Scots Judicial Review Update

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Access to Judicial Review

- Disproportionately low use of judicial review in Scotland:
  - 342 cases in 2010-11 (Scottish Government, *Civil Judicial Statistics, 2010-11*)
  - *cf.* England & Wales – 11,200 cases in 2011 (Ministry of Justice, *Judicial and Court Statistics 2011*)
- Why does disparity in access matter?
  - Individual justice
  - Upholding the rule of law
  - Judicial expertise and development of the law
- *Cf*:
  - Civil Courts Review/Courts Reform (Scotland) Bill – a disproportionate burden on the courts
  - Ministry of Justice, *Judicial Review: Proposals for Reform*, 2012 – a burden on public services and an unnecessary obstacle to economic recovery

Access to Judicial Review

A multi-dimensional issue:

- Standing rules
- Intervention rules
- Procedural certainty/flexibility/complexity
- Time limits
- Costs
- Access to legal services
- Legal consciousness

Standing

Walton v Scottish Ministers [2012] UKSC 44

- Inner House [2012] CSIH 19:
  - W not a 'person aggrieved' for the purposes of the Roads (Scotland) Act 1984, sch 2, para 2; nor would he have 'sufficient interest' at common law
  - Court would have exercised its discretion to deny W a remedy because it was inappropriate that the project should be stopped by '*an individual in the position of this reclaimer*'

Standing

Walton v Scottish Ministers [2012] UKSC 44

- Supreme Court (Lord Reed):
  - W '*indubitably a person aggrieved within the meaning of the legislation*' and would also have sufficient interest at common law
  - *AXA* had been '*intended to put an end to an unduly restrictive approach to standing which had too often obstructed the proper administration of justice: an approach which presupposed that the only function of the court's supervisory jurisdiction was to redress individual grievances, and ignored its constitutional function of maintaining the rule of law.'* [90]
  - Use of the words 'directly affected' in *AXA* intended to draw a distinction between '*the mere busybody and the person affected by or having a reasonable concern in the matter to which the application relates*.' [92]
  - *'there may … be cases in which any individual … will have sufficient interest … without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to bring proceedings to challenge it.'* [94]

Standing and Remedial Discretion

Walton v Scottish Ministers [2012] UKSC 44:

- *Per* Lord Carnwath at [103]: '*discretion … in practice may be closely linked with that of standing, and may be important in maintaining the overall balance of public interest in appropriate cases. … I see discretion to some extent as a necessary counterbalance to the widening of rules of standing. The courts may properly accept as … having "sufficient interest" those who, though not themselves directly affected, are legitimately concerned about damage to wider public interests… However, if it does so, it is important that those interests should be seen not in isolation, but rather in the context of the many other interests, public and private, which are in play in relation to a major scheme such as the AWPR.*'

Public Interest Intervention

Scotch Whisky Association, Petitioners [2012] CSOH 156

- RCS Rule 58.8A (2000):
  - Application and issue on which wish to intervene must raise matters of public interest;
  - Intervention relevant and likely to assist the court
  - Will not unduly delay proceedings or otherwise prejudice rights of parties
  - Court may impose terms and conditions in the interests of justice

Public Interest Intervention/Protective Expenses Orders

Scotch Whisky Association, Petitioners [2012] CSOH 156

- Fear of expenses liability as a deterrent to intervention - court can adopt similar approach to the grant of protective expenses orders
- **But:**
  - Intervener has obligation to act responsibly to minimise cost to other parties;
  - Court should be assiduous to prevent misuse;
  - Helpful for intervener to limit method of proposed intervention (if not court can impose conditions)

Protective Expenses Orders

- *Uprichard v Scottish Ministers* [2013] UKSC 21
- *Newton Mearns Residents Flood Prevention Group for Cheviot Drive v East Dunbartonshire Council* [2013] CSOH 68
- Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 No 81 (RCS Ch 58A)

Mora, Taciturnity and Acquiescence

- *Portobello Park Action Group Association v City of Edinburgh Council* [2012] CSIH 69
- *McGeoch v SLAB* [2013] CSOH 6
- *Bova and Christie v Highland Council* [2013] CSIH 41
- *OWA v Secretary of State for the Home Dept* [2013] CSOH 52
- *Hendrick, Ptnr* [2013] CSOH 66
- *Newton Mearns Residents*
- Draft Courts Reform (Scotland) Bill, s.84:

  (1) An application to the supervisory jurisdiction of the Court must be made before the end of—

  (a) the period of 3 months beginning with the date on which the grounds giving rise to the application arose, or

  (b) such longer period as the Court considers equitable having regard to all the circumstances.

Procedural Exclusivity

Ruddy v Chief Constable, Strathclyde Police [2012] UKSC 57:

> *Per* Lord Hope at [18]-[19] '*The sole purpose for which the supervisory jurisdiction of the Court of Session may be exercised is to ensure that a person to whom a power has been delegated or entrusted does not exceed or abuse that jurisdiction or fail to do what it requires… The proceedings which the appellant has raised are not of that character….The decisions of which the appellant complains do not need to be reviewed and set aside in order to provide him with a basis for his claim.*'