Law Society of Scotland

Consultation Response

Judicial Review – Draft Practice Note

28 April 2017

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Civil Justice Sub-committee welcomes the opportunity to consider and respond to the Scottish Court and Tribunal Service request for a consultation response to the issue of the updated draft Court of Session Practice Note on Judicial Review. The Sub-committee has the following comments to put forward for consideration on behalf of various members and practitioners who have responded to the draft provided.

Judicial Review – Draft Practice Note

Law Society of Scotland Member Responses

1 **Permission stage**

1.1 We do not have any concerns in principle with the proposed amendments to the existing practice note. However, we consider that the reference to the schedule of documents within paragraph 10 should be clarified. RCS 58.3(4)(b) provides that a schedule must be appended to a petition specifying documents which the petition founds upon that are not in the petitioner's possession or control. It is not clear whether the court's intention is that the documents necessary for the determination of permission should be listed within the RCS 58.3 schedule of documents, or if a separate list should be provided for the permission stage.

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1.2 With regards to paragraph 11, we believe that a person who is served with a petition should also be required to make reference to the schedule of documents necessary for the determination of permission whether to be refused or granted. That requirement should not just rest with the Petitioner.

1.3 We consider that the requirement in paragraph 12 for the Lord Ordinary to produce a brief note setting out concerns should be extended to every case in which a permission hearing is ordered. If that does not happen, it may be procedurally unfair for parties to be "ambushed" with questions at a permission hearing. If this change was implemented, parties would have advance notice of any possible issues.

2 Notification of readiness to proceed to a substantive hearing

2.1 We do not have any concerns regarding paragraph 16.

2.2 In terms of paragraph 17, parties should be given a definitive period of notice before a hearing is cancelled *ex proprio motu* by the Lord Ordinary to ensure the party responsible for communicating the cancellation is given maximum notice.

2.3 In paragraph 20, the reference to not needing to send a pre-proceedings letter to the Home Office should also extend to party litigants rather than just "agents of the individual".

2.4 Also in paragraph 20, we think it would be useful if the reference to "removal directions" could be amended to "notice of removal" so that the final sentence of the paragraph begins "If a notice of removal has been issued before a...".

2.4 We believe that in paragraph 23, agents should be required to state the reason for the urgency if the 14 day period is sought to be dispensed with.

3 Case management in judicial reviews

3.1 We welcome the requirement for parties to lodge a bundle of relevant documents within paragraph 26(b). We presume the court's intention is to require parties, where possible, to lodge one joint bundle of documents. It would be useful if the practice note explicitly stated that.

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3.2 Dealing with the terms of paragraph 28, where they apply in immigration and asylum cases, authorities should not include immigration rules given that they are almost certainly likely to be relied upon in such cases and the fact that they are not statutory provisions.

3.3 It would also be useful if the practice note would explicitly state whether parties are required, where possible, to lodge a joint list and bundle of authorities (as is the practice in the Inner House).

4 Bundles of authorities

4.1 Paragraph 28 states that "authorities do not include statutory provisions upon which the petition or answers proceed." It is not altogether clear whether statutory provisions should count towards the limit upon authorities, or whether statutory provisions should be lodged as part of a bundle of authorities at all. It would be helpful if the practice note was amended to clarify this point. In our view, it would be preferable for bundles of authorities to contain the statutory provisions parties are relying upon and that those provisions should not to count towards the limit upon authorities, as is the practice in the Inner House.

4.2 As noted above, it would be helpful if the practice note explicitly stated whether parties are expected to produce a joint list and bundle of authorities.

4.3 Paragraph 31 limits the number of authorities which can be produced to ten. This is the current limit on authorities for cases in the Inner House. We agree that parties should seek to keep the number of authorities being produced within a reasonable limit. However, we are concerned that the proposed limit of ten authorities may be too restrictive, particularly if there are more than two parties. Experience suggests that parties frequently exceed the limit of ten authorities in cases which are being heard at first instance in the Inner House. Recent experience in statutory appeals suggests that the legal issues relevant to the case often require to be fully aired at first instance before subsequent appeals narrow the focus of the arguments presented by the parties.

4.4 Petitions for judicial review are frequently broad in scope and cover areas of law that are novel or have not previously been examined in detail by the court. As judicial review proceedings in the Outer House will be cases heard at first instance, parties may also wish to reinforce their arguments by referencing multiple authorities. This may be required to ensure that the court has a clear and full understanding of relevant case law. It may therefore be necessary and appropriate for parties to refer to more than ten authorities in total. If the court is minded to impose a limit on the

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number of authorities that may be lodged, we would respectfully suggest that the limit should be raised from ten to twenty. A limit of twenty case authorities should be sufficient for the majority of judicial review proceedings. It would not constrain parties from making full and detailed arguments and it would assist with the efficiency and focus of the proceedings.

5 Bundles of documents

5.1 We do not have any concerns regarding the provisions of paragraphs 33 to 37.

5.2 For bundles of documents and authorities, they should be required to be paginated.

6 Notes of argument

6.1 We welcome the increased clarity regarding the standards the court expects with regard to notes of argument. We agree that notes of argument should be as concise as possible and that they ought not to contain detailed legal argument.

6.2 However, we think that the limitation of notes of argument to eight pages, contained within paragraph 39(e), may be unduly prescriptive. While an eight page note of argument may be appropriate for a narrowly focused judicial review, there may be a requirement for greater latitude in proceedings with a broader scope or that involve a novel point or area of law. We consider that the length of the note of argument should be left to the discretion of the parties, although the court might direct that notes of argument ought to be concise. We also note that practice note no.3 of 2011 (Causes in the Inner House) does not specify a page limit to notes of argument, and would support a similar approach with regard to judicial review proceedings.

6.3 We have no objection to the requirement for notes of argument to be as brief as possible.

7 Electronic authorities and documents

7.1 We note that the standard set of case management orders set out in RCS 58.11 (2) do not make provision for an order that documents should be lodged in electronic form. It would be helpful if the practice note would state whether the court intends to require pen-drives containing all of the

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documents to be referred to in the case to be lodged in future judicial review proceedings. If that is not the intention of the court, then in our view paragraph 40 is not needed.

8 Failure to comply

8.1 We agree that the court should be able to find no expenses are due to or by either party, or to modify an award of expenses, in respect of a failure to comply with the practice note. However, we do not think that the court should adjust expenses in respect of technical or minor breaches which do not inconvenience the parties or the court.

9 General Observations

9.1 For Petitions which raise similar or identical points of law, there should be a procedure where agents can request that Permission be considered by the same Lord Ordinary or specifically request that permission hearings call at the same time rather than leaving it to the Keeper to group similar hearings) or that the Petitions are conjoined in any further procedure.

9.2 The Home Office often serve enforcement notices (usually appended to a decision letter) advising that an applicant will not be removed for 7 days but thereafter can be removed, without notice, at any time during the next 3 months. Such a notice is referred to as a "notice of removal window" in the Home Office's Enforcement Instructions & Guidance (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/574005/chapter60-_v_14.pdf (see page 5).

These are different to removal directions. Removal directions specify a specific date, time and flight for removal. Removal is imminent in both cases, whichever notice is served. However where a notice of removal window has been served, it is currently unclear whether a Pre Action Protocol communication needs to be sent. Our view is that it does not as removal is imminent, the client is liable for removal within a matter of days, and there is insufficient time to intimate a Pre Action Protocol communication and await a response. However the wording is not clear. We believe the practice note may have been drafted at a time when the only enforcement notices used were removal directions. Changing the wording would make it clear that the exception applies regardless of which type of removal notice is served.

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9.3 In terms of conjoining Petitions, we would amplify that from experience, the Keeper's Office does not tend to actively group oral hearings together which raise similar points of law. In recent Nepalese Earthquake Judicial Review actions which raised identical issues of fact and law, permission hearings were set down for different days. Although permission was granted in both cases, if hearings were on separate days and permission was refused in one petition, it seems inevitable that the Office of the Advocate General in Scotland would argue that the Petitions are the same and should be treated accordingly. By contrast, if permission was granted, they would no doubt argue the other way saying that the cases could be distinguished. This would have the adverse effect of potentially prejudicing a case.

In the example referred to, when an attempt was made to group the two cases together by motion, the agents involved were asked by the Petitions Department to drop the motions and instead write a letter to them explaining why the Petitions should be conjoined. The effect of that for similar cases in future is that if any such request was refused, there would be no right to reclaim unless the request was made by motion. This seems to be an area on which there is little guidance for agents and parties.

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