Justice Committee
Courts Reform (Scotland) Bill

Written submission from Professor Tom Mullen, University of Glasgow

Submission on the Judicial Review Provisions of the Bill

I Introduction

I am a professor of law at the University of Glasgow with a long-standing interest in judicial review. Amongst other research on the subject, during the 1990s, along with colleagues from the University of Glasgow, I conducted detailed empirical research into judicial review in Scotland, published as T. Mullen, K. Pick & T. Prosser, Judicial Review in Scotland (Chichester: John Wiley, 1996).

This submission concerns two proposals for reform of the procedure for obtaining judicial review contained in the Courts Reform (Scotland) Bill:

- the introduction of a three month time limit; and
- the introduction of a requirement to obtain permission to proceed with an application for judicial review.

2 Three Month Time Limit

Section 85 of the Bill inserts a new section 27A into the Court of Session Act 1988 as follows:

27A Time limits

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

(2) Subsection (1) does not apply to an application to the supervisory jurisdiction of the Court which, by virtue of any enactment, is to be made before the end of a period shorter than the period of 3 months mentioned in that subsection (however that shorter period may be expressed).


Is there a need for law reform?

The first question is whether there is a problem which requires to be addressed and, if so, how serious it is.
The case for reform stated in the policy memorandum is that it is not in the interest of the courts or the wider public interest if judicial review becomes a tactical device to frustrate or to delay proper public policy decisions, or a vehicle to articulate what are essentially political arguments in the judicial sphere and that the balance struck by the Review in suggesting a three month time limit is probably correct. It is notable that neither the Review nor the policy memorandum nor any other document produced by the Scottish Government attempts to quantify the scale of the problem of undue delay in making applications for judicial review. This is disappointing as statistics on the extent and causes of delay and the stages of the proceedings at which it occurs could have been obtained from examining Court of Session records. There is some anecdotal evidence that there has been undue delay in some cases but it is unclear how useful, reliable or representative this evidence is. It cannot be assumed, therefore, that there is a substantial problem of delay in bringing applications for judicial review.

It can certainly be argued that a time limit might be justified as a means of preventing the injustice that may be done to particular respondents or to the interests of third parties who might rely on the validity of the decision or the damage to the wider public interest that may occur in specific cases even if there is no evidence of there being a substantial or widespread problem. Let me take each of these points in turn.

The respondent is usually a public body, so some of the types of harm that are done to private parties by delay in litigation will simply not occur. If we are considering damage to the interest of public bodies as opposed to private persons, we should give very little weight to any alleged damage which does not also constitute damage to a wider public interest. This is because public bodies exist solely to further the public interest. So, if public bodies are impeded from taking necessary action in the public interest, e.g. enforcement of licensing laws, or have incurred major expenditure on the strength of a decision, undue delay would constitute damage to the wider public interest. On the other hand, administrative convenience does not by itself constitute a wider public interest.

Of course, a case may affect the interests of third parties both private and public as well as the interests of the petitioner and the respondent. Third parties may have taken action in reliance on the validity of the decision and their interests may be adversely affected by a successful challenge long after the decision. In fact, very few cases seriously affect third party rights. By far the largest category of judicial review cases is asylum and immigration (between 76-80% of all cases in the years 2010-11 to 2012-13).1 These rarely if ever affect third party rights. One category of cases in which third parties are more likely to be affected is land use planning, but many planning decisions are already subject to a stricter six week time limit for challenging a local authority decision in court so in those cases the problem is already catered for.

We must also consider the public interest in securing to persons their legal rights; a strict time limit might damage that aspect of the public interest by defeating well founded claims for judicial review.

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1 Information supplied by Justice Analytical Services. There were 266 immigration petitions out of a total of 342 in 2010/11, 195/243 in 2011/12 and 224/293 in 2012/13.
I suggest that it has not been demonstrated that there is a substantial problem of delay in judicial review cases causing substantial damage to the public interest. Nonetheless, there is a case for introducing a time limit with appropriate safeguards because without a time limit there is a risk that there may be damage to the public interest or to the interests of third parties in some cases.

**What should the time limit be?**

The proposal is for a three month time limit although the Court may allow a case brought more than three months after the date on which the grounds giving rise to the application first arise to proceed, where it considers it equitable to do so. The period of three months appears to have been chosen primarily because that is the time limit for judicial review in England and Wales. No specific reason is given for three months being an appropriate period.

The time limit is unreasonably short for the following reasons.

- In most judicial reviews there would be no substantial damage to the public interest caused by the petitioner taking more than three months to bring the case to court.
- Judicial review petitions are not homogenous – they are used in areas of law that have little in common other than the involvement of public bodies as respondents e.g. immigration and asylum, prisoners’ rights, homelessness and other housing matters, licensing, planning, challenges to legislation and executive decisions as being outside devolved competence, and challenges to legislation and executive decisions on human rights grounds. It is difficult to argue that a one size fits all time limit is appropriate for such diverse categories of cases.
- There may be particular difficulties in cases which require legal aid as solicitors may in practice find it difficult to establish that there are grounds for judicial review and then obtain legal aid within three months.
- One of the aims of the requirement of permission is to encourage early settlement of cases. Having such a short time limit may discourage petitioners from engaging fully with respondents and thus undermine the aim of promoting settlement.

The draft provision does give the Court discretion to extend the time limit on equitable grounds. It is certainly necessary to have such a provision to avoid injustice in specific cases but the existence of such a provision also creates uncertainty for litigants. A longer time limit would reduce the number of cases in which the court had to exercise this discretion, and this would be preferable.

It is worth noting that the periods within which many categories of civil case must be brought are very much longer, e.g. three years for personal injury cases and five years for actions to recover debts. The primary explanation offered for requiring a much shorter period is the public interest but as noted above, in most cases this does not require such a strict time limit. The period of three months is longer than the time allowed for appeals to many tribunals but that is not an appropriate comparison as tribunals are intended to be an accessible and informal forum in which the parties
can represent themselves without legal representation and in which the tribunal members may take an inquisitorial approach to assist the unrepresented appellant. None of this is true of judicial review in the Court of Session.

3 Requirement to Obtain Permission

Section 85 of the Bill inserts new sections 27B-27D into the Court of Session Act 1988. Section 27B requires anyone who seeks judicial review of a decision or action to obtain the permission of the Court to proceed with the case. The applicant must demonstrate a sufficient interest in the subject matter of the application, and that application has a real prospect of success. The Court may grant permission unconditionally or subject to such conditions as the Court thinks fit, and may restrict the grounds on which the case may be argued.

The Court is not required to hold an oral hearing before deciding whether or not to grant permission. However, where permission has been refused or granted only on limited grounds the applicant may within 7 days request a review of the decision at an oral hearing. Both the request for a review and the oral hearing if granted must be considered by a different Lord Ordinary from the one who made the original decision. Where such an oral hearing has been heard and permission has again been refused or granted only subject to conditions or on restricted grounds the applicant may appeal to the Inner House.

The Review recommended that a requirement to obtain leave to proceed with an application for judicial review on the model of the leave requirement operated in England and Wales should be introduced. It considered that such a procedure would assist in promoting early settlement and in preventing unmeritorious claims from proceeding. This would create additional capacity in the court programme, enabling those cases in which leave is granted to be dealt with expeditiously. This view is endorsed by the policy memorandum and the great majority of responses to the Bill consultation were in favour of the proposal.

Is there a need for law reform?

As with the time limit proposal, the first question is whether there is a problem which requires to be addressed and, if so, how serious it is. I will deal with the issue of unmeritorious claims first and then the issue of promoting early settlement.

Unmeritorious claims

No evidence has been presented of the scale of the problem of unmeritorious cases being brought. This is important because it is claimed that the proposal will save court time which is currently being wasted. If the problem is not substantial there will be little saving. Any case for the reform based on court time being wasted by weak cases must be regarded as unproven.

There are also reasons to suppose that weak claims for judicial review may not in fact be numerous. One reason is that expenses normally follow success; the party

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2 Where a person seeks judicial review of a decision of a decision of the Upper Tribunal for Scotland there is an additional requirement that the application would raise an important point of principle or practice, or there is some other compelling reason for allowing the application to proceed.
who loses usually has to pay the other sides legal expenses as well as his/her own. This is likely to be a powerful deterrent to making an unfounded claim. Of course, the fear of an expenses award is likely to be much less of a deterrent for legally aided applicants. Typically, when a legally aided applicant loses a case, expenses are modified to nil. However, a person seeking legal aid for judicial review must convince the Scottish Legal Aid Board (SLAB) both that s/he has probable cause for taking legal action and that it is reasonable for legal aid to be granted. Therefore, where legal aid has been granted, the applicant has by definition already convinced an independent authority that his/her case has some merit. There is not, therefore likely to be a substantial problem of unmeritorious legally aided claims.

There are questions of principle as well as fact involved. In general, a litigant does not require the permission of the Court to proceed with a case. Clearly, it has not been thought appropriate in our legal system to require litigants to have their cases vetted before they raise legal actions. Given that, and given also that the risk of unmeritorious claims being made is present in all types of litigation, the obvious question is why an exception is being made for judicial review? This important point of principle is not directly addressed either in the Review or in subsequent documents. The Scottish Government ought to articulate clearly, the arguments that support departure from the long established principle that anyone who wishes may raise a legal action without first seeking permission to do so.

One possible answer is that a permission requirement is uniquely required in judicial review cases because of the public interest considerations involved in judicial review cases – essentially the same argument as is being made to support the time limit. However, there is no reason to suppose that public authority respondents routinely suffer more harm to their interests than litigants generally when required to defend unfounded claims, nor that there is likely to be any damage to the wider public interest in most cases. There will, of course, inevitably be diversion of resources from other worthwhile activity whenever weak claims are allowed to proceed but private parties face the same problem.

Promoting early settlement
The argument that a permission requirement would promote early settlement of cases which were well founded assumes that the grant of leave will encourage respondents to review their position at that stage and to concede the applicant’s claim more readily. There is some evidence to support this – relied on by the Review – in work carried out by the Public Law Project and the University of Essex.\(^3\) That research indicated high rates of settlement occurred in judicial review cases and that many of these occurred before the permission stage. However, as the Review itself notes, this is not likely to be purely a consequence of there being a leave requirement. There has been a pre-action protocol for judicial review in England and Wales in operation for a number of years and the researchers suggested that the increased rate of early settlements that the researchers had found occurred because the pre-action protocol for judicial review and the opportunity given to the respondent to oppose the granting of permission encourage respondents to look more closely at claims before they reach the permission stage. These lead respondents to concede

or settle where they accepted the essence of the claim or for other, pragmatic reasons.

The research also found that a very high proportion of cases settled before the permission stage were settled in favour of claimants suggesting that there are clear benefits for claimants in the English procedures. However, if a permission requirement is imposed in Scotland without also introducing pre-action protocols there is a danger that the expected benefits in terms of promoting settlement may not materialise. There has been pre-action protocol specifically for immigration cases in operation since September 2012.\(^4\) SLAB comment on this in their response to the Bill consultation and suggest that this approach should be adopted in relation to all judicial review petitions.

**Cost Benefit Analysis**

The permission requirement will introduce a new stage into the judicial review process. This will obviously consume court time and cost public money. The reform will, therefore, only produce savings in court time and public expenditure (or free up court time for other work) if the savings of court time achieved at later stages of litigation are greater than the extra time and costs added by the permission requirement. This may well be the outcome, but in the absence of any statistical data about current litigation or projections for the future it is very difficult to tell.

**Risk of Injustice**

The principal concern about the process is that it may cause injustice in some cases because where there is only a brief scrutiny of the merits of the case the risk of a good case being rejected is likely to be higher. There is also a risk of inconsistency in the approach of different judges given the open-ended nature of the test, namely a real prospect of success. That decisions on permission may be inconsistent has been a long-standing concern of English legal practitioners,\(^5\) where the rates of granting applications have varied widely.

The right to follow up a paper application with a request for an oral hearing and the right of appeal provided by sections 27C-27D go some way to meeting this concern but do not remove it entirely.

**Recommendations on Permission Requirement**

The Committee should treat the argument that there is a substantial problem of court time being wasted by weak cases as unproven and insufficient as a justification for introducing a permission requirement.

The argument that a permission requirement will promote early settlement saving court time, reducing costs to public authorities may be considered a more plausible rationale for the measure but there is uncertainty on a key question – how far the increase in settlements in England and Wales is due to the permission requirement *per se* and how far it is due to the pre-action protocol or to their combined effect. As

\(^4\) For the current protocol, see Court of Session Practice Note No. 2 of 2013.

the increase in settlement has occurred since the pre-action protocol was introduced, it seems more likely that it is the protocol or the combination of the two that is crucial.

Accordingly, the proposal to introduce a permission requirement should not be adopted unless the Scottish Government also commits to developing pre-action protocols for all subject areas of judicial review. The Committee should also invite the Scottish Government to provide whatever information it has on the operation of pre-action protocols in judicial review and to comment on their value in promoting early settlement of cases.

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