aid schemes and has accepted that national authorities may legitimately restrict legal aid by a variety of means and on a variety of grounds
including the imposition of a requirement of *probabilis causa*; the prevention of vexatious litigation; on grounds of limited resources, the exclusion of whole categories of cases such as defamation actions and applications to Employment Tribunals from eligibility for legal aid.

2. Application 27788/95 UK 27 January 1996, unreported. See also Application 11559/85 H v United Kingdom 45 D&R 281, where the Commission of Human Rights accepted the legitimacy of the category of vexatious litigant who requires special permission from the court before being permitted to raise action.
4. Application 10594/83 Munro v United Kingdom 52 D&R 158.

11.16 Criminal legal aid is specifically provided for in article 6(3)(c) of the Convention which states that:

'Everyone charged with a criminal offence has the following minimum rights:

... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ...'

11.17 Under the original system of criminal appeals in Scotland any person convicted of a crime had an automatic right of appeal to the High Court of Justiciary without any need for prior leave or a showing of *probabilis causa*. Reasonable likelihood of success in the appeal was, however, a prerequisite to the granting of legal aid. The result was that where an appeal was judged to fail the criterion of reasonable prospects of success, the accused was generally left without legal representation (since the Faculty of Advocate’s Code of Conduct required counsel not to present hopeless appeals) and the accused therefore required to represent himself and address the court on the merits of his own appeal against any contrary submission of the Advocate Depute representing the Crown. In *Granger v United Kingdom* the Court of Human Rights found that the refusal of legal aid and representation where the Appeal Court had to adjourn the appeal to examine transcripts of the evidence heard at the original hearing and then to reconvene to hear legal submissions and arguments from the Solicitor-General representing the Crown was contrary to the requirements of article 6(3)(c). In *Boner v United Kingdom* and in *Maxwell v United Kingdom* the fact that each unrepresented accused was facing an eight-year prison sentence and five-year sentence respectively was apparently sufficient to convince the Court of Human Rights that legal aid and representation should have been available in respect of their appeal, notwithstanding their lack of any reasonable prospects of success. As a result of these judgments the previous open access to the High Court for the purposes of criminal appeals was ended and a requirement of leave to appeal introduced which, if granted, automatically brings with it the right to criminal legal aid for legal representation before the Court of Criminal Appeal.
CRIMINAL INJURIES COMPENSATION

Introduction

11.18 In 1964 the government first introduced a scheme for the compensation from public funds of victims of criminal injuries. The scheme was announced in both Houses of Parliament on 24 June 1964. It was based not on any statutory powers, but instead owed its existence to the exercise of the royal prerogative by ministers of the Crown. Under the scheme as introduced ex gratia payments were to be made by the Criminal Injuries Compensation Board, an administrative body consisting of legally qualified individuals (QCs and solicitors appointed by the Home Secretary and by the Secretary of State for Scotland). The Board was to be 'entirely responsible for deciding the compensation to be paid in individual cases' and its decisions were not to be subject to appeal or to ministerial review.

The development of criminal injuries compensation from 1964 to 1995

11.19 The Board originally entertained applications for compensation, brought within three years of the incident, in respect of personal injuries (including death) sustained on or after 1 August 1964 in Great Britain which were directly attributable to a 'crime of violence' (later defined to include arson or poisoning) or, since 1990 to an offence of trespass on a railway. Further, where an individual took an exceptional risk which was justified in all the circumstances in relation to 'the apprehension or attempted apprehension of an offender or a suspected offender or the prevention or the attempted prevention of an offence or to the giving of help to any constable who is engaged in any such activity', and was accidentally injured as a result, compensation might be payable. The fact that an offender could not be convicted of an offence by reason of his youth, insanity or, latterly diplomatic immunity, did not preclude a finding that an individual injured by his act was to be regarded as a victim of a criminal injury for the purposes of the scheme.

11.20 The original scheme was first modified with effect from 21 May 1969, and again in 1979. The 1979 scheme, which applied to all incidents occurring on or after 1 October 1979, removed the previous absolute limitation whereby no compensation was payable if the victim and
offender were living together as members of the same family. Thus victims of childhood sexual abuse within the home before 1979 are effectively excluded from any criminal injuries compensation.

1 The definition of 'family' for the purposes of the 1969 Scheme includes cohabiters and their children: see R v Secretary of State for the Home Department and the Criminal Injuries Compensation Board, ex p Richardson (11 March 1996, unreported).

2 In R v Secretary of State for the Home Department and the Criminal Injuries Compensation Board, ex p P [1995] 1 All ER 870, [1995] 1 WLR 845, CA it was held that the Home Secretary's decision to remove the same household exclusion only with prospective effect from October 1979, while justiciable, could not be impugned as irrational and was accordingly upheld as valid.

11.21 In 1980, the Ministry of Defence introduced a Criminal Injuries Compensation (Overseas) Scheme which was intended to provide compensation to soldiers serving abroad which was roughly equivalent to what victims of crimes of violence within the United Kingdom might receive. The scheme was subsequently changed so as to exclude from its scope injuries sustained by soldiers as a result of an act by an enemy in a war or warlike situation. This unannounced change in policy was found sufficient to deprive a British soldier injured by a tank while serving in Bosnia-Herzegovina during the civil war there of compensation under the MOD scheme.


11.22 An updated version of the civilian scheme came into force in 1990. In contrast to the 1979 scheme, under the 1990 scheme it was the date when the application was received by the Board, rather than the date of the incident giving rise to the application, which determined the provisions of which scheme were to be applied. Thus, the 1990 scheme applied in full to applications for compensation received by the Board on or after 1 February 1990, and subject to modifications, to those applications received prior to that date. In January 1992 further minor modifications were made to the scheme.

11.23 The amount of compensation paid by the Board under the scheme in force under the schemes from 1964 to 1992 was based on the common law principles of the assessment of damages in delict and included provision for payment in respect of pain and suffering as well as loss of earnings and compensation for the dependants of any person who died as a result of the injuries sustained. If the criminal incident occurred within Scottish jurisdiction, Scots law principles applied; if in England and Wales, then the English common law applied. In practice the Board tended to adopt a common approach throughout the United Kingdom, so that the generally higher English awards for 'general damages' for pain and suffering were preferred to the often more modest awards the Scottish courts might award by way of solatium for comparable injuries.

1 See A Pollock 'Criminal Injuries Compensation' (1996) JLSS 66–70, 93–95 for a useful survey of the factors might be taken into account in the quantification criminal injuries compensation.
11.24 The Board also had a discretion to withhold or reduce compensation in the following circumstances: if they considered that the applicant had failed or unreasonably delayed to inform the police and to co-operate with bringing the offender to justice; that the applicant had failed to give all reasonable assistance to the Board or other authority in connection with the application; or where the Board considered that it was inappropriate that a full, or any, award be made having regard to the conduct and character of the victim as shown by his prior criminal convictions or unlawful conduct.

11.25 With the passing of the Criminal Justice Act 1988, it became possible for the existing scheme to be placed on a statutory basis, in particular by virtue of Part VII, (sections 108 to 117). The 1990 scheme and the 1992 amendments were however brought into force by virtue of the exercise of the same royal prerogative powers which had been prayed in aid by the government of the day in instituting the original scheme in 1964. The provisions of the CJA 1988 remained unused since they had not been brought into force on a day appointed by the Secretary of State as provided for by Act¹.

¹ See section 171(1) of the Criminal Justice Act 1988 which was in the following terms:

'Subject to the following provisions of this section, the Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint and different days may be appointed in pursuance of this subsection for different provisions or different purposes of the same provision'.

11.26 In December 1993 the Secretary of State for the Home Department announced that the government had decided against ever bringing the statutory scheme into force. Instead the relevant provisions of the Criminal Justice Act 1988 would be repealed at the earliest legislative opportunity. Pending such repeal (against a background of the spiralling costs of both the original, and the proposed statutory, schemes whereby the amount of criminal injuries compensation awarded to a victim varied according to the loss and damage actually sustained) the Secretary of State announced his intention to bring into operation a new ‘Tariff Scheme’ whereby a fixed amount, not based on common law principles, would be paid to the victims of crime depending on the nature of the injuries sustained, without any separate or additional payments being made for loss of earnings or other past or future expenses. This new scheme was published on 9 March 1994 and purported to come into force, by virtue of the exercise of the royal prerogative, on 1 April 1994.

11.27 The Tariff Scheme also established a new Criminal Injuries Compensation Authority, no longer composed of experienced personal injuries lawyers, to take over the functions of the old Criminal Injuries Compensation Board which was to be wound up. Qualified lawyers were however to be involved in the new Criminal Injuries Compensation Appeals Panel, set up to consider appeals against the decisions of the Authority.

11.28 In R v Secretary of State for the Home Department, ex parte the Fire Brigades Union¹ an application for judicial review of the Home Secretary's
decision not to bring into force the relevant provisions of the Criminal Justice Act 1988 and instead to implement the new Tariff Scheme was brought by various trade unions and other bodies, the members of which were said to be particularly liable to require to claim on the scheme as a result of criminal injuries sustained by them in the course of their working duties. No challenge appears to have been made to the standing of these representative bodies to seek judicial review on behalf of their members and the public at large.

1 [1995] 2 AC 513, HL.  
2 Cf Educational Institute of Scotland v Robert Gordons University [1997] Education Law Reports 1, OH.

11.29 On appeal, the House of Lords held by a 3 to 2 margin (with Lord Browne-Wilkinson, Lord Lloyd of Berwick and Lord Nichols of Birkenhead in the majority and Lord Keith of Kinkel and Lord Mustill dissenting in the minority) that the Secretary of State had a duty to keep under review when to bring into force the statutory scheme. Accordingly his unequivocal statement that 'the provisions in the Act of 1988 will not now be implemented' was a usurpation of a decision which belonged only to Parliament rather than the Executive and/or was an unlawful attempt by the Secretary of State to abandon or release a power (to bring the provisions into force) which had been expressly conferred upon him by Parliament. Further, the very passing by Parliament of the provisions of the Criminal Justice 1988 Act was said by Lord Browne Wilkinson to 'affect the mode' of exercise of (but since not brought into force, not to displace) the pre-existing powers of the Secretary of State acting under the royal prerogative to administer a scheme for the compensation of victims of criminal acts. Lord Browne Wilkinson also considered that there was a legitimate expectation enforceable in public law (to be contrasted with the lack of any rights enforceable in private law) that the scheme provided for under the statute would be brought into force. Notwithstanding that the provisions in question did not have statutory force, as a statement of Parliamentary intention rather than a thing writ on water they were found by Lord Lloyd of Berwick to be such as to prevent the Secretary of State introducing a new scheme which in its principles contravened to the proposed statutory scheme.

1 See Compensating Victims of Violent Crime: Changes to the Criminal Injuries Compensation Scheme (Cm 2434) (1993), para 38.  
2 See Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508 per Lord Dunedin at 526: 'If the whole ground of something which could be done by the prerogative could be done by statute it is the statute which rules'.  
3 For a brief discussion of some of the constitutional issues raised by the decision, see E Barendt 'Constitutional Law and the Criminal Injuries Compensation Scheme' [1995] Public Law 357–366.

11.30 The government's response to this judgment was to introduce the Criminal Injuries Compensation Bill to Parliament, the purpose of which was to repeal Part VII of the Criminal Justice Act 1988 and to introduce a
modified Tariff Scheme allowing for the severely disabled to receive additional sums to meet loss of earning and the costs of continued nursing care. The Bill was enacted as the Criminal Injuries Compensation Act 1995 and the modified Tariff Scheme came into force on 1 April 1996.

Compensation for criminal injuries following the Criminal Injuries Compensation Act 1995

11.31 The Criminal Injuries Compensation Authority (CICA) is empowered under the Criminal Injuries Compensation Act 1995 (CICA 1995) to deal with all applications for criminal injuries compensation received on or after 1 April 1996, regardless of the date of the incident giving rise to the injury. Applications for such compensation which had been made before 1 April 1996 continue to be dealt with by the Criminal Injuries Compensation Board acting under the pre-existing non-statutory schemes’ rules.

11.32 The CICA will only consider applications for compensation which have been brought within two years of the criminal incident complained of, unless it is considered that by reason of the particular circumstances of the case it is reasonable and in the interests of justice to do so. The Authority will award a pre-determined sum, depending on the nature of the injury suffered, on the basis of a published tariff matching specific injuries to particular amounts of money, for example: ‘Lower limb: fractured ankle (with continuing disability) – £5,000’, ‘Head: scarring; serious disfigurement – £5,000’ or ‘Paraplegia–(paralysis of the lower limb) – £175,000’. The Authority has, in addition a discretion to make awards for injuries which do not appear on the list, provided that they are considered to be worth an award of at least £1,000.

1 See Lilias Alison v Criminal Injuries Compensation Board (24 March 1998, unreported) OH for a discussion of the consideration relevant to any decision to waive time limits under the Criminal Injuries Compensation Scheme 1990.

11.33 In setting out a fixed tariff for injuries the new statutory scheme follows the approach commonly seen in private insurance schemes against death or injury. The precise interpretation of such private insurance schemes has given rise to a degree of litigation. The new statutory criminal injuries scheme might be seen as a form of safety net, a limited insurance policy made available by the state to all victims of crime rather than, as under the previous non-statutory scheme, providing a situation in which the state effectively stands in the shoes of the criminal wrongdoer and guarantees to his victims full compensation for all loss injury and damage which they suffered as a result of his criminal acts.


11.34 In addition to the specified tariff in respect of pain and suffering awards the new scheme makes some provision for partial compensation in
respect of wage loss and/or earning capacity. The first twenty eight weeks of any such loss are to be disregarded; the rate of loss of earnings or earning capacity is capped at one and a half times gross average industrial earnings as at the date of assessment; and the multiplier in respect of the assessed period of future wage loss is as specified in the scheme’s multiplier table, without need for reference to any actuarial evidence such as the Ogden Tables. The period of future loss to be taken into account in the assessment of compensation will vary depending on the particular contingencies of the case. A capped additional award may be made to those absent from work for over twenty eight weeks to cover such ‘special expenses’ resultant from the criminal injury such as: the replacement or repair of property or equipment relied on as a ‘physical aid’; the cost of attending for medical and/or dental treatment; the cost of private medical and/or dental treatment if reasonably incurred; and the reasonable costs of special equipment, adaptation to the victim’s accommodation and care where not otherwise freely available under existing public provision by local authorities, the National Health Service or other agencies. No provision is made for compensation for loss of pension rights.

11.35 Some provision is made for payments to near relatives following a crime of violence resulting in a fatality. Only funeral expenses will be paid directly to the deceased’s victim’s estate. A fixed loss of society award of £5,000 will be paid to each immediate family member (spouse, child or parent of the deceased), except if there is only one such surviving ‘qualifying claimant’ when an award of £10,000 will be made. There is provision for loss of support payment will be made for dependent relative. The multiplicand for the loss of parental service for children under the age of eighteen is specified as £2,000 per annum, although the Authority has a discretion to make ‘such other payments as are considered reasonable to meet other losses resulting on the death of a parent’. In R v Criminal Injuries Compensation Board, ex parte K, it was held under reference to the pre-statutory scheme that the benefit to a child of being absorbed into a new family following the murder of a child’s mother by her father was to be disregarded for the purposes of assessing damages for loss of dependency.\(^1\)

1 See R v Criminal Injuries Compensation Board, ex p K [1998] 2 FLR 1071, QB.

Judicial review and criminal injuries compensation

11.36 As with all judicial review applications, the courts have no jurisdiction to substitute their views for those of the decision-maker simply because they might well have reached a different decision were the same facts before them.\(^1\) The members of the relevant body considering an application for criminal injuries compensation have, however, properly to exercise their discretion. They must not shut their eyes and ears to any particular application and instead must consider and decide each case on its merits, rather than on the basis of their simply applying their settled policy or practice.\(^2\)

1 See eg R v Criminal Injuries Compensation Board, ex p Williams [1993] Crown Office Digest 488, QB and more recently, R v Criminal Injuries Compensation Board, ex p A (25 March 1999, unreported) HL per Lord Slynn:
The [Criminal Injuries Compensation] Board did, of course, have to evaluate the evidence and they were entitled to accept one side rather than the other, so that in the ordinary way the court would not interfere with their finding in an application for judicial review. The application for judicial review is not an appeal on fact. Moreover the Board were right to put the onus on the applicant to establish that she was the victim of a crime of violence.

2 For a summary of the past practice in relation to compensation for criminal injuries see the CICA publication A Guide to the Criminal Injuries Compensation Scheme (1990) and the CICA publication A Guide to the Criminal Injuries Compensation Scheme (1996).

11.37 Judicial review is, then, available against decisions of both the CICB and the CICA to ensure, at least, the following: that the provisions of the scheme in question have been followed in fact and correctly interpreted in law; that the rules of natural justice are respected in the proceedings before them; and that in reaching their decisions in any particular case the members of the Board or Authority have not ‘taken leave of their senses’ and descended into irrationality. As in all judicial review applications, where an identified error in law would not in fact have altered the ultimate substantive decision of the Board or Authority, the court might refuse to grant any remedy.


11.38 It has been held in England that the non-statutory scheme falls to be interpreted in accordance with its plain wording and violence should not be done to its language in order to achieve a particular desired result, even if this might be in accordance with an applicant’s legitimate expectations. This general approach to the construction of the scheme has generally been accepted in the relatively few application for judicial review made in Scotland of decisions of either the CICB or the CICA.


The definition of ‘injury’ for the purposes of the scheme

11.39 In P’s Curator Bonis v Criminal Injuries Compensation Board¹ the applicant was conceived as a result of incestuous rape by a father of his daughter and was born in 1973 with severe mental and physical abnormalities which it was accepted were attributable to her parents’ close consanguinity. The questions before the court in a judicial review from the Board’s decision to refuse an award under the 1969 scheme were as follows: were the congenital abnormalities ‘personal injuries’ for the purposes of the scheme; could it be said that the child’s congenital abnormalities had been caused by a crime of violence, namely the rape; were the applicant and the offender living ‘together as members of same family’ at the time of offence.

¹ 1997 SLT 1180, OH.
11.40 It was suggested by the respondents, relying on the case of McKay v Essex Area Health Authority¹ that since no damages were recoverable for such a situation at common law, then no compensation could be awarded under the scheme. This line was not taken up by the court. Instead, Lord Osborne held, as a matter of construction, that the severe congenital abnormalities suffered by the ward could not be described as injuries for the purposes of the scheme in that, because they were genetic and inherent in the make up of the ward, there was no pre-injury state capable of assessment and comparison with a post-injury state: disability, as a matter of ordinary language, is not the same as injury. On the question of causation the Lord Ordinary was of the view that it could be said that both the birth of the child and her injuries were attributable to the act of rape. And the Board’s suggestion that the child and the rapist were living together as members of the same family was also rejected by the court on the grounds that a foetus was not a person and could not properly be said to live with someone as a member of his family while in utero.


Directly attributable

11.41 For an individual to be found entitled to criminal injuries compensation he must be able to show that the injury complained of was ‘directly attributable’ to the criminal incident complained of. The incident need not be the sole cause of the injury but must have materially contributed to it, regardless of questions as to the foreseeability of the precise injury actually sustained², albeit that the foreseeability of the risk of harm will be required in order to establish the necessary mens rea for a criminal injury caused by recklessness rather than specific malice³.

¹ See R v Criminal Injuries Compensation Board, ex p Schofield [1971] 2 All ER 1011, CA.

11.42 In CW v Criminal Injuries Compensation Board¹ a judicial review petition was brought against the decision of the Board to refuse an application for criminal injuries compensation brought by the mother of girls who had been subjected to prolonged sexual abuse by their father, her husband. The eventual discovery by the petitioner of the nature of the abuse resulted in her becoming seriously traumatised and suffering psychological illness. In considering the terms of the 1990 scheme, however, the Board held as a matter of law that the petitioner’s injuries were not ‘directly attributable to a crime of violence’, since they construed ‘directly’ as meaning ‘without intermediaries or the intervention of other factors’. In quashing this decision and remitting the case back to a separately constituted Board for re-consideration of the application, Lord Johnston held that in principle such ‘secondary claims’ in the context of sexual abuse
within a family were competent. Whether or not compensation should be awarded depended on the consideration of all the factual circumstances to determine whether or not there is sufficient proximity in time and space such as to indicate a direct link in time and space between the criminal conduct founded upon and the injury to the claimant.

1 19 March 1999, unreported, OH.

Crimes of violence

11.43 In Craig v Criminal Injuries Compensation Board judicial review was sought of the decision of the Board to disallow applications from train drivers who argued that they had sustained nervous shock as a result of witnessing suicides who had thrown themselves in front of the trains they were driving. It was argued that the suicides were guilty of the common law crime of 'causing injury by a reckless act'. The Lord Ordinary dismissed the petition, holding the matter to have been already decided by the English case of R v Criminal Injuries Compensation Board, ex parte Webb. That case held that what constituted a crime of violence was 'very much a jury point' for the Board and that suicide was not crime of violence for the purposes of the scheme unless it could be said that the method chosen showed reckless disregard for the safety of others.

1 1993 GWD 5-303, OH.
2 See also on similar facts R v Criminal Injuries Compensation Board, ex p Warner [1985] 2 QB 1069.
4 See also R v Criminal Injuries Compensation Board, ex p Clowes [1977] 1 WLR 1353 per Eveliegh J, at 1353 where criminal injuries compensation was awarded to a police sergeant who was injured in a gas explosion which resulted from an escape of gas caused by an individual who had committed suicide by knocking the top off a gas pipe, given that the means chosen for the suicide was characterised by the court as a 'kind of deliberate criminal activity in which anyone would say that the possibility of injury was obvious'.

11.44 In Gray v Criminal Injuries Compensation Board the Inner House, in refusing a reclaiming motion by the petitioner upheld the decision of the Board to refuse compensation to a woman who had undergone a marriage ceremony and lived as husband and wife with an individual who was subsequently discovered to be a bigamist on the grounds that she could not be said to have been the victim of a 'crime of violence'. As Lord Coulsfield stated in the Inner House:

'It seems to us quite clear that the proper approach must be that described by Lawton LJ in ex parte Webb. The Board have to consider the nature of the crime which has been committed and decide whether it is, in all the circumstances of the case, a crime of violence treating those words in their ordinary sense in the English language. What this court has to consider is whether the Board erred in their approach to the question, and in doing so this court must also treat words in their ordinary sense. The reclamer's original contention to the Board was that she had suffered the crime of bigamy, but bigamy is plainly not a crime of violence... The crime committed is simply one of fraud. Since there is nothing in the authorities to require a different view, the Board were in our opinion, quite entitled to consider the particular circumstances of this case and to come to the conclusion that no crime of violence had been committed.'
11.45 In similar vein, in R v Criminal Injuries Board, ex parte P¹ the English court upheld the correctness of the decision of the Board acting under the 1990 scheme to refuse compensation to an applicant on the grounds that she had not shown that she was the victim of a crime of violence. The applicant had, when aged 12, been subjected to unlawful sexual intercourse and denied that she had consented thereto. The Board held, however, that while the medical evidence showing a bruise might be consistent with the use of force, it did not mean that violence had been involved. Further, in considering claims to compensation arising from non-consensual sexual intercourse, it has been held that the Board may properly take into account the question of the existence of the appropriate mens rea on the part of the assailant to establish the crime of rape, namely that the panel knew that his victim either did not consent to sex or gave no heed as to whether she consented or not².

¹ 14 April 1997, unreported, QB.
² R v Criminal Injuries Board, ex p SD (4 June 1997, unreported) QB.

Reviewable errors of law

11.46 In Rae v Criminal Injuries Compensation Board³ Lord Macfadyen upheld the decision of the Board, acting under the 1990 scheme and made after an oral hearing, to confirm the previous decision of a single member of the Board to granting an ‘inclusive’ award of compensation, that is to say without breaking it down into separate heads for solatium or ‘general damages’, and wage loss or ‘special damages’. The Lord Ordinary dismissed the petition, holding that the petitioner had failed to identify any error committed by the Board which resulted in it acting beyond its powers⁴. He held that an erroneous evaluation of the evidence by the Board, no matter how gross, did not of itself constitute an error of law. So long as there was relevant material before the Board it could reach a wrong conclusion on that evidence without its decision being characterised as irrational or unreasonable⁵. In the course of his judgment the Lord Ordinary distinguished between the approaches of Scots and English law as regards the reviewability of decisions of the board:

"In my opinion the Board is subject to judicial review on the ground of error of law if, but only if, the error is one which involves the board in acting in a way in which it has no power to act, or in refusing to act on the ground that it has no power to do so in circumstances in which on a sound view of its powers it is entitled to act. To put the matter more briefly, ultra vires error of law is ground for review; intra vires error of law is not. That view is in my opinion amply supported by cases such as Watt⁶, Wordie⁷ and O’Neill⁸. In my opinion the Scottish cases in which decisions of the board have been subjected to judicial review, namely Gray⁴ and Craig⁹ are examples of the application of that rule. In each of these cases, the decision under challenge involved determination of a matter relating to the extent of the board’s jurisdiction. If the Board had been wrong, in these cases, in holding that the events before it did not constitute crimes of violence, it would have been wrongly refusing to exercise its
jurisdiction. The same rule appears to be reflected in *Thompstone*. Insofar as *Lain* and *Tong* appear to support the proposition that in England a decision of the board may be quashed by an order of certiorari on the ground of error in law on the face of the record, without distinction between intra vires error and ultra vires error (and despite the reference in argument to *South East Asia Fire Bricks* I am not confident that I properly understand the scope of certiorari), the proposition is not in my view sound in Scots law.

1 1997 SLT 291, OH.
2 By contrast in *R v Criminal Injuries Board, ex p Cummins* [1992] Crown Office Digest 297, QB and [1992] PIQR Q81, it was held that although there was no statutory obligation upon the Board to give reasons for its decision, the failure to break down a compensation into its constituent elements and specify the reasons and evidence behind the calculation, in particular as regards future care, justified the court in quashing the award on the ground that inadequate reasons had been given and remitting the whole matter back to the Board for reconsideration.
3 Compare this approach with the following expressions of academic opinion, noted by Lord Slynn in *R v Criminal Injuries Compensation Board, ex p A* (25 March 1999, unreported) HL:
   'Mere factual mistake has become a ground of judicial review, described as 'misunderstanding or ignorance of an established and relevant fact' or acting 'upon an incorrect basis of fact'... This ground of review has long been familiar in French law and it has been adopted by statute in Australia. It is not less needed in this country, since decisions based upon wrong fact are a cause of injustice which the courts should be able to remedy. If a 'wrong factual basis' doctrine should become established, it would apparently be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or acting upon a misapprehension of law'. (Wade and Forsyth *Administrative Law* (7th edn) p 316–318);
   and
   'The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention'. (Smith, Woolf and Jowell *Judicial Review of Administrative Action* (5th edn) p 288).
4 *Wait v Lord Advocate* 1979 SC 120, 1979 SLT 137.
5 *Wordie Property Co Ltd v Secretary of State for Scotland* 1984 SLT 345.
7 *Gray v Criminal Injuries Compensation Board* 1993 SLT 28, OH.
8 *Craig v Criminal Injuries Compensation Board* 1993 GWD 5–303, OH.
13 1997 SLT 291 at 295.

11.47 This aspect of the decision of Lord MacFadyen in *Rae*, distinguishing between reviewable ultra vires errors in law and non-reviewable intra vires errors in law, has been the subject of a degree of academic criticism and it may be that the distinction will not be one which be maintained as Scots administrative law continues to develop apace. The decision may have the result of encouraging disappointed applicants to take their judicial review cases in England since, if Lord MacFadyen's decision is correct, they would appear to have a wider scope for review of their decisions by the courts there than would be available to the Scottish courts.

11.48 Thus, a decision of the Criminal Injuries Compensation Board sitting in Glasgow was made the subject of review before the English High Court in R v Criminal Injuries Compensation Board, ex parte Cowan¹. It was found that the Board’s decision to refuse compensation in respect of serious injuries sustained in the course of a domestic dispute was vitiated by its presumption that a push from behind which resulted in the applicant hitting his head against a wall and being rendered tetraplegic was in fact done in self-defence and hence had not been shown by the applicant to have been a crime of violence. The Board’s error would appear on the face of it to have been an intra vires one which would not have been reviewable in Scotland.

1 11 June 1998, unreported, QB.

Reasons and the requirements of fairness

11.49 In Young v Criminal Injuries Compensation Board¹ the Lord Ordinary upheld a decision of the Board to refuse a hearing to an individual who had been refused compensation in respect of injuries received in the course of a robbery on the grounds that he had previous convictions. Notwithstanding that the guide issued by the Board stated that it would consider with sympathy applications from applicants with previous convictions where the injuries for which compensation was sought were sustained while assisting the police or helping someone under attack, it was held that it had no duty to grant the applicant a hearing to give the opportunity to explain why his previous convictions should not be held against him. Lord Gill distinguished between a right to be heard and a right to a hearing². Natural justice, he suggested, required only that the applicant be given an opportunity to present his case, and this might be done in writing but did not necessarily require an oral hearing for the requirements of fairness to be met³. Further, it was held that the Board was under no obligation to provide reasons explaining why it was refusing an oral hearing to the applicant.

1 1997 SLT 297 per Lord Gill.
2 Cf the decision in R v Criminal Injuries Compensation Board, ex p Amrik Singh [1996] Crown Office Digest 149 QB where failure explicitly to take into account the police informer status of a victim of criminal assaults while in prison was held to vitiate a decision to refuse the applicant an oral hearing.
3 Cf R v Criminal Injuries Compensation Board, ex p Mattison (24 April 1997, unreported) CA and R v Criminal Injuries Compensation Board, ex p Chalders (3 February 1981 unreported) QB.

11.50 The tenor of Lord Gill’s somewhat restrictive approach in Young seems to run counter to the trend of decisions on similar facts by the English courts. Thus, the English Court of Appeal held in R v Criminal Injuries Compensation Board, ex parte Rene Florence Cook⁴ that the Board was required to give sufficiently detailed reasons showing its conclusions on the principal issues in the case in support of its decision to refuse compensation, on the grounds of the victim’s character, to the widow of a convicted armed robber who was murdered by his girlfriend. It was not however
obliged to set out every material consideration in the step by step approach desiderated by Sedley J. in an earlier decision before him concerning a refusal on compensation on the grounds of the Board's assessment of the applicant's willingness to engage in violence\textsuperscript{2}. In R v Criminal Injuries Compensation Board, ex parte Dickson\textsuperscript{3} the Board's decision to refuse compensation arising out of criminal assault on the basis that the victim had pervious criminal convictions was quashed because the Board had failed to indicate why these convictions, which were minor and over twelve months old, were thought to be a sufficiently significant factor to justify refusal of compensation and the Board had given the applicant no opportunity by way of an oral hearing to challenge its initial conclusions.

11.51 It has been held that, in the absence of a specific duty to give reasons for a particular decision, where that decision is on the face of it questionable, the courts may infer that it is irrational or improper such as to justify quashing it in the absence of fuller reasons justifying the decision and rebutting the inference\textsuperscript{1}. As Lord Sutherland has noted in the context of a licensing judicial review:

'The absence of reasons for a decision when there is not duty to given them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision maker who has given no reasons cannot complain if the court draws the inference that he had no rational reason for his decision\textsuperscript{2}'.

1 See R v Criminal Injuries Compensation Board, ex p Cook [1996] 2 All ER 144 per Hobhouse LJ at 156 and 158. See also R v Criminal Injuries Compensation Board, ex p S [1995] 2 FLR 615 per Sedley J.
2 See Bass Taverns Ltd. v Clydebank District Licensing Board 1995 SLT 1275, OH per Lord Sutherland at 1277.

11.52 Again, in contrast to Lord Gill's general approach in Young on the question of a right to a hearing, the English courts have held that considerations of fairness may require the Board to seek clarification of the evidence presented to it, particularly medical evidence which might substantiate claims and, if necessary, to allow an adjournment to permit the relevant evidence to be collated\textsuperscript{3}. The Board is however under no obligation itself to investigate a claim where the applicant was having difficulty obtaining certain evidence, although it had the power to do so\textsuperscript{4}. This general approach based on the upholding of rules of natural justice to ensure fairness of result has been confirmed by the House of Lords in R v Criminal Injuries Compensation Board, ex parte A\textsuperscript{5} where Lord Slynn held that the reliance by the Board on what transpired, after discovery of the relevant documents subsequent to the hearing, to be inaccurate and misleading
hearsay evidence (in the form of a summary by Police witnesses of the medical evidence as found by the police doctor who was not called as a witness before the Board) so vitiated its decision as to require it to be quashed and the matter remitted to the Board for reconsideration in the light of the true facts as set out in the police doctor’s report.

3. 25 March 1999, unreported, HL.

11.53 It has been suggested by one commentator that where an individual cannot recall how the injuries he or she received were caused, this is not in itself a good reason for rejecting the claim, provided that there is other supporting evidence from which the inference that the individual was indeed the victim of crime of violence might reasonably be drawn.


11.54 Similarly where the Board propose to rely on the evidence of a particular witness as the basis for rejecting a claim to compensation (for example, on grounds of unreasonable delay in reporting the criminal act complained of to the police) then fairness requires that the applicant be given an opportunity to test that witness’s evidence in cross-examination.

Further, it has been held in England that where the Board proposed to make substantial reductions from an otherwise vouched claim, then it should give the applicant an opportunity to address it on both the law and the facts.


11.55 In Stensland v Criminal Injuries Compensation Board the Lord Ordinary held that the Board’s decision not to re-open the petitioner’s application for compensation after a serious change in her medical condition on the basis of which her original award of compensation had been calculated could not be impugned by way of judicial review as ‘unfair’ or ‘irrational’.

1. 17 January 1997, unreported, OH.

Restrictions on categories of individuals entitled to compensation

11.56 Under the 1990 Scheme the Board was empowered to look as a preliminary issue at a victim’s character, as shown by his prior criminal convictions or other unlawful conduct, in deciding whether to grant any award of compensation or to reduce the same. Under the 1996 Scheme, the Board is entitled to look broadly at any evidence available in coming to a decision regarding the victim’s character and the appropriateness of granting a (full award) as a result. The CICA has provided at paragraph 8.16 of
its guide to the Scheme a table indicating how they will exercise their discretion as regards the weight to be accorded to unspent previous convictions. Such convictions are awarded points and the accumulation of a total number of such points will result in a specified percentage reduction from any final award of compensation, subject to any relevant mitigating factors.


11.57 In Brendan Curran v United Kingdom¹ the European Commission of Human Rights held that it was open to Contracting states to restrict the categories of persons who might be entitled to claim compensation for criminal injuries for a variety of policy reasons. It could not be said that the exclusion of certain persons from entitlement to compensation (in casu under the scheme applicable in Northern Ireland, those who had been engaged in the commission, preparation or instigation of acts of terrorism) amounted to the imposition of a further 'penalty' upon those persons contrary to article 7 of the Convention on Human Rights.

1 Application No 36988/97 4 March 1998, unreported, E Comm HR.

11.58 As is clear, however, from the decision of the European Court of Justice in Cowan v Trésor Public² Community law precludes any purported limitation of criminal injury compensation schemes on grounds of nationality of the home state. Nationals of other member states present in the home state may be exercising their free movement rights and any attempt to exclude them from claiming on the grounds of their nationality would be caught by the prohibition against nationality discrimination contained in article 12 of the Treaty of Rome, as amended by the 1997 Amsterdam Treaty.


Representation before the Board

11.59 In Templeton v Criminal Injuries Compensation Board¹ Lord Milligan held that the Board had a discretion on the question as to who might appear as a representative before it and held that in particular the Board could not be said to be acting unreasonably in refusing rights of audience and representation to a solicitor who had been struck off the roll of solicitors in Scotland.

1 1997 SLT 953, OH.

11.60 Although the Board has a duty to assist a party who appears before it without representation, its duty does not extend to effectively becoming that party’s representative and cross-examining contrary witnesses in the manner that a skilled advocate or other representative of the party might do¹.

Deductions from compensation

11.61 In *Cantwell v Criminal Injuries Compensation Board*¹ Lord Milligan held that the Board had acted correctly in taking into account ill health pension payments made to a police officer who had been injured in the course of his duties to offset the amount of compensation awarded to him under the scheme.

1 28 July 1998, unreported, OH.

11.62 In *R v Criminal Injuries Compensation Board, ex parte Barrett*¹ it was held that the Board had acted improperly in attributing the bulk of an award made to the family of an individual who had died as a result of criminal injuries to the spouse rather than to the two children of the marriage and then substantially reducing the total award against the proceeds of a life insurance policy which the spouse received on the death of the victim. The effect of the Board’s decision was to offset the monies which would otherwise have been properly due to them under the scheme against insurance monies received by their surviving parent and this was held to be unlawful.

Chapter 12

Local Authorities and Judicial Review

INTRODUCTION

12.01 The structure of local government, local government finance, local domestic taxation (council tax) and non-domestic taxation (business rates) are all matters which have been devolved to the Scottish Parliament. In contrast to the situation of German Länder, the geographical and administrative units which together form the Federal Republic of Germany and whose status and functions form part of the unalterable provisions of the German constitution, the Grundgesetz, the regulation of local government in the United Kingdom is not considered to be so central to the United Kingdom constitution as to require to be reserved to the Westminster Parliament by paragraph 1 of Schedule 5 to the Scotland Act 1998.

12.02 One author has recently written with regard to the relationship between Westminster and local government in Scotland:

The same statutory framework which is used to allocate primary functions [of local authorities] ... is also used to set out the Secretary of State's ongoing powers of intervention, which take many forms.

Most powers, although they may be quite ranging in their scope, are defined with some precision. It is rare that central government is given an open-ended power to tell local authorities how to conduct their business.


12.03 It is not self-evident that this balance between the powers of local government and supervision by national government will remain the same under the Scottish Parliament, particularly given the increasing tendency in England and Wales for the ever more specific regulation and supervision by central government of such matters as the provision of education which were formerly the preserve of local government.

12.04 Further, local authorities are required to conduct their activities in accordance with the requirements of Community law. The Court of Justice has held that when the terms of a Community directive are regarded as sufficiently precise and unconditional and leave no discretion with the member states as regards their implementation, these provisions may be relied upon directly by litigants before national courts. It is clear that, for the purposes of Community law, local authorities are regarded as emanations of the states and hence subject to the direct effect of directives.

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There is some question raised within the United Kingdom courts, however, as to whether or not local authorities may themselves rely on the direct effect of directive as against other emanations of the state\(^2\). In *Fiorenzuola d'Arda District Tax Office v Carpaneto Piacentino Council*\(^3\) the Court of Justice, by contrast, appears to have ruled clearly that a local authority could rely on the directly effective provisions of a Community directive in an action brought against it by the local tax office.


12.05 In *Fratelli Costanzo v Milan City Council*\(^4\) the court considered the provisions of the Public Procurement directive regulating public works\(^5\). In an effort to speed up tendering procedures, the implementing Italian law provided for the automatic exclusion from consideration of abnormally low tenders. This was contrary to the clear and unconditional terms of article 29(5) of the directive which required that in such circumstances the tenderer be given an opportunity to explain and demonstrate the genuineness of his tender. The court found that Milan city council, as the relevant administrative authority in this case, was under the same obligation as the national courts to apply the plain terms of the directive directly to the applications made to them and to refrain from applying any conflicting provisions of Italian law. The implications of this decision are that local authorities have an obligation directly under Community law to respect and apply the directly effective provisions of Community law, whatever the position taken in national law or by the United Kingdom or Scottish governments. National authorities of the state may not rely on their own state’s failure to give proper respect to the requirements of Community law\(^4\).


12.06 Further, local authorities also undoubtedly constitute ‘public authorities’ for the purposes of the Human Rights Act 1998. Section 6 of the Act now makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, unless it could not have acted otherwise as a result of one or more provisions of primary legislation.

12.07 Local authorities in Scotland have been accorded a broad range of responsibilities in such areas as education, housing, licensing, planning and the provision and regulation of social services. These functions will henceforth require to be carried out in accordance not only with statutory provisions of the Westminster and Scottish Parliaments, but also, where
possible, in a manner which is compatible with the incorporated Convention rights and where directly effective, in accordance with Community law rights.

12.08 Judicial review has already been used extensively in Scotland both by1 and against2 local authorities to enforce duties laid upon them under statute across the range of their functions. The Local Government etc (Scotland) Act 1995 has confirmed local authorities broad power to raise actions of direct concern to their council tax payers. In Wilson v Grampian Regional Council3 however, Lord Marnoch expressed doubts as to whether the status of council tax payer alone gave individuals title and interest to raise judicial review proceedings against financial decisions of their local authority, although community councils have been recognised to have standing to review decisions of local government within their area4.

1 See eg Strathclyde Regional Council v City of Glasgow District Council 1988 SLT 144, OH (reclaiming motion reported 1989 SLT 235) on the enforcement of duty of the respondent to provide suitable and sufficient premises for the purposes of the district court and Tayside Regional Council v British Railways Board (1993) Times 30 December, OH on the enforceability of a statutory duty to maintain an keep open a level crossing over a railway line.
2 See eg T Docherty Limited v Burgh of Monifieth 1971 SLT 13 in which a application was brought by housing developers to ordain the burgh to perform the duty imposed on it under the Burgh Police (Scotland) Act 1892, s 219 to construct sufficient sewers to remove the effluent from the drains from all the buildings and streets in the development area.
3 1993 SLT 506, OH. See also Simpson v Edinburgh Corporation 1961 SLT 17,1960 SC 313, OH (an unsuccessful attempt by a rate payer to save George Square in Edinburgh from the depredations of Edinburgh University).
4 Cockenzie and Port Seton Community Council v East Lothian District Council 1997 SLT 81, OH.

12.09 Judicial review applications brought by local authorities include proceedings against central government1 and other bodies2 for their alleged failures to act in a lawful manner. The Boundary Commission's review of local government electoral arrangements in Scotland has resulted in a number of judicial review petitions brought by local authorities concerned to preserve their size3 while the reorganisation of local authorities following the Local Government etc (Scotland) Act 1995 has resulted in a spate of judicial review petitions brought by authorities keen to hold on to their assets4.

1 See eg Tayside Regional Council v Secretary of State for Scotland 1996 SLT 473.
2 See eg Glasgow District Council v Traffic Commissioner for the Scottish Traffic Area 1990 SCLR 737 on the fixing of the levels of taxi fares in Glasgow; and Kinardine and Deeside District Council v Forestry Commissioners, 1992 SLT 1180, OH where the local authority raised a case based on more general public environmental interest.
3 See eg East Kilbride District Council v Secretary of State for Scotland 1995 SLT 1238, OH; Aberdeen City Council v Local Government Boundary Commission for Scotland 1998 SLT 613, OH; Shetland Islands Council v Local Government Boundary Commission for Scotland (14 January 1999, unreported) OH.
will increase the levels of such proceedings. A comprehensive survey of the past and future impact of judicial review on local authorities in Scotland is beyond the scope of this work. It is useful, however, to highlight some of the main areas in which judicial review has already been and might yet be applied to and by local authorities.


12.11 The Education (Scotland) Act 1980 provides as follows:

'1. (1) Subject to subsection (2) below, it shall be the duty of every education authority to secure that there is made for their area adequate and efficient provision of school education and further education'.

In Walker v Strathclyde Regional Council (No 1) it was held that this was not a strict or absolute duty but one subject to the gloss that the defenders would not be guilty of a breach of their statutory duty if they could show that they had reasonable grounds for failing to keep the schools open and the court were objectively satisfied that the grounds were compelling and reasonable. If the petitioners, who were parents of pupils attending local authority schools, could prove that the respondents' school provision had become inadequate and inefficient to a significant extent, then the Lord Ordinary, Lord Davidson considered that it was for the respondents to satisfy the court, if they could, that they had not failed in their duty statutory duty. It was further held that the petitioners had title to raise the judicial review by virtue of section 91 of the Court of Session Act 1868 (now section 45(b) of the Court of Session Act 1988).

1 1986 SLT 523, OH.

12.12 In Scottish Hierarchy of the Roman Catholic Church v Highland Regional Council the Scottish episcopate unsuccessfully sought judicial review of the decision of the local authority, with the consent of the Secretary of State, to implement proposals which had the effect of withdrawing from a number of pupils the possibility of schooling at a local authority denominational school. They claimed that the Secretary of State had not addressed his mind (as required to under section 22D of the Education (Scotland) Act 1980) as to whether or not the proposals, if implemented, would result in a 'significant deterioration' in the distribution and provision of school education in denomination schools compared with other non-denomination schools managed by the local education authority. In dismissing the petition as unfounded, the House of Lords found that although the Secretary of State's consent letter could have been better worded, it was plain from a reading of the document that he had had regard to all the relevant facts.

1 1987 SLT 708, HL.

12.13 Section 28(1) of the Education (Scotland) Act 1980 provides that a local authority 'shall have regard to the general principle that... pupils are
to be educated in accordance with the wishes of their parents'. In Harvey v Strathclyde Regional Council\(^1\) it was found that the fact of the continuing overwhelming opposition of parents of school children affected by the local authority's decision, made after due consultation, to close down a school and amalgamate it with another was such as to shift the onus to the local authority to show that they had had regard to the principle of education in accordance with the parents' wishes. Failure to show this to the satisfaction of the court would result in a quashing of the decision. This decision was reversed on appeal both in the Inner House and in the House of Lords where it was observed that, assuming that the general duty imposed by section 23 of the Education (Scotland) Act 1980 did apply, it was simply one consideration among others and it remained a matter for the petitioners to show either that the authority had had no regard to their wishes as parents or that such regard as they had given to it was so minimal as to be Wednesbury unreasonable.

1 1989 SLT 25. Reported on appeal at 1989 SLT 612, HL.

12.14 In Regan v Dundee City Council\(^1\) a challenge was made to the lawfulness of a decision to close a non-denominational primary school based on alleged defects in the consultation procedure adopted. Parents of pupils at neighbouring non-denominational schools to whom the education authority proposed to transfer the pupils had been consulted, but there was no consultation with parents at a local Catholic school to which parents at the school subject to closure might then make a specific placing request in respect of their child. It was held that since any transfer to the denominational school would not be 'in accordance with arrangements made by the education authority', the authority had no duty under the Education (Publication and Consultation Etc) (Scotland) Regulations 1981 to consult with parents of that school and the petition was accordingly dismissed\(^2\). In Dundee City Council\(^3\) it was held that it was competent to the court to exercise its supervisory jurisdiction to judicially review decisions of the sheriff in appeals under the Education (Scotland) Act 1980 by parents against the refusal of the authority to accede to school placing requests in respect of their children, and that the sheriff exceeded his jurisdiction in so far as he purported to base his decision in individual cases on general policy matters which were properly the remit of the authority.

1 1997 SLT 139.
2 SI 1981/1558. See also Shaw v Lothian Regional Council (1992) Scotsman, 16 September, OH.
3 1998 SLT 1244, OH.

12.15 In King v East Ayrshire Council\(^1\) a mother of two schoolchildren brought a petition for judicial review of the local authority's decision to close a primary school on the grounds that the authority had based this decision on a miscalculation of the percentage of pupils actually attending the school. A correct calculation would have shown that the number of pupils currently attending was more than 80% of the school's working capacity and accordingly the decision to close it should have been referred to the Secretary of State under section 22B of the Education (Scotland) Act 1998. The court noted that it was probable that the authority had indeed
made an error in their calculations (by referring to historic rather than current attendance figures) but that the court would not in the circumstances exercise its own discretion in judicial review procedure to order reduction of the local authority’s decision not to refer the matter to the Secretary of State.

1 1998 SC 182.

12.16 The general tenor of these decision seems to be that while the courts accept that there are specific enforceable statutory duties laid upon local authorities in reaching their decisions on matters concerning the provision and management of education within their area, the courts are loath to interfere with the substance of these decisions if they can avoid it. Given the cost and time implications of any reduction or reversal of the local education authority’s decision regarding the general provision and financing of education provision in their area, the courts in Scotland appear to take a hands-off approach, in general where possible exercising their discretion in favour of the authority’s decisions.

1 See to like effect Shaw v Strathclyde Regional Council 1988 SLT 313, OH regarding the details of the administration of clothing grants by the local education authority.

The Convention right to education

12.17 Among the rights designated as incorporated Convention rights in the Human Rights Act 1998 is that contained in article 2 of the First Protocol to the European Convention on Human Rights which is in the following terms:

'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.

12.18 In ratifying this provision, the United Kingdom also expressly reserved its scope by providing that the principle of education in accordance with parental, religious and philosophical convictions would apply ‘only in so far as it is compatible with the provision of efficient instruction and training and the avoidance of unreasonable expenditure’. Sections 1(2) and 15(1)(a) of the Human Rights Act 1998 require national courts to interpret and apply the Convention rights to education subject to this reservation.

12.19 In any event, in practice the European Court of Human Rights has given a relatively restricted interpretation to this article holding that it does not oblige a state to establish, subsidise or maintain at its own expense, education of any particular type although there is an obligation placed on the state to allow parents at their own expense to establish and run private schools which accord with their own philosophical and/or religious convictions provided that these schools fulfil proper education requirements
which might be imposed by the state\textsuperscript{3}. In general, the state is required to respect parents’ philosophical convictions in the substance of what is taught by conveying relevant information in an objective, critical and pluralistic manner without indoctrination in a particular ideology unacceptable to the parents\textsuperscript{4}. The state may lawfully subsidise church run schools\textsuperscript{5}. It has been suggested, however, that the provision of state funded Catholic education in Scotland, while refusing state funding for Muslim school might constitute a breach of article 2, Protocol 1 of the Convention when read with the anti-discrimination provision of article 14\textsuperscript{6}.

1 See the Belgian Linguistic Case (Ser A No 6, Judgment 23 July 1968) 1 EHRR 252, E Ct HR.
2 See X & Y v United Kingdom (Application No 9461/91) 7 December 1982, 312 DR 210 for a Commission decision that a claim to a right to state subsidy for a Rudolf Steiner school based on anthroposophical principles was rejected tout court as ‘manifestly ill-founded’.
3 Ingrid Jordebo v Sweden (Application No 11533/85) 6 March 1987, 51 DR 125.
4 Kjeldsen and others v Denmark (Application No 23) (1979-80) 1 EHRR 711.
5 Re Austria (Application No 23419/94) 1995 82 DR 41.

12.20 In Campbell and Cosans v United Kingdom\textsuperscript{1} the extended suspension of a pupil from a state school for his refusal to accept corporal punishment and the denial of an undertaking requested by another parent that her child would not be subject to such punishment was found by the Court of Human Rights to be a contravention of the state’s duties under article 2, Protocol 1 of the Convention to respect parents’ expressed philosophical conviction that corporal punishment was unacceptable. This decision led to the abolition in the United Kingdom of corporal punishment in state schools\textsuperscript{2} and in private schools which are state-assisted\textsuperscript{3}.

1 Application No 48 (1982) 4 EHRR 293.
2 See the Education (Scotland) Act 1980, s 48A (amended by the Education (No 2) Act 1996).
3 See also Costello-Roberts v United Kingdom (Application No 247-C) (1995) 19 EHRR 112 on general state responsibility for supervision and regulation of private schools being such as to bring these within the ambit of the Convention.

12.21 The European Commission on Human Rights has also emphasised the Contracting states’ discretion in the manner in which individual children should be educated. Thus the Commission has rejected complaints that the failure of a local authority to provide special educational provision for a dyslexic child\textsuperscript{1}, or the provision of education for disabled children in special schools\textsuperscript{2} constituted a breach of article 2, Protocol 1 of the Convention.

1 See SP v United Kingdom (Application No 28915/95) (1997) 23 EHRR CD 139. See to similar effect the decision of Lord Cameron of Lochbroom in Birley v Lothian Regional Council (22 November 1995, unreported) OH and R v Portsmouth City Council, ex p Faludy [1998] Education Law Reports 619, QB per Tucker J.

HOUSING AND HOMELESSNESS

12.22 It was homelessness cases which were the spur to the creation in Scotland of the accelerated judicial review procedure\textsuperscript{1}. The failure to pro-
vide any form of statutory appeal against a decision of a local authority in relation to a homelessness application resulted in recourse being had to judicial review procedure, putting the existing procedure under strain and requiring the creation of the streamlined expedited procedure now contained in Chapter 58 of the Rule of Court. Housing and homelessness cases still constitute a significant proportion of the matters brought by way of judicial review before the Court of Session, constituting between 1988 and 1993 some 16% of the total number of cases brought by way of judicial review to the Court of Session.

1 Brown v Hamilton District Council 1983 SLT 397.
3 T Mullen, K Pick and T Prosser Judicial Review in Scotland (1996) Table 3.2 at p 19.

12.23 In Hoolaghan v Motherwell District Council a homosexual former drug user in rehabilitation claimed a priority need for accommodation on the basis of his special vulnerability due to his fragile mental health and the fact that he had been the victim of homophobic activity. Notwithstanding that his application was supported by the regional Social Work department and his general practitioner, the housing authority's declined to give his claim priority on the grounds that he had no dependent children or other reason to suggest vulnerability. The court held in dismissing the judicial review against this decision that it could only interfere on grounds that the authority had reached its decision perversely since the assessment of vulnerability for a special reason was one involving a weighing of a variety of factual issues.

1 (1997) HLR 27, OH.
2 Cf Wilson v Nithsdale District Council 1992 SLT 1131, OH on the vulnerability of an 18 year old girl who had been the victim of a sexual assault and Kelly v Monklands District Council 1987 SLT 169, OH per Lord Ross in relation to a 16 year old girl.

12.24 Local authorities have been held to be required to give adequate reasons related to the particular circumstances of the applicant to show that they have properly applied their minds in support of a decision to refuse accommodation on grounds of intentional homelessness or lack of local connection. Their decisions to admit or refuse applicants to their housing lists should be made in accordance with the admission rules which authorities are required to publish under section 21(1) of the Housing (Scotland) Act 1987. A decision to refuse admission to the housing list which is not justified under these rules would be subject to possible reduction by the courts.

1 See Hanlin v Nithsdale District Council (1997) HLR 6, OH and Stewart v Inverness District Council 1992 SLT 690, OH. See also Stewart v Inverness District Council, 1992 SLT 690, OH.
2 MacMillan v Kyle and Carrick District Council 1995 SCLR 365 OH.
3 See eg Pirie v Aberdeenshire District Council 1993 SLT 1155, OH

12.25 Judicial review has also been held to be the appropriate procedure for claiming a discretionary home loss or home disturbance payment against a landlord under the Land Compensation (Scotland) Act 1973.
Possible relevance of the Convention rights

12.26 The European Convention on Human Rights does not guarantee a right to housing or accommodation. Housing and tenancy issues, depending on their particular facts, may however potentially raise arguments based on at least three Convention rights: namely article 1 of Protocol 1 guaranteeing the peaceful enjoyment of possessions; article 6 guaranteeing a right of access to the courts and a fair hearing; and article 8 which guarantees respect for private, family and home life.

12.27 The Convention rights on protection of possessions has sought to be relied upon primarily by landlords. Indeed, in a non-admissibility decision in 19941 the Commission on Human Rights appeared to suggest that the right to live in a property of which one was not the owner (in casu, a liferentrix of a chateau subject to an entail in the male line) was not a 'possessions' within the terms of article 1 of Protocol 1. In Iatridis v Greece2 however, the Court of Human Rights held that the eviction by order of the Ministry of Finance of a tenant and operator of a cinema did constitute an unlawful interference with the tenant's property rights protected by article 1 of Protocol 1. The applicant rented the property from a landlord whose title to the property the Greek state disputed and claimed for itself.

1 Durini v Italy (Application No 19217/91) 21 January 1994 D and R 76A.
2 25 March 1999, unreported, E Ct HR.

12.28 The Court and the Commission of Human Rights have accorded a large margin of appreciation to the Contracting states in questions as to the requirements of the public interest in the regulation of ownership rights1. The legitimacy of the Channel Islands strict control of residential housing rights has been upheld in principle by the court2, being aimed at the prevention of over-development and the maintenance of the local economy. However in its particular application to owners of a house previously rented out over some 20 years who were refused a licence to return to live in their home on Guernsey, it was held to be disproportionate in practice3.

1 See James v United Kingdom [1986] 8 EHRR 123 where the granting of a right to buy the freehold to long leaseholders from the Duke of Westminster, among others, was held not to be manifestly unreasonable such as to constitute a breach of the Convention right.

12.29 The Court of Human Rights is also loath to interfere in the national regulation of rent and tenancy controls, aimed at for example the provision or preservation of low cost housing for the socially disadvantaged1. National laws which impede owners of rented property from enforcing
eviction orders against tenants so as to regain possession of their property for their own use have been found to be proportionate where the tenants were old and infirm and disproportionate in practice where the landlord was in priority need of accommodation because he was disabled.

1 See Mellacher v Austria (1989) 12 EHRR 391.
3 Spada and Scalabrino v Italy (A/315-B) (28 September 1995, unreported) E Ct HR.
4 Scollo v Italy (A/315-C) (28 September 1995, unreported) E Ct HR.

12.30 In Buckley v United Kingdom a traveller sought to rely upon article 8 of the Convention in asserting the right to respect for her caravan home established on her land. However her individual preference as to her place of residence was not sufficient to outweigh the general interest in the due enforcement of planning controls which resulted in the decision to refuse her planning permission to remain on the land. Direct reliance on such Convention rights following incorporation by way of the Human Rights Act 1998 may, however, make a difference to such decisions as that in McPhee v North Lanarkshire Council where it was held that a local authority was not bound by its earlier promise to allow a traveller to return to her pitch after she left the site on which she was based to allow the authority to modernisation and upgrade it.

2 1998 SLT 1317, OH.
3 See also Stewart v Inverness District Council, 1992 SLT 690, OH.

LICENSING

12.31 Licensing is another of the main areas in which local authorities are called as respondents in petitions for judicial review. As has been noted:

'The large number of licensing cases in Scotland, especially those in liquor licensing, can be explained by gaps in the appeals system against licensing decisions. The most frequent reason for a petition for judicial review is refusal to grant a regular extension of permitted hours for licensed premises. Other reasons for review have included refusal to treat applications to the licensing board as lodged in time, and the granting of gaming licences, against which an objector has no right of appeal. (The relevant statutes are the Licensing (Scotland) Act 1976 and the Betting, Gaming and Lotteries Act 1963)'.


Title and interest to object

12.32 Licensing judicial review cases often raise questions of title and interest to sue. In the complete absence of a specific statutory right of objection it would appear unlikely that an individual would be considered to have title and interest to raise a petition for judicial review of a decision. Conversely, failure to exercise a statutory right of objection may also deprive one of title and interest to pursue a judicial review of a decision.
The stating of an objection is no guarantee that it will be acted upon, however.

1 Matchett v Dunfermline District Council 1993 SLT 536, OH.
2 Hollywood Bowl (Scotland) Ltd v Horshurgh 1993 SLT 241, OH.

12.33 Neighbours are given statutory title to object in a number of licensing statutes¹. The lawyer's question naturally arises therefrom 'Who is my neighbour'?². In Khan v Glasgow District Licensing Board³ it was held that the category of neighbour was limited to those who own or occupy property the amenity of which might be directly affected by the grant of licence. The neighbourhood, for the purposes of rights to object to licence applications, was held not extend to nearby places which the occupier of a property might reasonably visit while residing in his own house.

1 See the Licensing (Scotland) Act 1976, s 16(1).

12.34 In Inverness Taxi Owners and Drivers Association v Highland Council¹ judicial review was sought of the council's decision that the area of Highland Council be considered a single licensing area with no restriction on the number of taxis on the grounds that this decision effectively fettered the discretion vested in the council by virtue of section 10(3) of the Civic Government (Scotland) Act 1982 (as amended by the Transport Act 1985) to refuse a licence in the future if satisfied that there was no significant demand for the services of taxis in its area which was unmet. The council's objection to the petitioners' title to pursue the petition was upheld by Lord MacLean who noted that the petitioners' right under paragraph 3 of Schedule 1 of the Civic Government (Scotland) Act 1982 Act was to object to any application for grant or renewal should such an application be made. The right to object did not arise until such an application was made and was held insufficient to be an insufficient basis to give them a title to challenge a policy decision made by the licensing authority. He accordingly dismissed the petition as premature without further consideration of its merits².

1 19 February 1999, unreported, OH.
2 Cf Paisley Taxi Owners Association Ltd v Renfrew District Council 1997 SLT 1112, OH.

Procedural rights to a hearing

12.35 Perfect Leisure v Edinburgh District Licensing Board¹ involved a legitimate expectation founded on the past practice of the licensing board as claimed by the petitioner but disputed by the respondent. The petitioner claimed that at an oral hearing into an application for renewal of a regular extension of permitted hours the applicant need only address the licensing board on issues specifically focused in objections by third parties, by the
police or by the board itself at the hearing, there being no need to make
submissions on all the matters set out in specified in section 47 of the Law
Reform (Miscellaneous Provisions) Scotland Act 1990 (notably ‘need in the
locality’ and benefit to the community’). Such legitimate expectation was
held to constitute a sufficiently relevant claim to allow a judicial review
petition to proceed to a second hearing at which to resolve the factual
matters in controversy between the parties.

1 1996 SLT 1267.
2 See JAE (Glasgow) Ltd v Glasgow District Licensing Board 1995 SLT 1164, OH for a finding that
a licensing board has no obligation to hear evidence on disputed facts at an oral hearing
before reaching its decision.

12.36 In Monklands District Independent Taxi Owners Association v Monk-
lands District Council (No 2) it was held by Lord Marnoch that where
insufficient notice of any hearing into the merits of taxi licence applications
has been given by the licensing authority, no final decision can be made by
it. The result is that under section 3(4) of the Civic Government (Scotland)
Act 1982 the licences are deemed to have been granted notwithstanding the
fact that objections thereto had been lodged but not considered and the
objectors thereby denied any a hearing.

1 1997 SLT 7, OH. See also Monklands District Independent Taxi Owners Association v Monklands
District Council (No 1) 1995 SCLR 547, OH in relation to the recall of the interim interdict
pronounced at an earlier stage in these proceedings.
2 See in the context of deemed entertainment licences for theatres a similar avoiding of the

Challenges to vires

12.37 It has been held that it is not open to the clerk to the licensing board
to determine issues of the competency of applications for licences, such
matters being questions to be referred to and decided upon by the licensing
board.

1 See eg Docherty v Leitch 1998 SLT 374, OH per Lord Bonomy; Datelock Ltd v Bain 1998 SLT 381,
OH per Lord Gill; and Tait v City of Glasgow District Licensing Board 1987 SLT 340, OH per
Lord Clyde.

12.38 In Cinderella’s Rockafella’s v Glasgow District Licensing Board the
lawfulness of the licensing board’s general policy, reached after consulta-
tion with the police, to effectively impose a curfew on late night drinking
by allowing for a uniform extensions of permitted hours to Glasgow city
centre licensed premises only to 2 am was upheld by the court. It held that
control of violence was not simply a responsibility of the police but could
properly be taken into account by the licensing authority in reaching its
regulatory decisions.

1 1994 SCLR 591, OH.
2 See to similar effect Bass Taverns v Clydebank District Licensing Board 1994 SCLR 601.

12.39 Where there is a statutory obligation to give any reasons which are
produced in support of a particular licensing decision these reasons should
leave the interested party in no doubt as to why the licensing board had reached the decision in question. The giving of confused or ambiguous reasons may constitute sufficient basis to have a decision reduced on the grounds that it would not be clear to the court that the board had acted properly and within its' statutory powers in reaching the decision under challenge1.

1 See Brechin Golf and Squash Club v Angus District Licensing Board 1993 SLT 547. Cf Martin v Dundee Licensing Board (1993) Scotsman, 22 December, OH.

Possible relevance of the Convention rights

12.40 In Tre Traktörer v Sweden1 it was held that 'possessions' for the purposes of article 1 of Protocol 1 of the European Convention on Human Rights was to be interpreted broadly so as to encompass a licence to sell alcohol. The licence was said to form part of the economic interest of a restaurant and the its' loss adversely affected goodwill in and the overall value of the business. Similarly in Pudas v Sweden2 the holding of a taxi licence was held to fall within the scope of the Convention. The protection of such property rights falls within the scope of article 6(1) of the Convention with the result that licence holders are entitled to access to the courts and judgment within a reasonable time should there be any suggestion of an attempt to withdraw or limit the holding of the licence.

1 Tre Traktörer Aktiebolg v Sweden (A/159) [1991] 13 EHRR 309.

PUBLIC PROCUREMENT AND LOCAL AUTHORITIES

12.41 The award of public works contracts by local authorities is regulated by Community law. Although the Treaty of Rome says nothing specifically about public procurement, certain of its provisions are relevant to the activities of public authorities in this area. Article 6 (now article 12(1) post-Amsterdam) prohibits discrimination on the grounds of nationality; article 30 (now article 28) prohibits barriers to inter-state trade; article 52 (now article 43) provides for the abolition of restrictions on the freedom of establishment of nationals, including companies and firms (article 58(2) now article 48(2)); article 59 (now article 49) lays down similar rules for the provision of services within the Community; and article 90 prevents member states using public undertakings in a way which contravenes the rules on free competition within the Community.

12.42 The bulk of Community public procurement law is to be found in secondary Community legislation in the form of directives, which on implementation into national law, supersede or complement existing tendering procedures in member states. The directives set (differing) thresholds with respect to the value of the contract up for tender which trigger the application of the Community procedures. In considering the relevance of Community law to a particular contract, it is therefore necessary to have regard firstly, to whether it falls within one of the areas of activity covered
by the directives, and secondly, to whether its value surpasses the threshold of the relevant directive.

12.43 There are three principal, substantive directives in the field of public procurement. These cover, respectively:

- public supply contracts with a value in excess of the ECU equivalent of either 130,000 or 200,000 special drawing rights depending on the specific type of contract¹ involving the purchase, lease, rental or hire purchase with or without option to buy of products between a supplier and a public authority⁵;

- public works contracts² with a value in excess of the ECU equivalent of 5 million special drawing rights if awarded directly by member state authorities or 5 million ECUs if at least 50% of the contract is directly subsidised and concerning the execution, or both the execution and design, of building and civil engineering works. Contractors covered by the directive comprise any legal or natural persons involved in construction activities while contracting authorities are any bodies governed by public law. This directive also covers concession contracts, where consideration for works done consists in whole or in part of the right to exploit them;

- public service contracts³ covering any contracts with a threshold value depending on the type of service contract of at least 130,000 special drawing rights, 200,000 special drawing rights or 200,000 ECUs, which are not already covered by its counterpart instruments on public supplies and public works. Contracts relating to 'priority services' include accounting and auditing, publishing and printing, and cleaning and maintenance services are subject to the full procedures of the directive. Non-priority services, such as legal, educational and health services, are governed only by rules on technical standards and by the obligation to publish details of contract awards.


12.44 A fourth directive, the Utilities directive, specifically covers the sectors of transport, water, energy and telecommunications⁴. This directive applies not only to public authorities but also to private bodies which operate on the basis of special or exclusive rights granted by public authorities. Privatised utilities such as British Gas, British Telecom, Scottish Power and Hydro-Electric are therefore included.


12.45 The substantive directives use similar techniques to promote fair competition in the public procurement sector, albeit not in exactly the same terms. Firstly, they attempt to ensure ease of access to the tendering process for all Community companies. Notices of tenders must be advertised promptly in the Official Journal and drawn up in accordance with model notices set out in annexes to the directives. Secondly, the directives seek to ensure that the selection process is truly competitive by making it as open and as public as possible and preventing public authorities from dealing
exclusively with a small number of favoured contractors. In order to prevent discrimination against firms from other member states, contracts must be awarded on the basis of either the lowest price, or the 'economically most advantageous offer'. The directives lay down objective criteria which may be considered in relation to the latter. Permitted criteria include quality, technical merit, technical assistance and service, projected delivery date and, of course, price. The criteria to be applied must be listed in the contract notice. Potential contractors may only be eliminated from the tendering process on grounds specified in the directives such as lack of economic and financial standing, professional integrity or technical capacity.

The more recent amending directives 97/52 and 98/4 also impose an obligation on the awarding authority to 'de-brief' unsuccessful tenderers and to set out to them, subject to any confidentiality requirements, the advantages of the winning bid.

1 See the judgments of the European Court of Justice in Case 31/87 Gebroeders Beentjes BV v Netherlands [1988] ECR 4635 and in Case C-324/93 R v Secretary of State for the Home Department, ex p Evans Medical Life and Macfarlan Smith Ltd [1995] ECR I-563, [1995] All ER (EC) 481 for a discussion and consideration of the criteria which might legitimately be used by a contracting authority to identify the offer which constitutes the most economically advantageous offer.

2 In General Buildings and Maintenance plc v Greenwich London Borough Council [1993] TLR 125, QB 'technical capacity' was held to include health and safety considerations.

12.46 The Court of Justice has held illegal a condition of tender to the effect that the tenderer had to be wholly or partly in public ownership. By corollary, it could be argued that any condition which has the effect of disfavouring public authorities should also be struck down by the courts, on grounds of indirect discrimination and unequal treatment. In Gebroeders Beentjes v Netherlands, a company which had submitted the lowest tender for a land consolidation scheme but which was not awarded the contract, complained that the contracting authority had not complied with the terms of Community public procurement law. It argued, inter alia, that one of the criteria used by the body in awarding the contract (whether or not the tenderer was in a position to employ a given number of the long-term unemployed who were registered at the regional employment office) was incompatible with the principle of non-discrimination. The Court of Justice held that such a criterion would be incompatible with Community law if it appeared that it could only be met by Dutch firms, or if it would be more difficult for firms from other member states to fulfil.

2 See also Case 45/87 EC Commission v Ireland ('Dundalk Water Scheme') [1988] ECR 4949.

12.47 Foreign firms are also protected against any indirect discrimination caused by the insistence by procuring authorities that national technical standards be applied. Subject to limited exceptions, local authorities are obliged to have regard to European technical standards, or to national standards implementing European standards, in defining their bids. In the Dundalk Water Scheme case, the Commission successfully brought an action against the Irish government concerning a tender which insisted on the use of pipes made to an Irish specification. In the area of public works contracts the Construction Products directive, providing for the mutual recognition of certain national standards, supplements existing European
standards. The directives also lay down certain mechanisms in order to promote the effectiveness of their terms. Under the original public procurement regime, authorities frequently sub-divided contracts in order to circumvent the thresholds above which the provisions of the directives were to apply. Now the value of formally separate contracts awarded at the same time, is to be aggregated with reference to financial thresholds. Requirements that authorities report to the Commission on the contracts which they have awarded are intended to secure a general monitoring of compliance with the directives.


12.48 Finally the Court of Justice has held that the principle of equal treatment, although not originally referred to in the secondary legislation, is a necessary part of the directives on public procurement. The obligation to observe this principle goes to the very heart of the whole scheme of the public procurement directives. Since the purpose of the Community public procurement regime is to introduce principles of free and open competition in the area of public procurement, any "sweetheart deals" or pre-contractual negotiations on the substance of tenders with specific parties would be contrary to Community law. Directive 97/52 also sets out a specific duty on the contracting authorities to ensure that there is no discrimination as between the various tenderers.


The Council and the Commission state that in open and restricted procedures all negotiation with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held but only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities and provided this does not involve discrimination.

Although the declaration refers to EC Council directive 71/305, this has since been replaced and consolidated by the new public works directive 93/37 (as amended by directive 97/52).

Remedies in the field of public procurement

12.49 Member states are required by the Public Procurement Remedies directive to set up 'effective and rapid remedies' to facilitate the domestic enforcement of Community public procurement law by individual tenderers. Review procedures must include the power to suspend the award of contracts in interlocutory proceedings, to set aside contracts unlawfully awarded and to grant damages to persons harmed by the infringement. A firm must prove, however, that it would have been awarded the contract but for the infringement of procurement rules. The Utilities directive has its own associated remedies directive. For example, review bodies may be empowered to impose fines and take other measures to prevent or punish infringements, instead of suspending or setting aside award procedures. In order to obtain damages, a contractor need only prove that it had a real chance of winning the contract, rather than that it would have won it, as under the General Remedies directive. The remedies directives both
specifically provide that the effect of any interim or final order or award of damages on a contract which is subsequently concluded shall be determined by national law. The stated aim of these directives is to ensure that judicial remedies for infringements of procurement law are consistently and effectively available throughout the Community.

1 EC Council Directive 89/655. Its terms are covered by the United Kingdom legislation implementing the substantive public procurement directives.


12.50 The United Kingdom regulations expressly state that the duties imposed on the government by the Community secondary legislation are owed to individual suppliers. Before a contract has been made the Court of Session has a variety of remedies at its disposal: interim suspension of the implementation of the award of the contract and of the implementation of any decision taken by the contracting authority; ordering the contracting authority to amend relevant documentation, including the removal of any discriminatory specification; and/or the power to make an award of damages. Where a contract has been concluded, however, the only remedy available is in damages. The procedures for awarding the contract cannot be re-opened. One author has suggested, however, that where a contract is entered into in deliberate and conscious breach of the procurement requirements, the courts may hold the contract to be unenforceable on grounds of public policy and may be persuaded to reduce it. Whether the courts would be willing to extend the existing common law public policy prohibitions on freedom of contact in the face of specific alternative remedies provided under statute is, however, open to question. In any event, the burden of proof in showing the necessary flagrant and wilful disregard of the law on the part of a public authority is probably in practice too high to be surmounted.


12.51 It is important to note that the Community law regime only applies in situations where the public authority decides to award a contract to perform the required activity. The Community rules can therefore legitimately be avoided simply by undertaking the activity in-house. Thus, in R v Portsmouth City Council, ex parte Coles the English Court of Appeal held that the decision by a local authority to award work in-house was, in effect, a decision not to conclude a contract with any third party and as such fell outwith the scope of article 1 of the Public Works directive which defines public works contract as 'contracts for pecuniary consideration concluded in writing between a contractor (a natural or legal person) and an authority awarding contracts'. The court went on to hold, however, that the 1991 national regulations which purport to implement the Public Works directive are, paradoxically, broader in their scope and effect than the directive. The regulations provide that they should apply to 'a bid by one part of the contracting authority to carry out work or works for another part of the
contacting authority when the former part is invited by the latter part to compete with the offers sought from other persons. The implications of such apparent incompatibility between the directive and the implementing national regulations were, unfortunately not explored by the Court of Appeal in Coles.

1 See Cumbria Professional Care Limited v Cumbria County Council (10 May 1996, unreported) QB.
2 [1997] 1 CMLR 1135, CA.

12.52 In R v Secretary of State for the Environment, ex part Bury Metropolitan Borough Council it was held that a local authority could not rely upon the provisions of article 36 of EC Council Directive 92/50 on the conditions of procedure for the award of public service contracts to support its judicial review against an order by the Secretary of State that it re-tender a contract for refuse collection and street cleaning which it had awarded in-house to its own Direct Labour Organisation. The English Court of Appeal held that in-house awards were not contractual and so did not fall within the scope of the directive and that in any event, the directive was intended to protect tenderers by placing restrictions on the way in which local authorities conducted the tendering process, rather than confer rights on local government as against central government.

2 See also R v Secretary of State for the Environment, ex p Harrow London Borough Council (1997) 29 Housing Law Reports 1, QB.

12.53 There has been surprisingly little litigation in Scotland to date in relation to the operation of the public procurement regime. In Tay Premium Unit Consortium v Secretary of State for Scotland the petitioners had unsuccessfully tendered for a public works contract and sought to challenge by way of judicial review the vires of its award to another contractor by the Secretary of State on the grounds that, in reaching his decision, he had failed to comply with the Public Works Contracts Regulations 1991. This claim was held to be not well-founded in fact and the petition was accordingly dismissed.

1 Tay Premium Unit Consortium v Secretary of State for Scotland, decision of Lord Cameron of Lochbroom (20 October 1995, unreported) OH.
2 SI 1991/2680.

Public procurement and compulsory competitive tendering

12.54 Clearly public procurement law must also be viewed in conjunction with the system of compulsory competitive tendering (CCT) for local authorities and certain other public bodies, first introduced by the Conservative government in 1980 and more recently extended by way of the Local Government Act 1992. The system was intended to ensure that public authorities undertake certain activities only where they can do so efficiently and competitively in relation to the private sector. A wide range of activities which were previously performed 'in-house' as a matter of
course had, under CCT, to be opened up to public tender. In South Lanarkshire Council v Secretary of State for Scotland judicial review was sought by a local authority of the guidelines on CCT issued by the Secretary of State in 1996. It was argued that these guidelines were ultra vires and in any event were framed in such general terms as to be unintelligible. The petition was rejected as unfounded. In Ettrick and Lauderdale District Council v Secretary of State for Scotland a judicial review was successfully taken by the local authority against the Secretary of State’s direction under section 14 (2)(d) of the Local Government Act 1988 that the council had the power to carry out ground maintenance works only if they were to put out to tender anew. If the council’s Direct Services Organisation intended to submit a written bid for the works, the council had to put them out to tender in accordance with the requirements of section 7 of the Act. It was held by the Lord Ordinary, Lord MacLean, that the Secretary of State had no basis for making such a direction. The council had had the right to accept earlier tenders in whole or in part and the refusal by the private contractor whose tender had been accepted in part to carry out the works specified in that part left the council with no option but to award the whole of the tender to its own DSO. The change in government as a result of the May 1997 election has not resulted in the immediate wholesale abolition of the compulsory competitive tendering regime for local authorities although the intention of the Westminster Government was in time to develop a new system to achieve best value in local government.

2 1998 SLT 445, OH.
4 1995 SLT 996, OH.

FAIRNESS AND THE PLACING OF PUBLIC CONTRACTS

12.55 Stannifer Developments Ltd v Glasgow Development Agency and Scottish Enterprise did not concern either public procurement or compulsory competitive tendering, but instead was a judicial review petition seeking reduction of the decision of the second respondents on the recommendation of the first respondents to sell an area of land to a commercial competitor of the petitioners. It was the respondents’ duty under section 8(1)(g) of the Enterprise and New Towns (Scotland) Act 1990 not to dispose of land, except with the consent of the Secretary of State ‘for a consideration less than the best that can be reasonably obtained’. The Inner House held, contrary to the claim of the petitioners, that this did not oblige the respondents to sell the land for the highest price, but rather imputed a reference to a complex assessment of a number of factors of which price was only one. A further argument presented by the petitioners was that they had an substantive legitimate expectation that the respondents would not solicit or permit the amendment of sealed offers which resulted from their invitation to tender for the land. It was held, however, that the respondents were under no general duty to treat offers fairly or under a particular duty to treat them equally. As the Lord Justice Clerk, Lord Cullen observed:
'T]here are cases in which it falls to a body exercising statutory powers to act fairly having regard to the interests of those affected by the exercise of those powers. An obvious example is when the body requires to reach a quasi-judicial decision between such persons. Another might be where the exercise of the power would deprive persons of some existing right or benefit. . . . There is, however, no general rule that a body seeking to exercise a statutory power is under a duty to act fairly, and accordingly that its exercise of that power is not valid unless it has done so. . . . [T]he respondents were concerned with a proposed transaction in essentially the same way as any commercial body, and hence were subject to the same contractual and delictual responsibilities that might affect such a body'.

1 1998 SCLR 1132.
2 See also JDP Investments v Strathclyde Regional Council 1997 SLT 408, OH for discussion by Lord Hamilton of the circumstances in which the exercise of such a power might properly be subject to judicial review.

12.56 It is arguable that had it been possible to have established some connection with European Community law on the facts of the Stannifer Developments case (for example a connection with the public procurement regime) the general duty to act fairly even in purely commercial matters might not have been so readily dismissed by the court. Since the European Union is not a signatory party to the European Convention on Human Rights, the Commission on Human Rights has rejected as inadmissible complaints about the actions both of European Union central institutions and of member states when acting to implement a decision of the central Community institutions. The Commission on Human Rights has accepted however that directly effective rights having their origin in Community legislation may constitute 'civil rights' for the purposes of article 6(1) of the Convention, except where these are rights properly characterised as matters of 'public law'.

1 See also Laurie v Commission for Local Authority Accounts in Scotland 1994 SLT 1185, OH for an unsuccessful attempt to argue for duties of fairness and natural justice such as to require reasons to be produced by the respondents in support of their recommendation to the Secretary of State that the chief financial officer of the Western Isles Council be ordered to make payment to the local authority arising from his allegedly handling of investments by the council in the collapsed Bank of Credit and Commerce International (BCCI).

12.57 In Tinelly and McElduff v United Kingdom public procurement procedures in Northern Ireland were found to raise justiciable issues of fundamental rights under the European Convention on Human Rights, namely the right under article 6(1) of access to the courts in respect of the determination of civil rights and obligations. The inability of the applicants to challenge before the courts a certificate from the Secretary of State to the effect that for reasons of national security they were ineligible to be considered for the award of a public works contract was found by the Court of Human Rights to constitute a violation of their article 6 rights.

1 (A/935) 10 July 1998, unreported, E Ct HR.
RESIDENTIAL HOMES AND COMMUNITY CARE

12.58 Responsibility for the provision of community care services was conferred upon local authorities by the National Health Service and Community Care Act 1990 (NHSCCA 1990). In Scotland the relevant provisions of this statute were enacted as amendments to the Social Work (Scotland) Act 1968. Section 51 of NHSCCA 1990 creates a new Section 5(1A) of the Social Work (Scotland) Act 1968 which is in the following terms:

'The Secretary of State may issue directions to local authorities, either individually or collectively, as to the manner in which they are to exercise any of their functions under this Act or any other enactments [under which matters are referred to the local authority social committee] ...; and a local authority shall comply with any direction made under this subsection.

12.59 This section effectively places all of the social work functions currently exercised by local authorities in Scotland under the direct control and supervision of the Secretary of State. This new power was said in Parliament to be a reserve power which would be used sparingly, but was justified as necessary to ensure, among other things, that central government policy on the encouragement of a 'mixed economy' of care provision was achieved. The Secretary of State's power has been used to issue directions (contained in a series of circulars) regarding the creation by the local authorities of programmes for the provision of community care services within their local area. These circulars have dealt with such matters as consultation and choice of accommodation. There is no restriction on the form that these binding directions might take, however, and the subsection clearly envisages the possibility of specific directions being issued by the Secretary of State to individual local authorities. Section 6A of the Social Work (Scotland) Act 1968 also gives the Secretary of State power to initiate an inquiry (which may be held in private) into the social work functions of a local authority.

1 Such planning is required by the Social Work (Scotland) Act 1968, s 5A.
2 See eg Community Care in Scotland: Community Care Planning (circular SW1/1991); Community Care in Scotland: Consultation (circular SW4/1993); Community Care in Scotland: Choice of Accommodation (circular SW4/1993).

12.60 Community care services includes the provision of and making arrangements for the provision of residential establishments and, since April 1993, of nursing homes. Section 5B of the Social Work (Scotland) Act 1968 also provides for a formal procedure which might be initiated by any interested party to make representations and/or complaints in relation to the local authority's discharge of their statutory social work functions, including the provision of community care services. The question as to the degree to which local authorities are entitled to take account of the fact that their own resources and available funding is limited in assessing the needs of those they are statutorily bound to assist is a vexed one. In Murray v Social Fund Inspector it was held by Lord Cameron of Lochbroom that the social fund inspector was entitled to have regard to the state of the annual
budget available and the likely further demand thereon in assessing the level of priority and vulnerability of a claimant on the fund. There are apparently conflicting decisions from the House of Lords as to whether such a budget-conscious approach is appropriate in the case of local authorities assessment of need.

1 See the Social Work (Scotland) Act 1968, Pt IV (particularly s 61).
2 Social Work (Scotland) Act 1968, s 13A.
4 1996 SLT 38, OH.

12.61 An alternative way for the local authorities to save to save money in this area of care provision is to seek to ensure that, where possible, the costs of this are borne by those receiving care. In Yule v South Lanarkshire Councila a judicial review petition was taken of the decision of the local authority to refuse an applicant public funding to cover the costs of a residential nursing home. The petitioner's claimed that the authority had effectively disregarded the transfer of heritage for love favour and affection made by the applicant to her grand-daughter some seven months before she entered the nursing home. In upholding the vires of the decision the Lord Ordinary held that any transfer of property made for the purpose of decreasing the amount that an individual might have to pay for nursing care could properly be taken into account by the local authority in assessing liability to contribute to the costs of that care.

1 1998 SLT 490 for a report on a preliminary decision on relevance. The decision on the merits is an unreported decision of Lord Philip of 12 May 1999.

Possible relevance of the Convention rights

12.62 Although the European Convention on Human Rights does not directly specify protected or guaranteed social welfare or economic rights but rather focuses more on the private rights of individuals, the case law of the Strasbourg institutions in relation to the scope of civil rights to be protected before national courts under article 6, and more recently the right to protection of possessions under article 1, Protocol 1 and the right under article 14 not to be discriminated against has resulted in some protection for welfare benefits and national rights to social security provision.

1 See Gaygusuz v Austria [1997] 23 EHRR 364 for a finding by the court that in the context of a claim of discrimination on grounds of nationality, contrary to article 14 of the Convention, the right to emergency social assistance from a social fund linked to a contributory unemployment insurance scheme constitutes a claim to a possession under and in terms of the property protection provisions of article 1, Protocol 1.

12.63 Notwithstanding the generally compulsory nature of the schemes and the public law aspects of their administration, national social security schemes have been likened to private insurance arrangements, especially where connected with particular employment and the Court of Human Rights has held that the guarantees of access to court under article 6 of the
Convention apply in relation to decisions to grant or withhold both contributory\(^1\) and non-contributory\(^2\) benefits\(^3\) under such schemes. However the question of disputes over contributions to be made to such is treated as analogous with obligations to pay state taxes and criminal fines and hence as falling outwith the terms of article 6 as being a matter of liabilities under public law rather than concerned with 'civil rights and obligations'\(^4\).

1 Feldbrugge v Netherlands (A/99) [1986] 8 EHRR 425.
2 Schuler-Zgraggen v Switzerland (A/263) [1993] 16 EHRR 405.
3 See more recently Duclos v France (Application 20940-1/92) (17 December 1996, unreported) E Ct HR.
4 Schouten and Meldrum v Netherlands (A/304) [1994] 19 EHRR 432.

**LIABILITY OF A PUBLIC AUTHORITY IN DAMAGES FOR BREACH OF STATUTORY DUTY**

12.64 As is clear from the decision of Lord Ross in Micosta SA v Shetland Islands Council\(^5\) and subsequent cases\(^2\), the courts in Scotland have accepted the English jurisprudence on the tort of 'misfeasance in public office' to the effect that damages may be awarded against a public authority misusing its statutory powers only where bad faith can be demonstrated. Bad faith is to be construed in the sense of a deliberate and dishonest abuse of power by a public official who knew that the petitioner would suffer loss as a consequence or was recklessly indifferent to such loss occurring\(^3\).

1 1986 SLT 193, OH per Lord Ross at 198:
‘In my opinion, deliberate misuse of statutory powers by a public body would be actionable under the law of Scotland at the instance of a third party who has suffered loss and damage in consequence of the misuse of statutory powers, provided that there was a proof of malice or proof that the action had been taken by the public authority in the full knowledge that it did not possess the power which it purported to exercise. I have reached the conclusion on a consideration of English authorities … and having regard to the general principles applicable under the law of Scotland to abuse of legal process’.
2 See Ross v Secretary of State for Scotland 1990 SLT 13, OH per Lord Milligan.

12.65 As Lord Johnston noted in Shetland Line (1984) Ltd v Secretary of State for Scotland:

‘[I]t would appear that the balance of the academic view, as epitomised by Professor Wade [in Administrative Law (6th edn)] at 780, is that the court would not award damages against public authorities merely because they had made some order which turns out to be ultra vires unless there was malice or conscious abuse. Thus it was apparent that counsel [for the petitioners] was seeking to extend the long established view that ministers could be responsible in damages for misfeasance or abuse of office involving, in the later case, bad faith, to the additional context of simple negligence as admitting a claim if the facts fitted. … Damages are not awardable in respect of the consequences of a decision of a minister of the Crown in the absence of misfeasance or abuse of power amounting to bad faith’\(^4\).

1 1996 SLT 653, OH per Lord Johnstone at 657-658.
12.66 It is clear from the case law that it is not simply ministers of the Crown or central governments departments who are protected from liability for damages in cases of simple negligence in the exercise of their statutory duties, but any public authority including, in principle, the police\(^1\) and the English Crown Prosecution Service\(^2\) as well as municipal and local authorities\(^3\).


12.67 In Osman v United Kingdom\(^1\) the applicants complained of police inaction in failing to protect their family from a murderous attack from a school teacher. The teacher had been reported to the police both by the education authorities and the family because of his clear mental instability evidenced by obsessive identification with, stalking of and threats to a schoolboy whom he had taught. The school teacher’s obsession culminated in his killing the father of the schoolboy and inflicting serious injury on the pupil himself. The applicants stated that the public policy doctrines restricting the possibility of suing the police by granting them immunity from suit in negligence when acting in an investigative or preventative capacity unjustifiably denied them due access to the courts where they sought reparation for the loss, injury and damage occasioned to them as a result of the police’s operational failures. The Court of Human Rights found that the immunity from suit laid down in Hill v Chief Constable of West Yorkshire\(^2\) could not in the circumstances of these applicants be justified as a proportionate and legitimate restriction on the applicants fundamental right of access to the courts.

1 Osman v United Kingdom (Case No 87/1997/871) [1998] FLR 193, E Ct HR.
2 [1989] AC 53, HL.
**The Principle of Freedom of Expression in the European Convention**

13.01 Article 10 of the European Convention on Human Rights provides as follows (emphasis added):

1. 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are necessary in a democratic society,
   - in the interests of national security, territorial integrity or public safety,
   - for the protection of official secrets or restrictions on the political speech of civil servants,
   - for the prevention of disorder or crime, [for example, 'hate crimes' such as the incitement to racial hatred],
   - for the protection of health or morals, [for example, national laws prohibiting abortion advice, blasphemy or obscenity],
   - for the protection of the reputation or the rights of others, [for example, the law relating to defamation],
   - for preventing the disclosure of information received in confidence, [for example laws to enforce privacy or confidentiality or to require journalists to disclose their sources] or
   - for maintaining the authority and impartiality of the judiciary [for example, the laws against murmuring the judges and contempt of court].

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1 See [Automn v Switzerland (A/178)](1990) 12 EHRR 485.
2 For discussion of purposes for which and the extent to which Contracting States may license broadcasters in their territory see: [Groppera Radio AG v Switzerland (A/173)](1990) EHRR 321; [Informationsverein Lentia v Austria, (A276)](1994) 17 EHRR 93; and [Radio ABC v Austria A/840 (1998) 25 EHRR 185].
6 See eg [Handyside v United Kingdom (A/24) (1979-80) 1 ECHR 737].
13.03 The European Convention allows for restrictions on freedom of expression but only insofar as these restrictions are proportionate in the sense that they are aimed at one or more of the legitimate ends specified in article 10.2 and as a matter of fact they achieve that end in the least restrictive manner which is compatible with the exercise of the other rights and freedoms contained in the Convention.

FREEDOM OF EXPRESSION AND EUROPEAN COMMUNITY LAW

13.04 The Court of Justice has held that among the general principles of Community law applicable in this area is the protection of freedom of expression set out in article 10 of the European Convention. In Elleniki Radiophonia Tielerasi v Dimotiki Etaireia Pliroforissis, which concerned an attempt by the national Greek Broadcasting company to enforce its statutory monopoly on broadcasting granted it by the Greek government, the Court of Justice stated:

'[A]s soon as any such legislation enters the field of application of Community law, the European Court, as sole arbiter in this matter, must provide the national court with all the elements of interpretation which are necessary in order to assess the compatibility of that legislation with the fundamental rights - as laid down in particular in the European Convention on Human Rights - the observance of which the Court ensures'.


13.05 Subsequently in EC Commission v Netherlands the Court of Justice upheld the legality of Dutch broadcasting regulations which were designed to ensure a pluralistic broadcasting output, holding that such pluralism was precisely what article 10 of the European Convention was designed to promote.
13.06 In R v Secretary of State for National Heritage, ex parte Continental Television BV the United Kingdom government's attempt to restrict the television reception of hard-core pornography broadcast by satellite from Denmark to the United Kingdom was challenged by way of judicial review under reference to Community law principles of free movement of services. In Swedish Consumers Ombudsman v TV-Shop I Sverige the Court of Justice upheld the legality of national proceedings seeking to restrain certain marketing practices aimed at children which were contrary to Swedish consumer protection law in television advertising broadcast by satellite from the United Kingdom to Denmark, Sweden and Norway. It was noted that the Television Without Frontiers directive was only a partially harmonising provision and as long as the national measures against the misleading advertising did not go so far as to prevent the re-transmission within its territory of television broadcasts coming from another member state then these measures would not contravene Community law.

13.07 In Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH v Heinrich Bauer Verlag the Court of Justice struck down an attempt to ban, on the grounds of that Austrian publishers were prohibited under Austrian law from including prize competitions within their newspapers and periodicals, the importation from Germany to Austria of crossword puzzle magazines which offered prizes for winning entries. The court held that such a ban would be contrary to the principles of free movement of goods contained in article 30 (now article 28 post-Amsterdam) of the Treaty of Rome and free expression protected in article 10 of the European Convention.

FREEDOM OF EXPRESSION AND UNITED KINGDOM LAW

13.08 Prior to the enactment of the Human Rights Act 1998, the United Kingdom courts were faced with a number of challenges to restrictions on the freedom of expression imposed under United Kingdom law. The Privy Council observed that any restrictions on freedom of expression guaranteed at common law must be narrowly interpreted as derogations from a fundamental democratic right.

1 Ming Pao Newspapers v Attorney General of Hong Kong [1996] 3 WLR 272 at 276G-277H.
no conflict or difference between the provisions of article 10 of the European Convention and the requirements of the common law. In R v Central Independent Television plc the Court of Appeal observed that the provisions of the Convention which dealt with freedom of expression and the English common law mirrored one another to the extent that the common law imposed only those restrictions on free speech which were as set out in article 10(2). Thus, the fact that common law assumed there was freedom of expression and then set out a number of recognised exceptions thereto, while the Convention first set out a general right and then qualified this in particular circumstances, should not lead to any difference in the result.

1 [1996] 2 All ER 35 at 47d, 51b–c, 58.
3 See also Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, HL at 273C, 283E–284A, 291F.

Notwithstanding these positive statements of principle in favour of free speech, in practice the courts in the United Kingdom have often upheld restrictions on the freedom of expression as properly justified by one or more of the legitimate objectives set out in article 10(2) of the Convention, including national security, blasphemy, defamation, contempt of court and confidentiality.

National security

13.11 In R v Secretary of State for the Home Department, ex parte Brind the House of Lords examined the validity of the Thatcher government’s ban on the broadcasting of the voices of members of certain political organisations, in particular Sinn Fein, avowedly in the interests of national security, public safety and the prevention of disorder or crime. Arguments were presented on behalf of the petitioners to the effect that the use of executive power in this regard was disproportionate to its proclaimed objective of ‘starving the terrorist of the oxygen of publicity’, particularly given that the words of the banned individuals were simply voiced over by actors. These arguments were given short shrift, however, Lord Ackner stating:

‘Unless and until Parliament incorporates the [European] convention [on Human Rights and Fundamental Freedoms] into domestic law ... there appears to me to be at present no basis on which the proportionality doctrine applied by the European Court [of Human Rights] can be followed by the courts of this country’.

1 [1991] 1 AC 696, HL.

Blasphemy

13.12 In R v Lemon a conviction for blasphemous libel was upheld against the publisher of Gay News in respect of a poem apparently describing the sexual response of a Roman centurion to the crucified Christ on the grounds that the principle of respect for religious belief which the blasphemy law embodied was compatible with the principle of responsible free speech within a pluralist society as set out in the European Conven-
tion². In *R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhary*³ it was held that the common law offence of blasphemy could not be extended to non-Christian faiths.

1 [1979] AC 617, HL at 665B–E.
2 The lawfulness of this decision was upheld by the Commission on Human Rights in Case 8710/79 Gay News May 7 1982, 28 DR 77. See also Otto Preminger Institute v Austria (A/295-A) (1995) 19 EHRR 34, E Ct HR and Wingrove v United Kingdom (1997) 24 EHRR 1, E Ct HR.
3 [1991] 1 QB 429 at 448E–452C.

Defamation

13.13 The law of defamation is clearly a break on free expression, but one which the courts in Scotland have long upheld and justified as grounds either for restraining by way of interdict⁴ the publication or broadcasting of material which on the face of it harms an individual’s reputation, or as the basis for seeking damages subsequent to publication. In *Winter v News Scotland Ltd*⁵ an Extra Division of the Inner House declined to interfere with an award of £50,000 damages by a civil jury for defamation in respect of an article published in a newspaper. The article had alleged that pursuer had had sexual intercourse with a prisoner. The defenders’ argument that the award had to be regarded as excessive, as it would be a sum appropriate for solatium only in cases of the gravest physical injury. The court held that it was inappropriate to attempt to make a direct comparison between an award of solatium for pain and suffering caused by physical injury and an award of solatium for injury to feelings and reputation refused the motion for a new trial refused.

1 McMurdo v Ferguson 1993 SLT 193, OH per Lord Murray.
2 1991 SLT 828.

Contempt of court

13.14 In *Attorney General v Associated Newspapers Ltd*¹ the House of Lords dismissed an appeal against a newspaper’s committal for contempt of court for publishing disclosures by jurors relating to deliberations within the jury room. It was held that an absolute prohibition on the disclosure of jury room secrets was necessary to maintain public confidence in the court system’s authority and impartiality and was thus a justifiable restriction under the European Convention since the law of contempt was clearly aimed at an objective which was recognised as legitimate under article 10(2)².

1 [1994] 2 AC 238, HL.

13.15 Contempt of court considerations have also been taken into account to interdict televisions broadcasts. In *Muir v British Broadcasting Corporation*⁶ the High Court of Justiciary held that it had power under its residual equitable powers of the nobile officium to prohibit the broadcasting of a BBC
television programme where it considered that there was a more than minimal risk of prejudice to the trial of accused persons, even where the programme did not necessarily constitute a contempt of court under the Contempt of Court Act 1981. The programme had reported the views of central Crown witness in a forthcoming trial on a related matter which was not the subject of immediate prosecution, namely allegations of assaults on inmates of Barlinnie Prison by unnamed prison officers. In granting the interdict against broadcasting prior to the trial the High Court stated that there was a risk of prejudice to the trial of the accused persons because at least one juror might form the impression from the programme that the doctor interviewed on it who was also to be a Crown witness at the forthcoming trial was a witness of considerable credit whose views should be taken to be of particular significance and weight.

1 1997 SLT 425 (bench consisting in Lords Sutherland, Milligan and MacLean).

Confidentiality and rights to privacy

13.16 The European Commission on Human Rights has held that national laws for the protection of the privacy of individuals are in principle compatible with the requirements of article 10 of the Convention on Human Rights1. There is however no law of privacy, as such, at common law in either England2 or Scotland3. Article 8 of the Convention which grants everyone ‘the right to respect for his private and family life’ accordingly represents something of an innovation for the courts of this country4. The Commission of Human Rights has held that the common law on breach of confidence, trespass, nuisance, harassment and malicious falsehood taken as a whole may represent a sufficient range of remedies to cover the privacy rights guaranteed under the Convention5.

1 See Neves v Portugal (Application No 20683/92, Judgment 20 February 1995).
3 See the 1972 Scottish Law Commission Memorandum on the possibility of reviving the action of contumelia, in relation to statements made about an individual which, regardless of their truth or falsehood, are calculated by their disseminator to hold that individual up to public hatred and contempt. Compare with the complaint in Winer v United Kingdom (Application No 10871/84) (1986) 48 D & R 158 that the applicant had no remedy in English law as regards true statements published about him which nevertheless intruded upon his privacy.
4 See also Protection from Harassment Act 1997, section 8(1) which provides that in Scotland ‘every individual has the right to be free from harassment and accordingly a person must not pursue a course of conduct which amounts to harassment of another’ and allows both for the civil remedies of interdict and damages and criminal penalties for contraventions of this right.

13.17 The courts in England and Wales have granted injunctions or damages in respect of breach of confidence where the information itself has the necessary quality of confidence about it, the information in question was imparted in circumstances where an obligation of confidence is imported and there has been unauthorised use of that information to the detriment of the party who initially communicated it1. The law on confi-
dentiality was unsuccessfully prayed in aid against publication in *Scotsman Publications v Lord Advocate* where it was held by the House of Lords that the detriment to the public interest caused by the disclosure by a third party of originally confidential material was insufficient to outweigh the public interest in freedom of expression and interdict against publication was accordingly refused.  

1 See *Coco v A N Clark Engineering Ltd* [1969] RPC 41 at 47 and *Malone v Metropolitan Police Commissioner* [1979] Ch. 344. See Laws J in *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807 for the suggestion that unauthorised *paparazzi* photographs of private acts may be covered by an obligation of confidentiality as follows:  

"If someone with a telephoto lens were to take from a distance and with no authority a photograph of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if had found or stolen a diary in which the act was recounted and proceeded to publish it. In such a case, the law will protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence".  


3 Cf *Attorney General v Guardian Newspapers (No 2) 'Spycatcher'*[1990] AC 109, HL.

**Representation of the People Act 1983**

13.18 In *Bowman v United Kingdom* the Court of Human Rights found that a prosecution under section 75 of the Representation of the People Act 1983 of an anti-abortion campaigner constituted a disproportionate interference with her rights to freedom of expression under article 10 of the European Convention. The campaigner who was acting on behalf of the Society for the Protection of the Unborn Child (SPUC) was found to have exceeded the £5 permissible expenditure allowed to individual non-candidates in promoting or procuring the election of any constituency candidate in the context of a general election campaign to the Westminster parliament.


**The Human Rights Act 1998**

13.19 Section 12 of the Human Rights Act 1998 (HRA 1998) makes particular provision for the right to freedom of expression under the Convention and effectively imposes a statutory *caveat* procedure in matters involving free expression. The courts are enjoined not to grant any relief which might affect this Convention right in the absence of the respondent against whom the relief is sought unless the court is satisfied either that all practicable steps have been taken to notify the respondent or that there are compelling reasons that no such notification should be made.

13.20 Further, interim relief may only be granted under the HRA 1998 where 'the court is satisfied that the applicant is likely to establish that publication should not be allowed, having particular regard in the case of journalistic, literary or artistic material to public availability or public interest and any relevant privacy code. The allusion to the relevant privacy code refers to the Code of Practice drafted by the newspaper industry and
enforced by their self-regulatory non-statutory body, the Press Complaints Commission. It would seem from this provision of the HRA 1998 that where material is not yet in the public domain and it has been obtained in breach of any applicable privacy code, then the balance of convenience will be against publication in the interim, unless such publication can be nonetheless shown to be in the public interest.

13.21 The Press Complaints Commission (PCC) has no legal power to prevent publication of material, to enforce any of its rulings or to grant any legal remedy against a newspaper contravening its Code in favour of the victim of such contravention. There would seem to be no reason why in principle decisions of the PCC should not themselves be subject to the principles of judicial review in Scotland. Decisions of the statutorily established Broadcasting Complaints Commission have been made the subject of judicial review proceedings in England.


The Scotland Act 1998

13.22 The subject matter of the Broadcasting Act 1990 and the Broadcasting Act 1996, as well as matters concerning the British Broadcasting Corporation have all been specified in Head K1 of Schedule 5 to the Scotland Act 1998 as being 'reserved matters' and hence regulation in these areas is outwith the legislative competence of both the Scottish parliament and Executive.

POLITICAL IMPARTIALITY AND THE BROADCASTERS

13.23 Article 3 of the First Protocol to the European Convention provides that:

'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

13.24 The regulation of elections for membership of the Scottish Parliament as well as for the House of Commons and the European Parliament and the franchise at local government election remain by virtue of Head B3 of Schedule 5 to the Scotland Act 1998 matters reserved to the Westminster Parliament. It seems likely, however, that the Court of Human Rights would consider the Scottish Parliament to constitute a 'legislature' for the purposes of article 3 to Protocol 1 given its primary rule making powers and high degree of political autonomy. The court has held, for example, that the European Parliament constitutes a legislature for the purposes of article 3 of Protocol 1 of the Convention, and that the exclusion of Gibraltar residents from the right to vote for that parliament constituted an unlawful denial of their democratic rights to participate in the choice of legislature.
which at least in part, governed their situation. The Commission on Human Rights has held that United Kingdom local authorities do not fall within the criteria for constituting a legislature for the purposes of this article. The Commission has further held that article 3, Protocol 1 does not confer any rights upon individuals to insist that political parties be given any particular given broadcasting access even in the context of election campaigns.

2 Matthews v United Kingdom (18 February 1999, unreported) E Ct HR.
4 Purcell v Ireland (Application No 15404/89) (1991) 70 DR 262.

13.25 There is, of course, no obligation directly imposed on the press by national law in the United Kingdom to present a politically impartial or balanced viewpoint. The English press in particular is notoriously partisan. By contrast, Scottish broadsheets have in the main tended to avoid excessive identification with any one political party, but this situation may change in the new political culture engendered by the re-establishment of a Parliament in Scotland.

13.26 Broadcasters, on the other hand, have traditionally been understood to have legally enforceable obligations of political impartiality imposed upon them. The Broadcasting Act 1990 requires the licensing and regulatory authorities for independent commercial broadcasters to secure that every licensed service preserve 'due impartiality' as regards matters of major 'political controversy'. In R v Radio Authority, ex parte Bull the English Court of Appeal upheld the lawfulness of a decision of the Radio Authority to refuse to allow radio advertising by Amnesty International (British Section) on the grounds that any such advertising would be directed towards a 'political end' by a 'body whose objects are wholly or mainly of a political nature' and hence would contravene section 92 of the Broadcasting Act 1990. The position of the BBC, governed by its incorporating Royal Charter and licences to broadcast granted under the Wireless Telegraphy Act 1949 and the Telecommunications Act 1984 is legally more complex and will be considered below.

1 [1997] 3 WLR 1094.

13.27 For the most part applicants have not sought to challenge the legality of the political impartiality provisions covering the activities of the broadcasters but have sought instead to enforce them. The Representation of the People Act 1983 regulates the broadcasting of items relating to particular constituencies or electoral areas in the course of an election campaign. In Grieve v Douglas-Home the unsuccessful Communist candidate for Kinross and West Perthshire constituency in the 1964 election, Christopher Murray Grieve, brought a petition under sections 107 and 108 of the Representation of the People Act 1949 (the predecessor to the 1983 Act) seeking a finding that the election to parliament on 15th October 1964
of Sir Alec Douglas-Home was void on the grounds that, as leader of the Conservative party, he had appeared in two party political broadcasts broadcast throughout the United Kingdom on both the BBC and the Independent Television Network to ‘urge the cause of the Conservative party and solicit votes for their candidates’. The expenses incurred in connection with the broadcasts were not, however, authorised in writing by the candidate’s election agent nor were they included in the statutory return of expenses. The petitioner alleged that these failures constituted a breach of section 63 of the 1949 Act. It was held, by the Court for Trial of Election Petitions consisting of Lords Migdale and Kilbrandon, that the broadcasts were not made with a view to promoting the election of the respondent. Rather the motive of the television authorities in arranging the broadcasts was informing of the public and accordingly there had been no infringement of the statute by the respondent, the British Broadcasting Corporation, or the Independent Television Authority. The petition was therefore refused.

1 1965 SC 315.

Independent television companies and political impartiality

13.28 The courts in Scotland appear to have accepted the competency of judicial review of the acts and omissions of the Independent Broadcasting Authority. Thus in Brian Wilson v Independent Broadcasting Authority' Lord Ross sitting in the Outer House accepted the competency (in terms of title and interest) of an action brought by the promoters of the ‘Labour Vote No Campaign Committee’ seeking interdict against the proposed broadcast by the IBA in the week prior to the 1 March 1979 referendum on the Scotland Act 1978 of four party political broadcasts, one for each of the Scottish Parliamentary parties, and also interdict to prevent the IBA from broadcasting any programme on 28 February 1979 ‘designed to influence voting by the electorate in the referendum’. They sought interdict on the grounds that at least three of the four party political broadcasts would be directed to securing a ‘Yes’ vote and that the broadcast scheduled for the eve of poll would be unduly influential, such as to put the IBA in breach of their statutory duty to maintain a proper balance on political matters. On 15 February 1979 Lord Ross granted interim interdict in the terms sought by the petitioners on the grounds that the IBA were prima facie in breach of their duty under section 2(2)(b) of the Independent Broadcasting Authority Act 1973 to ensure that programmes broadcast by them on, among other matters, the subject of the referendum maintained a proper balance and that the balance of convenience favoured the ‘Labour Vote No Campaign Committee’.

1 1979 SC 351, 1979 SLT 279.

13.29 In Wolfe v Independent Broadcasting Authority' Lord Robertson considered a petition from the office bearers of the Scottish National Party complaining of the network news and current affairs programmes transmitted by the commercial television companies in Scotland which, it was claimed, gave exclusive coverage to the activities of the Labour, Conserva-
tive and Liberal Parties in the course of a general election campaign and made no reference to the activities in Scotland of the SNP contrary to their duty under section 2(2)(b) of the Independent Broadcasting Authority Act 1973 'to ensure that the programmes broadcast... in each area maintain a high general standard in all respects, and in particular in respect of their content and equality, and a proper balance and wide range of their subject matter, having regard both to the programmes as a whole, and the times of day at which the programmes are broadcast'. The lack of representation of the position and views of the SNP was said to be in breach of the duty to maintain an 'proper balance'. Lord Robertson, differing from Lord Ross in Wilson, inclined to the view that the proper balance duty could not be applied to specific programmes but applied to the whole range of broadcast material. In any event he refused on grounds both of want of adequate specification and balance of convenience, the prayed for interim interdict which sought to prohibit the respondents 'from transmitting for reception in Scotland news and current affairs television programmes relating to the forthcoming general election which exclude representation of or reference to the views and activities of the SNP, or fail to give its' view and activities parity of time and treatment with the views and activities of the Labour, Liberal and Conservative parties'.

1 18 April 1979, unreported, OH.

13.30 In Robert Wilson v Independent Broadcasting Authority (No 2) 1 Lord Prosser considered an application for judicial review brought against the IBA by members of the SNP under reference to the IBA's duties under the Broadcasting Act 1981 'to maintain a proper balance in the subject matter of programmes' broadcast by it in each area and to ensure, so far as possible, that 'due impartiality is preserved by the persons providing the programmes in matters of political or industrial controversy or relating to current public policy'. The matter in controversy was the allocation of party political broadcasts among the parties competing in the 1987 election. The Conservatives, Labour and SDP/Liberal Alliance were allocated five broadcasts of 10 minutes' duration of which three were to be transmitted throughout the United Kingdom and two to Scotland only, while the SNP were to be permitted only two broadcasts of 10 minutes each to be transmitted to Scotland only. The SNP sought in their judicial review petition firstly a declarator that in proposing to allocate to them fewer broadcasts than those allocated to the other three parties, the IBA were failing to act in accordance with their duties under section 2(2)(b) and/or section 4(1)(f) of the Broadcasting Act 1981, and secondly a declarator to the effect that the IBA was, in effect, statutorily bound to secure that an equal number of broadcasts in Scotland of equal duration be allocated to each of the Conservative Party, Labour Party, SDP/Liberal Alliance and SNP during the course of the general election campaign. The petitioners argued that the IBA were bound to consider not only the United Kingdom but also the specifically Scottish political dimension in coming to their decision on allocation of broadcasting time in Scotland. It was held by the court, following that the respondent were indeed statutorily required under section 2(2)(b) but not section 4(1)(f) of the Broadcasting Act 1981 to ensure a proper balance in the presentation of party politics under the system of
party political broadcasts. However, the court was of the view that having regard to the 'United Kingdom dimension' of the aims and interests of the other parties. Lord Prosser observed:

'It can see no improper balance in an allocation of time to the United Kingdom parties to deal with that dimension and broadcast on that plane. Whether the allocation is the best, or is right, is not for me to judge... [The adoption of an allocation which gives extra time to the United Kingdom parties for United Kingdom transmissions, must in my opinion be regarded as a tenable decision, reflecting United Kingdom dimensions as well as a Scottish dimension, and consistent with the respondents' duty to ensure a proper balance'.

1 1988 SLT 276, OH.

13.31 In *Scottish National Party v Scottish Television plc* Lord Eassie held that any attempt to enforce the duty of commercial television companies in Scotland under section 6(1)(c) of the Broadcasting Act 1990 to show 'due impartiality' as respects matters relating to 'current public policy' should proceed by way of judicial review rather than by way of an ordinary action for interdict. Lord Eassie observed that the duty to observe due impartiality in relation to a particular topic, for example, party politics during an election period, was one which applied over the whole range of broadcasting output over a period and was not to be restricted solely to considerations of balance within individual programmes looked at in isolation. The broadcasters enjoyed a measure of discretion in determining what constituted a 'due' degree of impartiality in any particular case, and that therefore it could only be disturbed by the courts on the usual grounds for judicial review of discretionary decisions as set out by Lord Diplock in *CCSU v Minister of the Civil Service*. He stated:

'It may be possible that if the debate between three main UK party leaders, excluding the SNP, were to take place, and if it were available to the respondents as a network programme, its format, duration and likely public impact could present the respondents with a greater difficulty than that presented by other network programmes in the field of politics and current affairs. They would no doubt have to assess carefully whether the impact of such a programme, if transmitted by them in Scotland, would present in the context of politics in Scotland, a partiality which could not be overcome having regard to the complete range and type of programmes relating to the [UK general] election which they were proposing to broadcast. But in my view that is primarily a matter for their judgment.

... Broadcasting companies are vested with certain powers and duties by virtue of licences granted to them from the Independent Television Commission under the authority of the Broadcasting Act 1990 and if members of the public are entitled to apply to the court to review the exercise of these powers and duties that, to my mind, is of necessity an application to the court's supervisory jurisdiction'.

1 1998 SLT 1395, OH.
2 [1985] 1 AC 374, HL per Lord Diplock at 410. See also *Attorney General v Independent Broadcasting Authority, ex p McWhirter* [1973] 1 All ER 689, CA.
3 [1985] 1AC 374, HL per Lord Diplock at 395-396 (emphasis added).
The British Broadcasting Corporation and political impartiality

13.32 In 1979 Lord Denning stated, without citation of any particular authority, that a duty of political impartiality extended to the BBC, noting in Marshall v BBC that:

'It is important to observe that it is the duty of the BBC to be impartial in their programmes. This is especially important during an election campaign. They are not to favour one candidate or party more than another candidate or party'\(^1\).

1 [1979] 1 WLR 1071 at 1073, [1979] 3 All ER 80, CA. In the report of this case in All ER, this sentence, at 81h, reads as follows:

'It is important to observe that the BBC has accepted a duty to be impartial in their programmes'.

13.33 In McAliskey v British Broadcasting Corporation, however, Senior Counsel appearing for the BBC disputed this proposition, submitting rather that 'the BBC is under no obligation, whether by Royal Charter, licence or statute, to secure a fair balance as between conflicting views on controversial matters, and that at the highest is bound only by the following voluntary statement in a letter dated 19 June 1964 from the then Chairman of the BBC, Lord Normanbrook, to the then Postmaster General:

"The Board recall that the Postmaster General has relied on them to maintain the Corporation's policy of treating controversial subjects with due impartiality and they intend to continue this policy both on the Corporation's news services and in the more general field of programmes dealing with matters of public policy."'\(^2\).

1 [1980] NI 45 at 47, Ch.

13.34 In Lynch v British Broadcasting Corporation\(^3\) Hutton J sitting in the Queen's Bench Division of the Northern Ireland High Court dismissed an application for an interlocutory injunction from the Chairman of the Northern Ireland Executive of the Workers' Party against the BBC excluding him and his party from taking part in special programmes to be broadcast during a United Kingdom general election campaign on the grounds that they had polled less than 5% of the first preference votes in the October 1982 elections to the Northern Ireland Assembly. Somewhat controversially, it was held by the Northern Ireland court that the BBC was under no enforceable legal duty to act with impartiality as between different parties in political matters. Although as a matter of policy the BBC seeks to act impartially, it was held that this was not an obligation which could be enforced by the courts, any breach in this policy being a matter to be taken to the Home Secretary or the Westminster parliament. In any event, if there were any such impartiality duty, it was one which allowed the BBC an element of discretion or margin of appreciation the exercise of which would only be interfered with by the courts on grounds of irrationality or Wednesbury unreasonableness.

13.35 In *R v British Broadcasting Corporation and The Independent Television Commission, ex parte the Referendum Party* the English High Court considered a challenge by way of judicial review to the allocation to the Referendum Party of only one five minute party political broadcast for the 1997 general election campaign, to be contrasted with the five ten minute broadcasts allocated to the Labour and Conservative Parties respectively, and the four ten minutes broadcasts allotted to the Liberal Democrats. It was noted by the court that under clause 5.1(c) of Agreement of 25 January 1996 between the BBC and the Secretary of State for National Heritage, the BBC undertook to secure that its programmes, including those dealing with matters of political controversy, were dealt with ‘due accuracy and impartiality’. The court rejected the submission put forward by counsel for the Referendum Party under reference to the Canadian case of *Reform Party of Canada v Attorney General of Canada* that ‘fair play’ or ‘impartiality’ meant giving ‘an opportunity for minorities to turn themselves into majorities’, holding instead that:

‘Impartiality in this context is not to be equated with parity or balance as between political parties of different strengths, popular support and appeal. … It means fairness of allocation having regard to these factors, yet making allowances for any significant current changes in the political arena and for the potential effect of the powerful medium of television itself in advancing or hindering such changes’.

1 [1997] EMLR 605, QB.
2 (1992) 7 Alta LR (3d) 1, QB.
3 [1997] EMLR 605, QB at 618.

13.36 The question of the competency of bringing a judicial review in England in respect of a claimed breach of the BBC’s undertaking to the Secretary of State in the 1996 Agreement to maintain a position of ‘due accuracy and impartiality’ in relation to political matters, among others, was raised in *ex parte The Referendum Party* but was not finally decided either way by the court, on the grounds that the application could be refused on its merits. In *R v British Broadcasting Corporation, ex parte The Pro-Life Alliance Party* it was accepted by counsel for the BBC (in opposing on its merits an application for leave to bring a judicial review application) that there was an arguable case that the BBC were amenable to judicial review in respect of its’ decision to refuse to broadcast part of a proposed party political broadcast by the Pro-Life Alliance Party showing footage of abortions on grounds of taste and decency. In refusing leave and dismissing the application on the grounds that there was no substance in any of the arguments (*Wednesbury* unreasonableness and breach of the right to free expression under article 10 of the European Convention) sought to be advanced on behalf of the applicant, Dyson J observed that that:

‘I am in no doubt that the decision of the BBC fell within its margin of appreciation, notwithstanding that issues of freedom of expression are at stake in this case’.

13.37 This question as to the susceptibility of the BBC to judicial review has similarly not yet been definitively ruled upon by the courts in Scotland. In *Houston and Chalmers v British Broadcasting Corporation*\(^1\) the Inner House in a situation of urgency and without the opportunity of hearing full argument, upheld the grant by the Lord Ordinary, on grounds of a prima facie case of prejudice and balance of convenience, of an interim interdict against the BBC broadcasting on 3 April 1995 an extended interview with the then Prime Minister John Major in an action brought by way of summons by two candidates for the Scottish local council elections of 6 April 1995 from the Labour and Liberal Democrat parties respectively. In *Scottish National Party v British Broadcasting Corporation*\(^2\) Lord Gill refused an application for interim interdict and dismissed as irrelevant at an hearing on first orders a judicial review petition seeking review of the corporations' broadcasting policy on the party conferences.

1 1995 SC 433.
2 23 September 1996, unreported, OH. See Munro 'SNP v. BBC round 2' (1996) 146 NLJ1433 for a commentary.

13.38 Given the lack of emphasis on the public/private distinction as a criterion for the competency of judicial review in Scotland, and standing the underlying common law notion of *ius quaesitum tertio* in contract, it seems highly unlikely that the courts in Scotland would consider that the fact that the BBC's duty of political impartiality was expressly set out only in a contractual undertaking given in an agreement between the Corporation and the Secretary of State would be such as to exclude the courts from reviewing the exercise of this duty as it affected third parties. It is submitted that the decision of Hutton J in *Lynch v British Broadcasting Corporation* on the non-enforceability of the duty of political impartiality would not be considered good law in Scotland.
INTRODUCTION

14.01 The extent of the supervisory judicial review jurisdiction of the Court of Session has been generally understood by the courts in Scotland not to reach into matters of criminal law and procedure. Criminal law issues in Scotland are the province of the High Court of Justiciary which alone exercises a supervisory role over the decisions of lower courts and tribunals in the criminal justice system.

14.02 Thus in Reynolds v Christie Lord Morison held that a decision of a stipendiary magistrate to refuse legal aid was not subject to judicial review as the power exercised by the magistrate was wholly governed by provisions which applied exclusively to criminal business and which had been enacted by the High Court of Justiciary. Lord Morison observed as follows:

'It is not disputed that the Court of Session has no supervisory jurisdiction in relation to criminal matters. That jurisdiction is exclusively exercised by the High Court of Justiciary, as appears from Hume's Commentaries, ii, 59, in which it is said that "there is one article of power, which is the exclusive province of the Court of Justiciary, without exception of any other judicature, how eminent soever its degree . . . the power of providing a remedy for all extraordinary occurrences in the course of criminal business". The learned author then gives examples of matters connected with criminal business which he refers to as being subject to the exercise by the High Court of Justiciary of "this nobile officium, or right of superintendence".'

1 Compare with the subsequent decision of Lord Cullen in K v Scottish Legal Aid Board 1989 SLT 613, OH in which he affirmed the competency of a petition or judicial review of a refusal of criminal legal aid against a changed statutory background from that in effect when Reynolds v Christie was decided by Lord Morison:

'Under the Legal Aid (Scotland) Act 1986 . . . a number of important functions are entrusted to an independent board whose procedures are laid down by regulations made by the Secretary of State for Scotland. I am satisfied that it is competent for judicial review to be used in order to challenge an adverse decision of the respondents in a case such as the present'.

14.03 In McDonald v Secretary of State for Scotland however the Lord Ordinary, Lord Hamilton, upheld the competency of a petition for judicial review of the Secretary of State's refusal to exercise his power under section 263 of the Criminal Procedure (Scotland) Act 1975 to refer the petitioner's criminal conviction and sentence for counterfeiting offences back to the
14.03 Criminal Justice, Prisoners' Rights and Judicial Review

High Court to hear and determine the referral as if it were an appeal. It was argued on behalf of the Secretary of State that his discretion in this matter was absolute and being akin to the exercise of the royal prerogative was not subject to the supervisory jurisdiction of the Court of Session. This submission was rejected by the Lord Hamilton in the Outer House who held that judicial review of the decision of the Secretary of State under this provision was indeed possible. The application was still dismissed as incompetent however in that it sought to review the decision wholly on its merits, without specification of procedural impropriety on the part of the Secretary of State or other irregularity which might make the matter subject to review by the courts.
1 1996 SLT 16, OH.

14.04 Where the lower court is acting in an administrative rather than a judicial capacity, even in a matter raising criminal justice issues, then the proper remedy is judicial review to the Court of Session1.
1 See Reid v Secretary of State for Scotland [1999] 2 WLR 28, HL per Lord Clyde at 54.

14.05 It is likely that the coming into force of the Human Rights Act 1998 will result in greater use of at least the techniques of judicial review before the criminal courts in Scotland, requiring the re-consideration and assessment for compatibility with the Convention rights of such issues as pre-trial rights to access to legal advice while in detention, rules on the admissibility in criminal trials of wrongfully or improperly obtained evidence, the right to silence and the permissibility of making adverse comment or drawing adverse inferences therefrom at trial, the legality of placing reporting restrictions on criminal proceedings and the common law power of the High Court of Justiciary to declare conduct criminal in the absence of any pre-existing specific statutory provision.

5 On the face of it such a power would appear to contravene article 7(1) of the Convention which provides that:
   No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed'.

14.06 As has been noted in the context of a discussion of the impact of the New Zealand Bill of Rights on which the Human Rights Act 1998 was explicitly modelled:

'The abiding impression of the first seven years of [New Zealand] Bill of Rights jurisprudence is the utter domination of criminal cases. From the literally thousands of cases in which the Bill of Rights has been invoked on behalf of the accused, a large number had been reported and a disproportionately large
number have gone up to the [New Zealand] Court of Appeal. One indicator of the amount of case law is that the treatment of the Bill of Rights in the leading criminal law text-book runs to over 250 pages. All of this is consistent with the Canadian experience [with the 1982 Charter of Rights and Freedoms].


14.07 It should be borne in mind that Scots criminal law and procedure (except for specific statutory offences relating to reserved matters such as drugs and firearms), the criminal justice and prosecution system in Scotland, and prisons including the functions of the Scottish Prison Service and the treatment of offenders are all matters which have been devolved to the Scottish Parliament under the Scotland Act 1998. Acts of the Scottish Parliament in all these areas will therefore be subject to particular competency review by the courts, including as regards their compatibility with the domesticated European Convention rights under the Human Rights Act 1998.

CRIMINAL DUE PROCESS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

14.08 Article 5 of the European Convention on Human Rights sets out the basic principle that everyone has the right to liberty and security of person and cannot be deprived of liberty except in accordance with a procedure prescribed by law. Article 5(3) provides that every arrested or detained person is entitled to trial within a reasonable period or to release pending trial.

14.09 Article 6 of the Convention embodies the general principle of a right to a fair trial. The European Court of Human Rights has held that criminal proceedings should in general be adversarial. The right to a fair trial has accordingly been said to encompass the principle that there be 'open justice' and 'equality of arms' between prosecution and defence. Article 6(3) sets out a series of minimum rights for every person charged with a criminal offence, including:

(a) 'to be informed promptly, in a language which he understands and in detail, the nature and the cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.

1 See Bradstetter v Austria, (Ser A No 211, Judgment 28 August 1991) (1993) 15 EHRR 378 at 413.
Article 2(1) of the Seventh Protocol to the Convention provides:

‘Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law’.

This is not a right which has yet been specifically incorporated into domestic law by the Human Rights Act 1998, but it remains a binding obligation on the United Kingdom authorities under international law.

Recovery of documents in criminal proceedings

It has been argued that article 6 of the Convention may have an effect on the current procedures for recovery of documents in criminal proceedings in Scotland. Currently, when documents which the accused requires for the preparation of his defence are in the possession of the Crown or third parties and are not available to him, the accused is entitled at common law to petition the High Court of Justiciary to grant a commission and diligence for their recovery. The High Court has held that the petitioner should explain to the Crown authorities for what purpose and to what end particular documents are sought, indicating in general terms the relationship of the documents sought to the charge and the proposed defence in order for the Crown to be able properly to consider the application on its merits. If the High Court is satisfied that the documents sought may competently be produced at the trial and are necessary for the presentation of the defence, then an order for their recovery might be granted, even in the face of objections from the Crown if they consider the interests of the accused’s securing a fair trial require this. An application for the recovery of a witnesses’ criminal record has, however, been held by the court to be incompetent on grounds of public policy and public interest and the court will not exercise its powers of recovery to assist or permit a purely fishing or speculative diligence.

3 Downie v HM Advocate 1952 JC 37.
4 See eg HM Advocate v Ward 1993 SCCR 595 per Lord McCluskey and Hemmings v HM Advocate 1997 JC 140 per Lord Osborne.
5 HM Advocate v Ashrif 1988 SLT 567.
6 See Barbour v HM Advocate 1994 GWD 37–2169.

In Edwards v United Kingdom the prosecution failed to disclose the existence of certain evidence at the trial. When the matter was taken to the Court of Appeal in England, it was held that the jury would not have reached a different verdict even if the undisclosed material had been made
available. The European Court of Human Rights emphasised that fairness under article 6 of the Convention requires that the prosecution disclose all material evidence for and against the accused. Failure to do so gave rise to a defect in the trial procedure which could, however, be remedied by an appeal which provided for the hearing of fresh evidence. It is, of course, not open to the Court of Human Rights to substitute its judgment on the facts for that of the domestic courts. The role of that court is simply to ascertain whether or not the proceedings in their entirety, including the way in which evidence was taken, was fair. Since United Kingdom criminal proceedings are adversarial, the court also held that there was an onus on the accused and his advisers to raise material issues, for example the disclosure of a confidential report. The majority of the court held that the accused’s legal advisers’ failure to request or challenge the claimed immunity of a confidential document when they had the opportunity to do so, would not render the trial and appeal proceedings unfair.  

2 See the Commission decision Callaghan (9 May 1989) 60 DR 296 rejecting the application by the ‘Birmingham Six’ complaining of the unfairness of the English provisions on the hearing of new evidence by the Court of Appeal, rather than by a new judge and jury at first instance.

14.13 In McLeod v HM Advocate a five judge High Court heard an appeal against a trial judge’s refusal to dismiss a petition from an accused seeking to recover certain documents from the police, namely some seventy seven pro forma questionnaires completed by persons detained and interviewed by the police when investigating premises allegedly used for under-age drinking and the illegal consumption of Ecstasy, cannabis, and amphetamines. In dismissing the appeal the High Court observed that in its view the requirement that an accused explain the basis on which he wishes sight of particular documents and satisfy the court that these documents will serve a proper purpose in the interests of justice by being of material assistance to the proper preparation of presentation of the accused’s defence was compatible and consistent with the requirements of the European Convention.

1 1998 JC 212.  
2 See Benendoun v France (A/284) (1994) 18 EHRR 54

PRISONERS’ RIGHTS AND JUDICIAL REVIEW

14.14 In the 1943 case of Arbon v Anderson Lord Justice Goddard observed as follows:

'It seems to me impossible to say that if [a prisoner] can prove some departure from the prison rules which caused him inconvenience or detriment he can maintain an action. It would be fatal to all discipline in prisons if governors and warders had to perform their duty always with the fear of an action before their eyes. The safeguards against abuse are appeals to the governor ... and ... to the Secretary of State, and those, in my opinion, are the only remedies'.

1 [1943] 1 KB 252 per Goddard LJ at 255.
14.15 The very idea that prisoners might continue to have enforcible legal rights once detained in prison was once thought to be a controversial, not to say absurd, idea. Prisons were places of exile from the web of interlocking duties, claims and obligations which made up civil society. The punishment of imprisonment was most centrally constituted by the deprivation of rights from the prisoner, on the basis that this was the most fitting consequence of his failure to respect the rights of others. By wilfully breaking the criminal law, the imprisoned individual was thought no longer worthy to be a bearer of rights himself.

14.16 The deprivation of rights thesis did not mean, however, that prisoners were declared to be outlawed and deprived of legal protection. Rather, society continued to have obligations to them in terms of maintaining them in a safe as well as a secure environment in prison. It was just that, like children and the insane, prisoners were deemed to have lost the right to demand on their own account enforcement of these obligations. No longer regarded, for a determinate period at least, to be fit to be a subject under the law, the prisoner became instead an object of the law’s paternalism.

14.17 In Scotland, the law’s paternalism was personified in the office of the Secretary of State for Scotland who, with the enactment of the Prisons (Scotland) Act 1877, gained responsibility for the maintenance of all prisons in Scotland. The Secretary of State for Scotland was invested with broad discretionary powers to ensure the proper running of Scotland’s prisons as he thought fit. Prisoners were entitled to nothing. They were granted privileges in prison, which could be limited, withdrawn, or refused, all at the discretion of the prison executive. Prisoners themselves were not recognised by the courts as having any legal basis on which the challenge or complaint about the exercise of these powers. Thus in Becker v Home Office Lord Denning could state:

‘If the courts were to entertain actions by disgruntled prisoners the governor’s life would be made intolerable. The discipline of prison rules would be undermined. The Prison Rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action’.

1 [1972] 2 QB 407 per Lord Denning at 418 G-H.

14.18 The legal climate has now changed, however. The growth in judicial review procedure has meant that the courts now more readily recognise their proper constitutional role as active guardians of the individual against the excesses of the executive and administration. The courts have been more ready to intervene and to quash the administrative exercise of power where actions or omissions have been seen to constitute an abuse of the discretion and the trust invested in the executive by the constitution. The vigilance of individuals has been recognised by the courts
to be a necessary element in ensuring that the executive has acted lawfully, within the limits of its (discretionary) powers.

14.19 The passing of the Criminal Justice and Public Order Act 1994 has opened up the possibility of the (semi-)privatisation of the prison service in Scotland. It has accordingly become more difficult for the courts to rely on the assumptions of enlightened paternalism in the running of prisons when those with the immediate financial responsibility for the custody of prisoners will also necessarily have regard to profit and their corporate responsibilities to their shareholders.

14.20 In the case of the lawful use of powers in the running of prisons in Scotland, whether directly managed by the Secretary of State or contracted-out, it is clear that the individuals most directly aware of the activities of the particular prison administration are the imprisoned. The courts in Scotland would be shirking in their duties, and denying justice to the whole of civil society, if they refused to hear the complaints of prisoners about the abuse of power within prisons, and if they failed to act upon those allegations found to be well-founded by striking down the prison administration’s unlawful acts.

14.21 The courts have accordingly begun to recognise their obligation to provide a remedy to those, even in prison, found to be the victims of injustice. Convicted prisoners have been recognised by the courts as retaining all rights which have not either expressly or by necessary implication been taken from him1.

1 Raymond v Honey [1983] 1 AC 1 per Lord Wilberforce at 100 G-H. This approach to prisoners’ rights was approved in Scotland in Thomson, 1989 SLT 343 OH.

The statutory framework for prisoners’ rights in Scotland

14.22 The main statutes concerned with prison life in Scotland are the Prisons (Scotland) Act 1989 and the Prisoners and Criminal Proceedings (Scotland) Act 1993. The rules governing the day to day life of those in custody are contained within the Prisons and Young Offenders Institutions (Scotland) Rules 19941. The Prison Rules are supplemented by directions issued (and, since the Prisoners and Criminal Proceedings (Scotland) Act 1993, published) by the Secretary of State. Previous to the changes ushered in by the Prisoners and Criminal Proceedings (Scotland) Act 1993, prison authorities had also regularly relied upon and applied standing orders promulgated by the Secretary of State. The lawfulness of interpreting such standing orders as conferring powers on the prison administration greater or further than those explicitly authorised by regulation or statute is, however, doubtful2.

1 SI 1994/1931.
Rights in prison

14.23 The Prisons and Young Offenders Institutions (Scotland) Rules 1994\(^1\) for the first time, stipulate that prisoners may have rights and entitlements under the prison regime, rather than simply privileges. Privileges specified in rule 40 may be forfeited as a punishment or disciplinary sanction at the discretion of the prison governor under rule 100. These privileges include: the keeping of items of personal property within the cell; the purchasing of items within or outwith prison; access to facilities and participation in recreational activities; the possession and smoking of tobacco. By contrast rights granted under the rules cannot be withdrawn by the prison authorities as a disciplinary sanction\(^2\).


14.24 The 1994 Prison Rules set out the following rights of prisoners while in prison:

- the right to a single cell or room or, if it is necessary that the accommodation be shared, the right to a suitable cell-mate\(^3\);
- the right to be advised as to the governor’s reasons for allocating the prisoner to a particular part of the prison\(^4\); there would appear, however, to be no right for the prisoner to be advised as to the Secretary of State’s reasons for allocating or transferring her to a particular prison\(^5\);
- the right not be removed from association with other prisoners except as follows:
  1. for stated reason connected with good order or discipline for up to three days or, with the authority of the Secretary of State, up to one month\(^6\);
  2. as a punishment for a refractory or violent prisoner confinement for up to 24 hours\(^7\);
  3. as a punishment, cellular confinement for up to three days\(^8\);
  4. pending investigation of an alleged disciplinary offence for up to three days, unless exceptionally extended by order of the Secretary of State\(^9\);
- the right to author books or articles with a view for publication\(^10\);
- the right to keep abreast of current affairs through the print and broadcasting media\(^11\);
- the right to have her security classification reviewed annually and to be informed of the reasons for the chosen classification\(^12\);
- the right to wear his own clothes\(^13\) except where the Secretary of State has otherwise directed, in which case to wear suitable clothing supplied by the Secretary of State\(^14\);
- the right to practice, so far as practicable, his religion\(^15\);
- the right to participate in a programme of educational classes suitable, so far as practicable, to the needs and interests of the prisoner\(^16\);
- the right to one hour’s daily outdoor exercise, unless in exceptional circumstance pertaining to the prison, this right has, by direction, been removed by the Secretary of State\(^17\);
- the right to reasonable facilities for recreational activities outwith normal working hours and, in particular, a library\(^18\);
- the right to be protected from the foreseeable violence of other prisoners;
- the right to sufficient wholesome and nutritious food and drink provided within the prison;
- the right to hygienic living conditions, including twice weekly access to showers or baths and clean bedding;
- the right to be appropriate medical and dental care;
- the right to be advised as to the content and import of the Prison Rules applying to the particular prison in which he originally finds himself or is subsequently transferred to;
- the right to send and receive letters and packets subject to the general right on the part of the prison authorities to open, examine and read such correspondence if they believe that it contains material likely to be prejudicial to the good order of the prison or to relate to criminal activity.

(1) Letters or packets to or from courts may be opened by a prison officer in the presence of the prisoner if he has reason to believe that it contains a prohibited article: any such article may then be confiscated but the correspondence may not be read.

(2) Letters or packets to or from a prisoner's legal adviser may be opened by a prison officer in the presence of the prisoner if he has reason to believe that it contains a prohibited article: any such article may then be confiscated but the correspondence may only be read if the governor has advised the prisoner, and informed her of his reasons, that he has cause to believe that its contents endanger the security of the prison, or the safety of any person, or relate to criminal activity.

- the right of access to a telephone, although such calls may be logged, monitored and recorded by the prison authorities;
- the right to visits, within the sight but not the hearing of the prison officer, from a person of the prisoner's choice, and from his legal adviser;
- the right not to work more than 40 hours a week in prison and to receive standard remuneration for any work carried out;
- the right to be segregated from prisoners of the opposite sex;
- the right to make complaints ultimately to the independent Scottish Prison Complaints Commissioner (the Prisons Ombudsman) in relation to internal prison matters;
- the right to a proper opportunity, exceptionally with the assistance of legal representation, to present and to defend his case in accordance with the rules of natural justice at a hearing before the governor into alleged disciplinary offences and to appeal against any finding of guilt or punishment. Punishable breaches of discipline are set in Schedule 3 of the 1994 rules. The punishments available to the governor are set out in rule 100 and include: the forfeiture of privileges for up to 14 days; the stoppage of up to 28 days wages over a 56 day period; increasing the sentence to be served by up to 14 days for each offence up to a maximum of one sixth of the total sentence.
The Scottish courts and prisoners' rights

14.25 Prisoners in Scotland have an absolute right of unimpeded (but not necessarily physical) access to the courts, both domestic and European. Access to the courts has been described in English cases as a ‘constitutional’ or ‘fundamental’ or ‘vested common law’ right. Attempts have been made in Scotland by and on behalf of prisoners to obtain redress from both the sheriff court and the Court of Session in respect of allegations by them of unlawful conduct by the administration in relation to their treatment in prison and in the consideration of their cases.

2 Raymond v Honey [1983] 1 AC 1, HL.
3 R v Secretary of State for the Home Department, ex p Anderson [1984] QB 778, QB.
4 R v Secretary of State for the Home Department, ex p Leech (No 2) [1994] QB 198, CA.

14.26 A number of attempts have been made, usually by party litigants, to obtain legal redress via the sheriff court in relation to prisoners' right claims. All of these attempts to date have been dismissed as incompetent.

Leitch v Secretary of State for Scotland

14.27 In Leitch an action was raised in the sheriff court seeking payment of damages from the Secretary of State on the grounds that he had allegedly
defamed the pursuer and that in the purported exercise of his ministerial duty under section 263 of the Criminal Procedure (Scotland) Act 1975, namely in refusing to refer the pursuer's conviction for robbery back to the High Court, he had acted oppressively in relation to the pursuer. The pursuer's attempts to put at issue before the civil courts the merits of his original conviction was held to be incompetent and the action was dismissed.

1 1982 SLT (Sh Ct); 1983 SLT 394.

Moore v Secretary of State for Scotland¹

14.28 In Moore the Inner House considered an appeal against dismissal of an action brought by a prisoner party litigant in the sheriff court. It appeared that the pursuer was seeking from the civil courts a declarator that he had been wrongly convicted of murder and was claiming damages resulting therefrom from the Secretary of State. He also appeared to seek an order from the civil courts ordaining the Secretary of State to refer his case back to the High Court for re-consideration. It was held that the manner in which he had proceeded was incompetent and the case was dismissed².

1 Moore v Secretary of State for Scotland, 1985 SLT 38.
2 See R v Deputy Governor of Parkhurst Prison, ex p Hague [1992] 1 AC 58, HL where their Lordships held that a breach of the Prison Rules by the prison authorities did not found any private law claim in damages.

McDonald v Secretary of State for Scotland¹

14.29 In McDonald Secretary of State for Scotland a prisoner, James McFarlane McDonald, raised an sheriff court action seeking interdict against the Secretary of State or anyone on his behalf from carrying out searches on him without lawful authority, warrant or justifiable cause. The action was dismissed by both the sheriff and, on appeal, by the sheriff principal on the basis that by reason of section 21 of the Crown Proceedings Act 1947 it was not competent to grant interdict against the Crown in Scotland in civil proceedings.

1 1994 SLT 692.

14.30 The sheriffs' decisions, and their rationale were upheld by the Second Division of the Inner House chaired by Lord Ross. The suggestion by the amicus curiae applying the reasoning of Lord Woolf in M v Home Office³ that interdict might have been competent had the application proceeded by way of judicial review, was rejected in an obiter observation from the bench that there were formidable difficulties in the contention that judicial review applications did not constitute civil proceedings within the meaning of section 1 of the Crown Proceedings Act 1947.

1 [1993] 3 All ER 537, HL.
14.31 In McDonald v Secretary of State for Scotland (No 2) a second attempt was made in the sheriff court by James McFarlane McDonald to challenge the validity of searches carried out on him, under rule 14 of the Prison (Scotland) Rules 1952 as supplemented by standing order Fb5 issued by the Scottish Home and Health Department. Declarator, interdict and damages were sought on the basis that the searches were illegal since standing order Fb5 which purported to authorise them had not received any Parliamentary approval.

2 SI 1952/565.

The sheriff at first instance dismissed the action on the basis that it raised matters which were properly the subject of a judicial review application. On appeal to the sheriff principal, however, the sheriff’s order for dismissal was quashed on the basis that the matters raised related to allegations of the Secretary of State’s failure to act rather than his acting in excess or abuse of his powers, and that the question of the Secretary of State’s omissions could properly be the subject of inquiry in the sheriff court.

1 McDonald v Secretary of State for Scotland, 1995 SCLR 598, Sh Ct.

14.33 The Secretary of State appealed the matter to the Inner House which, reversing the sheriff principal, held that the central question in the case was the validity of the standing orders which raised matters that could only proceed by way of judicial review in the Court of Session. The sheriff court action for declarator and damages was accordingly dismissed.

Prisoners’ rights and judicial review in the Court of Session

14.34 The actions of prison governors, of the Secretary of State and of the parole board in relation to prisoners would seem to fall within the remit of the supervisory jurisdiction of the Court of Session, whether this is analysed in terms of tri-partite relationships or public law. Accordingly one would expect prisoners’ rights cases to figure significantly in judicial review applications.

1 See O’Reilly v Mackman [1983] 2 AC 237, HL.

14.35 Compared to the position in England, however, and in stark contrast to the position in Northern Ireland, there have been relatively few applications to the Court of Session under the new judicial review procedure for the courts to review administrative decisions taken in relation to prisoners in Scotland. Again in comparison to the English and Northern Irish courts, it cannot be said that the decisions of the Court of Session in the judicial review applications which have been brought before them have
been at the cutting edge of the development of prisoners' rights. The courts in Scotland have, in this area to date, taken a markedly conservative role emphasising and enforcing the broad powers and discretion of the executive, rather than protecting and expanding the fundamental rights of those held in custody.

Reference to the High Court for review of conviction

14.36 As we noted above in McDonald v Secretary of State for Scotland, James McFarlane McDonald again brought an action for judicial review of the Secretary of State's refusal to exercise his power under section 263 of the Criminal Procedure (Scotland) Act 1975 to refer his conviction and sentence for counterfeiting offences back to the High Court to hear and determine the referral as if it were an appeal. The submission on behalf of the Secretary of State that his discretion in this matter was absolute and being akin to the exercise of the royal prerogative was not subject to the supervisory jurisdiction of the Court of Session was rejected by Lord Hamilton in the Outer House. Although reserving his opinion as to whether or not a decision made by a minister relative to the prerogative of mercy is subject to review by the Court of Session under its supervisory jurisdiction, Lord Hamilton held that judicial review of the Secretary of State's decision under this statutory provision was in principle competent as falling within the tri-partite analysis set out in West stating:

'The power contained in s 263 is one entrusted to the Secretary of State by the legislature. It is a power which may be exercised in respect of any person who has been convicted of a criminal offence in Scotland. It meets the characteristics of a "jurisdiction" or "power to decide" as discussed in West. It is accordingly, at least prima facie, a power the exercise of which is subject to the supervisory jurisdiction of the Supreme Court. Although contained in a statute regulating criminal procedure, it was not argued that the petition was incompetent on the ground that the relative jurisdiction was vested in the High Court of Justiciary rather than in the Court of Session.

... The width of the discretion inherent in the power does not, in my view, of itself exclude the supervisory jurisdiction to review its exercise. The width of the power may be such as to leave little, if any, scope for some grounds of challenge. However, other grounds of challenge will, in principle, remain available.'

1 1996 SLT 16, OH.

14.37 As we have already noted, however, Lord Hamilton nonetheless dismissed the judicial review petition on grounds of competency, in that it appeared that the petition was seeking to review the decision wholly on its merits, without specification of any procedural impropriety on the part of the Secretary of State or other irregularity which might make the matter subject to reduction by the courts.
Categorisation and transfers of prisoners

14.38 In *Thomson*¹ a prisoner sought judicial review of the Secretary of State's decision, in exercise of powers granted under section 9 of the Prisons (Scotland) Act 1952, to transfer him from Glenochil prison to Peterhead prison and to remove his Category C grading (as a prisoner unlikely to be a danger to the public and who can be given the opportunity to serve his sentence with the minimum of restrictions) to category B (as a prisoner who is likely to be a danger to the public, and who must be kept in secure conditions to prevent his escape).

1 1989 SLT 343 OH.

14.39 The basis for the application to the supervisory jurisdiction of the Court of Session was that no reasons, or no proper reasons had been given for the decision. In dismissing the application the Lord Ordinary held that although as a matter of principle the Secretary of State's decision to transfer a prisoner from one institution to another might be reviewable, the effect of the statutory provision in question was to confer an absolute discretion on him to make such executive decisions as he thought fit for operational and security reasons. In order to bring the matter under review by the court, the applicant had to offer to show that the Secretary of State had misdirected himself in law in coming to his decision². The prison administration, however, had no duty to make known to prisoners the reason for their decisions on these matters. No mention was made in the judgment as to the reviewability or otherwise of the decision to change the prisoner's Category status from C to B³.

1 In *R v Secretary of State for the Home Department, ex p de Vries* [1993] 502, QB where it was held that, while inter-prison transfer decisions might be subject in principle to judicial review, this would only be on the grounds of the irrationality of the decision.
2 Compare to like effect on similar facts *R v Secretary of State for the Home Department, ex p Parry* (2 November 1994, unreported) CA.

14.40 With the coming into force of the Prison Rules 1994⁴, a prisoner now has a statutory right under rule 13(3) to be informed of the reasons why he has been allocated to a particular part of the prison. With the growing awareness among the judiciary of the need for individuals to be informed of the reasons for administrative decisions which affect them as a prerequisite to their obtaining effective access to and proper redress from the courts, it may be that the decision in *Thomson* will not stand the test of time. In *ex parte Arif*² it was observed that subject to exceptions arising from public interest immunity, sufficient material should be made to a prisoner to allow him to make representations on his categorisation or assessment of risk of escaping, since categorisation affects a prisoners prospects for consideration for parole and eventual release⁴.

2 *R v Secretary of State for the Home Department, ex p Arif* [1997] Crown Office Digest 477, QB.
3 See also *R v Secretary of State for the Home Department, ex p Duggan* [1994] 3 All ER 277.

14.41 In *R v Secretary of State for the Home Department, ex parte Mulkerrins*¹ the English Court of Appeal refused to interfere in the decision of the
Secretary of State to classify the applicant, who had been sentenced to thirty years in prison after his conviction for the importation of cocaine, as Category A prisoner and an exceptional high escape risk. The applicant, after being invited to make representation to a review committee, was advised by them that his classification as an exceptional escape risk was based on confidential police information received to the effect that the applicant was a significant member of a criminal organisation and commanded sufficient external resources such as to make him capable of organising and executing an armed escape attempt. It was held that, in contrast to the powers of the criminal courts, it was not within the jurisdiction of the English High courts in judicial review to determine whether or not the evidence in question should properly be withheld from the public domain. The petition was therefore dismissed since there was no procedural impropriety or unfairness and nothing to indicate that the decision of the Secretary of State could be impugned as irrational.

2 See to like effect R v Secretary of State for the Home Department, ex p McAvoy [1998] 1 WLR 790, CA and R v Secretary of State for the Home Department, ex p Doody [1994] 1 AC 531, HL.

Privacy of correspondence

14.42 In Leech v Secretary of State for Scotland1 a prisoner applied by way of judicial review petition for a declarator that prisoners were entitled to unimpeded and uncensored correspondence with their legal advisers concerning proposed or existing legal proceedings. Under rule 74(4) of the then current Prison (Scotland) Rules 19522 it was provided that every letter to or from a prisoner should be read by the governor and that it was within the discretion of the governor to stop any letter if he considered its contents objectionable. Moreover under standing order Mb20 applications to see a solicitor were conditional upon the solicitor disclosing to the governor the subject of the meeting.

2 Le SI 1952/565.

14.43 In dismissing the judicial review petition the Lord Ordinary held that rule 74(4) of the Prison (Scotland) Rules 19521 could not be said to be ultra vires, either on grounds of irrationality or illegality. The administration could properly reach the conclusion, upon a balanced and informed consideration of the security and management risks which might result from uncontrolled correspondence between prisoners and their solicitors, that such a censorship of correspondence was necessary for the proper running of the prison. Further, the fact that prisoners could have face-to-face meetings with their legal advisers meant that nothing in the censorship of correspondence deprived them of their rights or opportunity to obtain confidential legal advice. The requirement to disclose to the governor the subject matter of the meeting with the solicitor was also held to be justifiable for security reasons and did not in any event, breach the principle of access to confidential legal advice.

1 See para 14.42 above.
14.44 The Lord Ordinary's decision was upheld on appeal to the Inner House which confirmed that given that visits between solicitor and prisoner were possible, the general censorship of correspondence did not constitute a practical restriction such as to deny a prisoner access to the courts or to legal advice1.

1 See also Derek Donaldson [1993] Times Law Reports, OH.

14.45 More as a result of the case law of the European Court of Human Rights than any decisions of the Scottish courts, the treatment of prisoners' correspondence under the 1994 Prison Rules1 has been significantly changed since the decision in Leech. There is now an absolute right, under rule 49, to the privacy of the correspondence between the courts and a prisoner and, under rule 50, a qualified right to the privacy of correspondence between a prisoner and his legal adviser.

1 Le the Prisons and Young Offenders Institutions (Scotland) Rules 1994, SI 1994/1931.

14.46 In R v Secretary of State for the Home Department, ex parte Simms and R v Secretary of State for the Home Department, ex parte Main1 the English Court of Appeal upheld the lawfulness of two decisions of the Secretary of State restricting prisoners' rights in the area of freedom of expression. In the case of Main the Secretary of State decided to prevent prisoners receiving visits from journalists unless the journalists signed an undertaking that they would not use any material acquired or information obtained for professional purposes. In the case of Simms the decision was to authorise the searching but not the reading of correspondence with their legal advisers outwith the presence of the prisoner correspondent. The Court of Appeal held that the right to communicate with journalists qua journalists was forfeited by a prisoner as one consequence of his being imprisoned2 and that the searching of legal correspondence to ensure its bona fide nature was justified from considerations relating to the maintenance of security in closed prisons3. The maintenance of security was seen as a particular consideration in relation to Category A prisoners such as to justify the imposition of 'closed conditions' on all prison visits whereby prisoners classified as exceptional escape risks are wholly separated by a glass screen form all visitors, both family and lawyers4.

1 [1998] 2 All ER 491, CA.
2 Cf R v Secretary of State for the Home Department, ex p Bamber (15 February 1996, unreported) CA in which the court upheld a ban on prisoners' telephone contact with broadcasting organisation.
3 In R v Secretary of State for the Home Department, ex p Kaniglulari [1994] Crown Office Digest 526, DC in which the court upheld as justified by security considerations the prison system's monitoring of telephone calls, even with legal advisers, and ban on calls to mobile telephone numbers.
4 R v Secretary of State for the Home Department, ex p Ó Dhubháir and Ó'Brien [1995] Times Law Reports 539, QB.

Disciplinary offences and due process

14.47 In Conway v Secretary of State for Scotland1 a prisoner sought judicial review of a decision made in June 1993 finding him guilty of certain
disciplinary offences and imposing punishments lasting some 14 days consisting in confinement to his cell, deprivation of the use of a mattress, forfeiture of remission and work earnings, deprivation of recreation and association with other prisoners and exclusion from work. It was argued on behalf of the Secretary of State that since the punishments had already been meted out, the application for judicial review would have no practical consequences and ought to be refused.

1 1996 SLT 689.

14.48 The Lord Ordinary agreed that judicial review was not appropriate unless the successful challenge to the administrative decision in question had practical consequences for the applicant. In the circumstances of the case however the prisoner could point to continuing practical consequences of the disputed decision, namely his loss of wages and remission, in contravention of his patrimonial and fundamental human rights, if his legal argument were well founded. The matter was accordingly continued for further legal argument on the merits.

14.49 In *R v Governor of Swaleside Prison, ex parte Wynter*¹ the English courts confirmed that the procedures of prison disciplinary tribunals should be seen to be subject to the overriding requirement that the prisoner be given a fair hearing. The requirements of fairness in relation to prisoners charged with failing drug tests were said to entail that the prisoners concerned were informed of the testing procedures used and the measures employed to ensure the accuracy of these tests. It was thought rarely, if at all, appropriate to allow the prisoner the opportunity of cross-examining the laboratory medic or technician who had actually carried out the tests to ensure their accuracy. Neither is legal representation before a prison board of visitors considering a charge against a prisoner a requirement of fairness or natural justice in every case².

2 *R v Board of Visitors of the Maze Prison, ex p Hone* [1988] AC 379, HL.

Release from custody and computation of sentence

14.50 In general, prisoners sentenced before 1 October 1993 become eligible for parole upon serving one third of their sentence¹. For those sentenced on or after 1 October 1993 to less than 4 years, the qualifying period of release on licence is one half of their sentence². For those sentenced on or after 1 October 1993 to a determinate sentence of 4 years or more, the qualifying period for eligibility for parole is one half of their sentence, and two thirds of their sentence for release on licence³.

1 Prisons (Scotland) Act 1989, s 22(1). See *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 WLR 906, [1997] 1 All ER 397, CA for an unsuccessful attempt to argue against the retrospective effect of the post 1993 changes imposed in England and Wales on grounds of the prisoners' legitimate expectations of an earlier release date.
2 Prisons and Criminal Proceedings (Scotland) Act 1993, ss 1(1) and 27(5). See *R v Secretary of State for the Home Department, ex p François* [1998] 2 WLR 530, HL and *R v Secretary of State for the Home Department, ex p Walker* [1998] 1 WLR 809, QB for a discussion of the parallel
14.51 Those sentenced to a discretionary life sentence in Scotland should have the period ('the relevant part') before they might be ordered to be released by the parole board determined by the trial judge at the time sentence is imposed. Those sentenced to a mandatory life sentence in Scotland may only ever be released on licence by the Secretary of State following a non-binding recommendation from the parole board.

1. Prisoners and Criminal Proceedings (Scotland) Act 1993, s 2. See R v Secretary of State for the Home Department, ex p Pierson [1998] AC 539, HL for a successful challenge by way of judicial review of the decision of the Secretary of State to increase by five years the minimum period of imprisonment of a prisoner serving two mandatory life sentences beyond the tariff recommended by the trial judge.

2. Prisoners and Criminal Proceedings (Scotland) Act 1993, s 3. See R v Secretary of State for the Home Department, ex p Hindley [1998] QB 751, [1998] 2 WLR 505, CA where it was held that the imposition of whole life tariffs ('life means life') on prisoners with mandatory life sentences could not be considered unlawful.

14.52 The House of Lords has held in an English appeal that the Secretary of State has the power or discretion under section 29 of the Crime (Sentences) Act 1997 to extend the detention of a mandatory life sentence prisoners beyond the tariff period even where it is recommended by the Parole Board and where it no longer considered that he posed a danger to the public. While in another English appeal, the House of Lords has held that the Secretary of State must inform prisoners serving mandatory life sentences how long term has been recommended them by the judiciary.


2. R v Secretary of State for the Home Department, ex p Doody [1994] 1 AC 531, HL.

14.53 In the cases of Nicholson, Maguire and others a judicial review petition was raised seeking a declarator of the right of the petitioners to be released early in terms of the Prisoners and Criminal Proceedings (Scotland) Act 1993. It was argued that the effect of Schedule 6(3) of the Act was that prisoners on bail at the relevant date of 1 October 1993 were 'existing prisoners' and as such entitled to release after serving half their sentences. This argument was dismissed in both the Outer and the Inner House.


2. See to like effect the decision of the English High Court in R v Secretary of State for the Home Department, ex p Probyn [1998] 1 WLR 809, QB where it was held that in determining whether a individual is a long term or a short term prisoners under the Criminal Justice Act 1991, s 33(5) regard is had to the sentence imposed by the court and not that sentence as reduced by any time spent on remand.

Release on parole

14.54 It has been held in England that the Parole Board is under no duty at common law to inform a prisoner of the reasons for its decision as to
whether or not to recommend an individual for parole. Reasons were subsequently required to be given by virtue of rule 15 of the Parole Board Rules 1992. A prisoner's refusal to acknowledge guilt should not be seen as an absolute bar to his consideration for parole and a decision of the Parole Board based on this reason alone would be reducible.


14.55 In Rea v Parole Board for Scotland a prisoner had been advised that his release on licence later in the year had been recommended by the Parole Board and that this recommendation had been accepted by the Secretary of State. He was then transferred to an open prison to 'train for freedom'. Prior to his realise, however, he was called before the prison governor in connection with allegations regarding the misuse of a visitors pass and, following a governor's adjudication, he was returned to a closed prison. The Parole Board then withdrew its recommendation that he be released on licence.

1. 1993 SLT 1074, OH.

14.56 The prisoner sought reduction and suspension of the Parole Board's decision together with a declarator that, in accordance with the rules of natural justice, he was entitled to the following: written notice of the grounds on which the Parole Board reached their decision to withdraw their recommendation that he be released on licence; a hearing on the evidence at which the prisoner might appear or be represented to consider whether on the grounds had been established; reconsideration by the Parole Board of their decision in the light of this hearing.

14.57 In dismissing the application, the Lord Ordinary held that there was no basis in the Prisons (Scotland) Act 1989 for the rights contended for by the prisoner and that the discretion conferred on the board and on the Secretary of State should not be hampered in any manner which might prevent or inhibit their continuous reassessment of their recommendations of release of prisoners on licence. The Lord Ordinary observed that while the Parole Board and the Secretary of State had a duty to act fairly in discharging their functions, it was not appropriate to introduce judicial style hearings into administrative structures.

1. Cf R v Secretary of State for the Home Department, ex p O'Toole (31 January 1997, unreported) CA.

14.58 Once again, however, there has been significant statutory change in this area subsequent to the decision in Rea, brought under pressure from the case law of the European Court of Human Rights. Judicial style
tribunals with formal representation, oral participation and the examination of witnesses have been introduced within certain proceedings of the Parole Board for Scotland, notably those brought under Part IV of the Parole Board (Scotland) Rules 1993 dealing with the question of the release on licence of discretionary life prisoners.

1 See para 14.55 above.
2 See eg Weeks v United Kingdom (Ser A No 114, Judgment 2 March 1987) (1988) 10 EHRR 293.
3 See eg R v Parole Board, ex p Citizens [1994] Crown Office Digest 351 and 441, QB. These judicial style procedures have been held not to be applicable in relation to decision of the Parole Board to confirm the decision of the Secretary of State to recall a discretionary life sentence prisoner released on licence: see R v Parole Board, ex p Watson, [1996] 1 WLR 906, [1996] 2 All ER 641, CA.

14.59 In McRae v Secretary of State for Scotland a prisoner was recalled to prison after his release on licence was revoked by the Parole Board for Scotland as a result of his having been committed for trial in another matter. The trial did not however go ahead as planned but was deserted pro loco et tempore. The prisoner sought the quashing of the decision to revoke his release on licence as unreasonable on the grounds that the new trial had been deserted. The petition was refused, however, and the decision of the Parole Board allowed to stand.

1 1997 SLT 97, OH per Lord Weir.

14.60 In Carr v Secretary of State for Scotland Lord Milligan quashed a decision of the Secretary of State rejecting a recommendation from the Parole Board to release a prisoner on licence. The petitioner had been convicted of culpable homicide and had been sentenced to twelve years imprisonment. The petitioner had served a number of years in prison and the Parole Board reviewed her circumstances on two occasions and recommended that she be released on licence. This recommendation was rejected by the Secretary of State on the grounds that he did not consider that she had served a sufficiently long period of her sentence to satisfy the requirements of punishment and deterrence. No reference was made in the decision letter to the particular circumstances of the petitioner’s case. It appeared that the decision to reject the recommendation of the Parole Board had been reached on the application purely of general policy considerations. On the grounds that he had failed to indicate that he had taken into account the petitioners particular circumstances, the Secretary of State’s decisions was quashed as unlawful and the matter was remitted to him to consider anew.

1 1998 SCLR 160, OH.
2 See also R v Secretary of State for the Home Department, ex p Murphy (6 June 1997, unreported) [1997] Crown Office Digest 478, QB and R v Secretary of State for the Home Department, ex p Pegg [1995] Crown Office Digest 84, QB.

14.61 In Ritchie v Secretary of State for Scotland Lord MacLean sitting in the Outer House considered an application for judicial review of a decision of the Secretary of State, contrary to the recommendations of the Lord Justice General and of the Parole Board, that a life prisoner should spend at least fifteen years in custody. It was held that the Secretary of State had failed to
give the prisoner the opportunity to make representations prior to the making of any decision by him as to amount of time the prisoner should spend in custody. This failure to hear the prisoner's views was held to constitute such procedural unfairness as to vitiate the decision which was accordingly reduced for the Secretary of State to re-consider the whole matter in the light of such representations as might be made to him by the petitioner and others.

1 1999 SLT 55, OH.

14.62 In Holmes v Secretary of State for Scotland¹ a prisoner applied for judicial review of the Secretary of State's refusal to grant him early release on licence in accordance with the original recommendation of the Parole Board. The Parole Board subsequently withdrew their recommendation for parole after the pursuer was found to have visited a bookmaker while on release on licence from the prison to visit the dentist. The Lord Ordinary dismissed a petition for judicial review which sought to question the rationality both of the latter recommendation of the Parole Board and of the Secretary of State in deciding to act in accordance with it.

1 1998 GWD 27-1351, OH.

Mental health detentions and judicial review

14.63 Where individuals have after trial been found to have committed ex facie criminal acts while suffering from a mental disorder within the meaning of the Mental Health Acts, the courts may order their detention within the State Hospital rather than their imprisonment within the penal system¹. Persons who are subject to such a hospital order with an order restricting their discharge have by virtue of sections 63 to 67 of the Mental Health (Scotland) Act 1984 a right of appeal by way of summary application to the sheriff within the sheriffdom within which the hospital in which the person is detained is situated². In considering such an appeal the sheriff is said to be acting in an administrative capacity and accordingly his decision will be subject to judicial review before the Court of Session rather than any further substantive appeal to the High Court of Justiciary.

1 See the Criminal Procedure (Scotland) Act 1995, ss 58, 59.
2 For judicial consideration of the regime of compulsory civil detention in hospital of individuals suffering from mental disorder and their post-detention supervision by a community care order see Krol (AP) v Craig (3 December 1998, unreported) HL.

14.64 In Reid v Secretary of State for Scotland² the House of Lords considered an appeal by the Secretary of State from a decision of the Inner House³ the effect of which was, on consideration of the inter-relationship between sections 17 and 64 of the Mental Health (Scotland) Act 1984, that if a person detained compulsorily in hospital under a restriction order could not be said to be medically treatable in the sense of capable of receiving treatment likely to alleviate or prevent a deterioration in his condition (in casu psychopathic disorder manifested by abnormally aggressive or seriously irresponsible conduct) then the sheriff is bound to order his dis-
charge from the restriction order and consequent release from hospital regardless of any considerations relative to the protection of the public. The sheriff in this case had found that if the petitioner were to be released there was a very high risk of his re-offending and that any such offence was likely to have a 'sexual connotation'. Their Lordships reversed the decision of the Inner House, with Lord Clyde outlining the duties of the sheriff when faced with an appeal against continued detention as follows:

'If he [the sheriff] is satisfied in the light of all the evidence before him and in the whole circumstances that the appellant is not suffering from mental disorder of a nature or degree which makes it appropriate for him to be detained in hospital for medical treatment [defined in section 125 of the Act as including nursing and care and training under medical supervision] then he must discharge him. The circumstances which he may consider can include the mater of the health and safety of the patient and the safety of other persons, including members of the public; that is to say the propriety, as distinct from the necessity, of his continued detention in hospital'.

1 [1999] 2 WLR 28, HL per Lord Clyde at 54.
2 Reported sub nom Reid v Secretary of State for Scotland 1997 SLT 162.
3 Note that under the Criminal Procedure (Scotland) Act 1995, s 59A (added by the Crime and Punishment (Scotland) 1997, s 6) there is now the possibility of bringing such an individual back into the prison system to serve the sentence of life imprisonment which would otherwise have been imposed.

14.65 In Wilkinson v Secretary of State for Scotland the Inner House considered a similar judicial review petition against the decision of the sheriff to refuse an appeal by an individual who, subsequent to his trial in September 1974 for lewd, indecent and libidinous practices and behaviour and the culpable homicide of a six year old girl, was ordered to be detained in the State Hospital at Carstairs without limit of time on basis that medical evidence brought before the trial court showed him to be suffering from 'mental illness'. The petitioner had unsuccessfully exercised his statutory right of appeal to the sheriff in 1986, 1992 and 1996 and on the third refusal had brought the petition for judicial review. It was argued on his behalf that, while he might be said to be a person affected by sexual deviancy by reason of his paedophilia, he could not be said to suffer from any 'mental disorder' within the meaning of section 1 the Mental Health (Scotland) Act 1984 such to justify his continued detention within the State Hospital, particularly in the light of section 1(3) of the Act which provides that:

'No person shall be treated under this Act as suffering from mental disorder by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs'.

1 16 February 1999 unreported.
2 See Winterwerp v The Netherlands [1979] EHRR 387, E Ct HR for support for the view that article 5 of the European Convention on Human Rights will not permit detention on the ground simply of deviant views or lifestyle and X v United Kingdom [1981] 4 EHRR 188, E Ct HR which required the United Kingdom to amend the existing law on compulsory detention in hospital to provide for the detainee's right of access to a court to determine the lawfulness of continued detention and questions of possible discharge to conform to the requirements of article 5(4).

14.66 The Inner House re-iterated that in judicial review it was not the function of the court to examine the evidence with a view to forming its
own view of it. Rather the court was confined to looking only at the legal validity of the sheriff's decision and could not go behind the facts as found by him which were to the effect that the petitioner was suffering from a psychopathic mental illness 'characterised by anti-social personality disorder manifested by inter alia egocentricity, lack of feeling for others and lack of remorse for past offences' which might manifest itself in relation to his sexual contacts with young children. They accordingly dismissed the petition, notwithstanding the fact that the sheriff's construction of his duties under the Mental Health (Scotland) Act 1984 did not precisely accord with the analysis set out by their Lordships in Reid\(^1\) holding that 'the sheriff's approach to the issues of fact, which it was for him to resolve, is in no way vitiated by his erroneous view as to a separable matter of law, corrected in Reid v Secretary of State for Scotland, after Sheriff Keane refused the petitioner's application'.

1 See para 14.64 above.

THE EUROPEAN CONVENTION AND PRISONERS' RIGHTS

14.67 In 1973 the Council of Europe adopted the 'European Standard Minimum Rules for the Treatment of Prisoners'. These rules were most recently updated in 1987 and are known as The European Prison Rules 1987. They are not legally binding but rather set out standards to which national prison rules should aspire. They provide, however, a useful template against which the reasonableness of national prison rules might be measured in any judicial review application. It is hoped that they will be found to be of use by the Scottish judiciary in future applications for review of the legality of the Scottish prison rules in the light of European standards.

14.68 We have mentioned the importance of the 1950 European Convention on Human Rights in developing judicial awareness of the rights of prisoners. A variety of articles of the Convention have been used before the European Court of Human Rights in developing the corpus of law which can now be termed European Prisoners' Rights\(^1\). These include: article 3 outlawing cruel and inhuman treatment and punishment; article 4 outlawing slavery and forced labour; article 5 guaranteeing liberty and security of person; article 6 guaranteeing a fair trial; article 8 on the right to privacy and respect for family life; and article 12 on the right to marry and found a family. We shall deal with each of these provisions in turn and with the case law which has been developed around them in relation to prisoners rights.

Article 3 – the prohibition on torture and inhuman treatment

14.69 Article 3 of the European Convention on Human Rights provides that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’. This is an unqualified absolute right which cannot be derogated from even in times of war or national emergency, for example in relation to combating terrorism. Since 1987 there has also been a separate convention supplementing article 3, namely the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which established the Committee for the Prevention of Torture to ensure that signatory states to the Convention, of which the United Kingdom is one, duly comply with article 3 of the Convention on Human Rights. To this end the Prevention of Torture Committee is entitled to inspect all detention facilities of the signatory states, including police cells, remand and detention centres, prisons and secure hospitals, and to make reports on their findings. These reports may then be published, normally with the consent of the state in question.


14.70 In Ireland v United Kingdom torture was defined by the Court of Human Rights as meaning the deliberate infliction of inhuman treatment causing and intended to cause very serious and cruel suffering. Inhuman treatment was said to be treatment which, whether intended to or not, has caused suffering to a minimum level of severity, depending on all the circumstances of the cases including the sex, age and state of mental and physical health of the victim. In this case the court found that severe beatings carried out on four detainees at the Palace Barracks during interrogations by members of the security forces in Northern Ireland constituted ill treatment. In addition, psychological interrogation techniques involving some or all of the following practices – spread-eagling of detainees against a wall over a period of hours, placing hoods over their heads, subjected them to constant white noise, depriving them of sleep and depriving them of food and drink – were also held to constitute instances of unlawful inhuman treatment on the part of the Northern Irish security forces.

1 (Ser A No 25, Judgment 18 January 1978) (1979-80) 2 EHRR 25.

14.71 The United Kingdom government was, however, held not to be responsible for the unquestionably inhuman and degrading conditions of the confinement of IRA prisoners engaged in the dirty protest campaign for political status in the late 1970s, since the foul conditions of the prisoners’ cells were self-imposed. The state continues to have a duty,
however, to exercise its custodial obligations in a humane and flexible way even in the face of obstructive and unco-operative prisoners, seeking to protect the health and well-being of their detainees with due regard to the ordinary and reasonable requirements of imprisonment\(^2\).

1 Application No 8317/78 *McFeeley and others v United Kingdom* (1981) 3 EHRR 161. See also Application No 11208/84 *McQuiston v United Kingdom* 46 DR 182 (1986).


### 14.72 Solitary confinement or segregation of persons in detention may be justified by reasons of security or discipline\(^1\), protection of the prisoner from others\(^2\) and the protection of others from the prisoner\(^3\). Failure to provide appropriate medical treatment to persons in detention such as to cause them to suffer serious injury to their health will constitute inhuman treatment contrary to article 3 of the European Convention on Human Rights\(^4\). Forced feeding and/or non-consensual medical treatment where the life of the detainee is at risk do not constitute a breach of article 3 since the state has an obligation under article 2 to protect human life\(^5\).

1 See Application No 8158/78 *X v United Kingdom* 21 DR 95 (1980) and Application No 10117/82 *X v United Kingdom* 7 EHRR 140 (1984).

2 Application No 7630/76 *Reed v United Kingdom* 19 DR 113 (1979); Application No 9813/82 *X v United Kingdom* 5 EHRR 513 (1983); and Application No 82317/78 *X v United Kingdom* 28 DR 5 (1982).


4 Application No 8224/78 *Bonnechaux v Switzerland* 18 DR 100 (1978).

5 Application No 10565/83 *X v Germany* 7 EHRR 152 (1984).

### 14.73 The prison administration’s insistence that prisoners wear distinctive prison uniform\(^1\), that they should appear and be transported in public in handcuffs and/or prison uniform\(^2\) and that convicted terrorists be subject to intimate body searches have all been held to be justifiable exercises of state power\(^3\).


2 Application No 12323/86 *Campbell v United Kingdom* 57 DR 144 at 156 (1988).


### 14.74 In *Tyrer v United Kingdom*\(^4\) it was found that corporal punishment of a 15-year-old youth convicted of assault involving the infliction of three birch strokes on his bare buttocks by a police constable constituted degrading but not inhuman treatment in that its intention was grossly to humiliate and debase the individual. Racial abuse by prison officers may also possibly constitute degrading treatment contrary to article 3 of the European Convention on Human Rights\(^2\).


### Article 4 – outlawing slavery and forced labour

### 14.75 Article 4 of the European Convention on Human Rights provides that no-one shall be held in slavery or servitude and no-one shall be
required to perform forced or compulsory labour. Article 4(3)(a), however, expressly exempts from this prohibition any work required to be done in the ordinary course of lawful detention. Thus, compulsory prison labour, even when done without reasonable remuneration and without the benefit of insurance under social security laws as well as work done by prisoners on behalf of private firms under contracts concluded with the prison administration, has been held to be permissible under the terms of the Convention.

1 Application Nos 3134/67, 3172/67 and 3188-3206/67 Twenty one detained persons v Germany 6 April 1968, (1968) 11 Yearbook 528 at 552.

Article 5 – guaranteeing liberty and security of the person

14.76 Article 5(1) of the European Convention on Human Rights provides that no-one may be deprived of their liberty except in accordance with fair and proper procedures prescribed by domestic law which authorise arrest and detention in the particular circumstances of the case. The Court of Human Rights has ruled that arrest and/or detention on suspicion to allow further investigations into specific matters and to obtain evidence sufficient to base a charge is permissible although the suspicions have to be reasonable and objectively based.

2 See Winterwerp v Netherlands (Ser A No 33, Judgment of 24 October 1979) (1979-80) 2 EHRR 387 at para 46 of the judgment.

14.77 In Weeks v United Kingdom an individual who had been convicted of armed robbery at the age of 17 for the theft of 35 pence was given a discretionary indeterminate life sentence. After ten years detention he was released on licence. His licence was revoked after one year however after his conviction for a burglary and certain driving offences. The effect of this revocation was once again to deprive him of his liberty. The Court of Human Rights held that revocation of his licence and consequent deprivation of liberty could only be carried out lawfully if done in accordance with fair procedure requirements of article 5 of the Convention, and was thus reviewable by a court.


14.78 In Thynne, Wilson and Gunnell v United Kingdom the applicants were convicted sex offenders who were serving indeterminate sentences and had not been released although they had served periods in prison longer than the norm for the offences of which they had been convicted. The Court of Human Rights held that they were entitled to periodic and speedy review by a court, in accordance with fair procedural norms, of their
continuing detention. An individual detained under and in terms of a mandatory life sentence does not have such rights of periodic review, however².


**Article 6 – the right to a fair trial**

14.79 Article 6 of the European Convention on Human Rights guarantees a 'fair trial' in the determination of an individual's civil rights and obligations as well as in the hearing of any criminal charge against him. This involves a complex of rights, including the following:

- that there be equality of arms in the sense that each party to a civil action or criminal trial must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage compared to his opponent³;
- that there be a hearing at which all materials relevant to the case be made available to both parties⁴;
- that the decision of the judge on the matter at issue should be pronounced publicly, within a reasonable time, and be properly reasoned so that the possibility of an appeal is safeguarded⁵; and
- that the case be heard in the presence of the parties and of the public unless there exist exceptional circumstances, for example reasons of public order and security, that justify the exclusion of the press and the public from the court or tribunal⁶.

1 Neumeister v Austria (Ser A No 8, Judgment 27 June 1968) (1979-80) 1 EHRR 91.

14.80 The Court of Human Rights has unequivocally affirmed that article 6(1) of the Convention also embodies a fundamental right of effective access to both the civil and criminal courts: this right applies to prisoners as much as to any other person⁷.

1 Golder v United Kingdom (Ser A No 18, Judgment 21 February 1975) (1979-80) 1 EHRR 524.

14.81 In Campbell and Fell v United Kingdom³ the Court of Human Rights held that the power of prison Boards of Visitors in England to order that a prisoner lose remission on his sentence for offences against discipline in prison was sufficiently like that of a criminal court determining and sentencing on a criminal charge as to bring the Boards of Visitors within the scope of article 6 when acting in this way. The Boards of Visitors had consequently been to be acting as independent and impartial tribunals applying the presumption of innocence to those brought before them and affording them the rights of the defence set out in article 6(3).

1 Campbell and Fell v United Kingdom (Ser A No 80, Judgment of 28 June 1984) (1985) 7 EHRR 165.
14.82 The rights of the defence in criminal trials are set out in article 6(3) and include the following: the right of the accused to be informed promptly and in detail of the nature and cause of the accusation; the right of the accused to have adequate time and facilities for the preparation of his defence; the right of the accused to defend himself either in person or with legal representation of his choice; the right of the accused to cross-examine witness brought against him and to bring witnesses before the tribunal in support of his defence under the same conditions as witnesses brought against him. A right of appeal against conviction and sentence for a criminal offence is also guaranteed under a Protocol to the Convention1.

1 See Protocol 7, article 2 of the European Convention on Human Rights.

Article 8 – the right to privacy and respect for family life

14.83 Article 8(1) of the European Convention on Human Rights guarantees the right to respect for an individual’s private life and family life, his home and his correspondence, including telephone calls1. Article 8(2) provides that any interference by a public authority with these rights has to be in accordance with the national legal procedures and justified as necessary in a democratic society to protect the common good. Clearly detention in prison will constitute interference with family life, but insofar as the prison regime permits the greatest possible family contact consistent with the act of detention, the interference with family life will be held to be justified for the sake of the punishment and deterrence of crime2.

1 Klass v Germany (Ser A No 28, Judgment 6 September 1978) at para 41 (1979-80) 2 EHRR 214.

14.84 In a number of cases brought before the European Court of Human Rights article 8 of the Convention has been relied upon, however, to challenge the lawfulness of restrictions on and censorship of prisoner’s correspondence by the state authorities. The stopping or censoring of letter on the grounds that they contain derogatory remarks about the prison authorities3 or that it contained objectionable matter intended for publication4 will not be justified.


14.85 The Court of Human Rights has laid particular importance on the protection of correspondence between prisoners and their legal advisers. In Goldin v United Kingdom4 the court held that there was no justification for the Governor of Parkhurst Prison stopping letters from a prisoner to his solicitor in which he sought advice on the possibility of raising proceedings for defamation against a prison officer who had alleged that he had been assaulted by the prisoner. There was held to be a fundamental right to be
able to communicate with one’s lawyer with a view to seeking advice in connection with possible court proceedings, whether civil or criminal. The court has also held that prisoners cannot be compelled to raise complaints internally within the prison system (‘prior ventilation’) before being allowed to seek outside legal advice.

1 Golder v United Kingdom (Ser A No 18, Judgment 21 February 1975) (1979-80) 1 EHRR 524.

14.86 The subsequent attempt by the Prison authorities in England to impose a rule to the effect that the internal channels of complaint should be used at the same time as seeking advice in correspondence and visits with one’s solicitor (‘simultaneous ventilation’) was struck down as unlawful by the English High Court.

1 R v Secretary of State for the Home Department, ex p Anderson [1984] QB 778, QB.

14.87 In Leech (No 2) the English Court of Appeal held that while some screening of a prisoner’s correspondence with his solicitor is permissible for reasons of prison security, this screening must be proportionate in the sense of limited to the bare minimum necessary to confirm that the correspondence in question is in truth bona fide legal correspondence.

1 R v Secretary of State for the Home Department, ex p Leech (No 2) [1994] QB 198, CA.

14.88 In Campbell v United Kingdom the Court of Human Rights held that, while the opening of mail between a prisoner and his legal adviser might be justified to determine whether or not it contained any illicit enclosure, this should only be done in the presence of the prisoner and the correspondence should not be read unless the authorities had reasonable cause to consider that the right was being abused. Correspondence between prisoners and the European Commission on Human Rights was also held to be so privileged.

2 See, also, the European Agreement relating to Persons participating in proceedings of the European Commission and Court of Human Rights, Article 3(2):
   ‘As regards persons under detention, the exercise of this right [to participate in Strasbourg proceedings] shall in particular imply that:
   (a) if their correspondence is examined by the competent authorities, its despatch and delivery shall nevertheless take place without undue delay and without alteration;
   (b) such persons shall not be subject to disciplinary measures in any form on account of any communication sent through the proper channels to the Commission or to the Court;
   (c) such persons shall have the right to correspond, and consult out of hearing of other persons, with a lawyer qualified to appear before the courts of the country where they are detained in regard to any application to the Commission, or any proceedings resulting therefrom’.

Article 12 - the right to marry

14.89 Article 12 of the European Convention on Human Rights guarantees men and women of marriageable age the right to marry and to found a
family. The Commission on Human Rights has held in two applications that the state has a duty to allow prisoners to be married while in prison\(^1\). Thus far, however, the Commission has rejected claims that prisoners have a right under the Convention to conjugal visit while in prison\(^2\).

1 Application No 7114/75 Hamer v United Kingdom 24 DR 5 (1979) and Application No 8186/78 Draper v United Kingdom 24 DR 72 (1980).
Appendix 1

ACT OF SEDERUNT (RULES OF THE COURT OF SESSION 1994) 1994

SI 1994/1443

This Act of Sederunt was made by the Lords of Council and Session, under and by virtue of the powers conferred on them by section 5 of the Court of Session Act 1988 and came into force on 5 September 1994.

1 (Citation and commencement).

Rules of the Court of Session

2 The provisions of Schedule 2 to this Act of Sederunt shall have effect for the purpose of providing new rules for the Court of Session.

* * *

CHAPTER 58

APPLICATIONS FOR JUDICIAL REVIEW

58.1 Application and interpretation of this Chapter
58.2 Disapplication of certain rules to this Chapter
58.3 Applications for judicial review
58.4 Powers of court in judicial review
58.5 Nominated judge
58.6 Form of petition
58.7 First order
58.8 Compearing parties
58.9 First hearing
58.10 Second hearing

* * *
Application and interpretation of this Chapter

58.1—(1) This Chapter applies to an application to the supervisory jurisdiction of the court.

(2) In this Chapter—
‘the first hearing’ means a hearing under rule 58.9;
‘the second hearing’ means a hearing under rule 58.10.

Disapplication of certain rules to this Chapter

58.2 The following rules shall not apply to a petition to which this Chapter applies:
rule 14.4 (form of petitions),
rule 14.5 (first order in petitions),
rule 14.9 (unopposed petitions).

Applications for judicial review

58.3—(1) Subject to paragraph (2), an application to the supervisory jurisdiction of the court, including an application under section 45(b) of the Act of 1988 (specific performance of statutory duty), shall be made by petition for judicial review.

(2) An application may not be made under paragraph (1) if that application is made, or could be made, by appeal or review under or by virtue of any enactment.

Powers of court in judicial review

58.4 The court, in exercising its supervisory jurisdiction on a petition for judicial review, may—
(a) grant or refuse any part of the petition, with or without conditions;
(b) make such order in relation to the decision in question as it thinks fit, whether or not such order was sought in the petition, being an order that could be made if sought in any action or petition, including an order for reduction, declarator, suspension, interdict, implement, restitution, payment (whether of damages or otherwise) and any interim order;
(c) subject to the provisions of this Chapter, make such order in relation to procedure as it thinks fit.

Nominated judge

58.5 A petition for judicial review shall be heard by a judge nominated by the Lord President for the purposes of this Chapter or, where such a judge is not available, any other judge of the court (including the vacation judge).
Form of petition

58.6—(1) A petition for judicial review shall be in Form 58.6.
(2) The petitioner shall lodge with the petition all relevant documents in his possession and within his control.
(3) Where the petitioner founds in the petition on a document not in his possession or within his control, he shall append to the petition a schedule specifying the document and the person who possesses or has control over the document.
(4) Where the decision, act or omission in question and the basis on which it is complained of is not apparent from the documents lodged with the petition, an affidavit shall be lodged stating the terms of the decision, act or omission and the basis on which it is complained of.

First order

58.7 On being lodged, the petition shall, without appearing in the Motion Roll, be presented forthwith to the Lord Ordinary in court or in chambers for—
(a) 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, being a date not earlier than 7 days after the expiry of the period specified for intimation and service; or
(b) any interim order;
and, having heard counsel or other person having a right of audience, the Lord Ordinary may grant such an order.

Comparing parties

58.8—(1) A person to whom intimation of the first hearing has been made and who intends to appear—
(a) shall intimate his intention to do so to—
   (i) the agent for the petitioner, and
   (ii) the Keeper of the Rolls,
   not less than 48 hours before the date of the hearing; and
(b) may lodge answers and any relevant documents.
(2) Any person not specified in the first order made under rule 58.7 as a person on whom service requires to be made may apply by motion for leave to enter the process; and if the motion is granted, the provisions of this Chapter shall apply to that person as they apply to a person specified in the first order.

First hearing

58.9—(1) At the first hearing, the Lord Ordinary shall—
(a) satisfy himself that the petitioner has duly complied with the first order made under rule 58.7; and
(b) hear the parties.
(2) After hearing the parties, the Lord Ordinary may—
(a) determine the petition; or
(b) make such order for further procedure as he thinks fit, and in particular may—
(i) adjourn or continue the first hearing to another date;
(ii) order service on a person not specified in the first order made under rule 58.7;
(iii) make any interim order;
(iv) order answers to be lodged within such period as he shall specify;
(v) order further specification in the petition or answers in relation to such matters as he shall specify;
(vi) order any fact founded on by a party at the hearing to be supported by evidence on affidavit to be lodged within such period as he shall specify;
(vii) order any party who appears to lodge such documents relating to the petition within such period as the Lord Ordinary shall specify;
(viii) appoint a reporter to him on such matters of fact as the Lord Ordinary shall specify; or
(ix) order a second hearing on such issues as he shall specify.

Second hearing

58.10—(1) Where the Lord Ordinary orders a second hearing under rule 58.9(2)(b) (ix), the Keeper of the Rolls shall, in consultation with the Lord Ordinary and the parties, fix a date for the second hearing as soon as reasonably practicable.

(2) Subject to the terms of any order for further procedure made under rule 58.9(2)(b), the parties shall, not less than 7 days before the date of the second hearing, lodge all documents and affidavits to be founded on by them at the second hearing with copies for use by the court.

(3) At any time before the date of the second hearing, the Lord Ordinary may cause the petition to be put out for hearing on the By Order Roll for the purpose of obtaining such information from the parties as he considers necessary for the proper disposal of the petition at the hearing.

(4) At a hearing on the By Order Roll under paragraph (3), the Lord Ordinary may make such order as he thinks fit, having regard to all the circumstances, including an order appointing a commissioner to recover a document or take the evidence of a witness.

(5) At the second hearing, the Lord Ordinary may—
(a) adjourn the hearing;
(b) continue the hearing for such further procedure as he thinks fit; or
(c) determine the petition.

* * *
Appendix 2

HUMAN RIGHTS ACT 1998 (c 42)

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes

[9th November 1998]

* * *

Introduction

1 The Convention Rights

(1) In this Act 'the Convention rights' means the rights and fundamental freedoms set out in—
(a) Articles 2 to 12 and 14 of the Convention,
(b) Articles 1 to 3 of the First Protocol, and
(c) Articles 1 and 2 of the Sixth Protocol,
as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The Secretary of State may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) 'protocol' means a protocol to the Convention—
(a) which the United Kingdom has ratified; or
(b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

* * *

21 Interpretation, etc

(1) In this Act—

* * *

'the Commission' means the European Commission of Human Rights;
'the Convention' means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom;
'the First Protocol' means the protocol to the Convention agreed at Paris on 20th March 1952;
'the Sixth Protocol' means the protocol to the Convention agreed at Strasbourg on 28th April 1983;
'the Eleventh Protocol' means the protocol to the Convention (restructuring the control machinery established by the Convention) agreed at Strasbourg on 11th May 1994;

SCHEDULE 1
THE ARTICLES

PART I
THE CONVENTION
RIGHTS AND FREEDOMS

Article 2
Right to life
1 Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2 Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3
Prohibition of torture
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4
Prohibition of slavery and forced labour
1 No one shall be held in slavery or servitude.
2 No one shall be required to perform forced or compulsory labour.
3 For the purpose of this Article the term ‘forced or compulsory labour’ shall not include:
(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
Constitutional Rights

(c) any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community;
(d) any work or service which forms part of normal civic obligations.

Article 5
Right to liberty and security

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 6
Right to a fair trial

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
Appendix 2

(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

No punishment without law

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8

Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

Freedom of thought, conscience and religion

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder

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or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11
Freedom of assembly and association

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12
Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 14
Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 16
Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17
Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18
Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

PART II
THE FIRST PROTOCOL

Article 1
Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest.
and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest to secure the payment of taxes or other contributions or penalties.

Article 2
Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3
Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

PART III
THE SIXTH PROTOCOL

Article 1
Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2
Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

NOTE on Appendix 1

The Act received royal assent on 9 November 1998 and certain provisions came into force on that day and on 24 November 1998: section 22(2); Human Rights Act 1998 (Commencement) Order 1998, SI 1998/2882. The remainder of the Act, including section 1, Schedule 1 will come into force on a day to be appointed in terms of section 22(3).
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