JUDICIAL REVIEW

SCOPE AND GROUNDS

By

Scott Blair, Advocate

THE TRIGONOMETRY OF JUDICIAL REVIEW

In Scotland, unlike England and Wales, the judicial review jurisdiction is not limited to cases which have an element of public law. As explained by Lord President Hope in West v. Secretary of State for Scotland 1992 SC 385 at 413 the scope of judicial review is as follows:

“The following propositions are intended therefore to define the principles by reference to which the competency of all applications to the supervisory jurisdiction under Rule of Court 260B is to be determined:

1. The Court of Session has power, in the exercise of its supervisory jurisdiction, 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.

2. The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires.

3. The competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor is it correct in regard to issues about competency to describe judicial review under Rule of Court 260B as a public law remedy.

By way of explanation we would emphasise these important points:

(a) Judicial review is available, not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted.

(b) The word "jurisdiction" best describes the nature of the power, duty or authority committed to the person or body which is amenable to the supervisory jurisdiction of the court. It is used here as meaning simply "power to decide", and it can be applied to the acts or decisions of any administrative
bodies and persons with similar functions as well as to those of inferior tribunals. An excess or abuse of jurisdiction may involve stepping outside it, or failing to observe its limits, or departing from the rules of natural justice, or a failure to understand the law, or 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.

(c) There is no substantial difference between English law 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.

(d) Contractual rights and obligations, such as those between employer and employee, are not as such amenable to judicial review. The cases in which the exercise of the supervisory jurisdiction is appropriate involve a 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 or for whose benefit that jurisdiction, power or authority is to be exercised.”

Over the next few pages an attempt will be made to explain these propositions in a little more detail. Given the approach of the Supreme Court in Eba v. Advocate General for Scotland [2011] UKSC 29; [2011] 3 WLR 149; [2011] PTSR 1095; 2011 SLT 768; [2011] STI 1941 (decided 22 June 2011), the view that the substantive law of judicial review in Scotland and in England should be the same has even greater resonance now.

Until West was decided, and based on the decision in Tehran v Argyll and Clyde Health Board 1989 SC 342 we had followed the English case law and had used the public law test to determine if judicial review was competent. Tehran was over-ruled in West.

One final point should be made here. As explained by Lord Marnoch in Bell v Fiddes 1996 SLT 51 at 52H, it follows that the supervisory jurisdiction excludes procedures for which specific provision is made under the Rules of Court (for example reduction in Chapter 53 or suspension in Chapter 60) where the jurisdiction being challenged is not of the kind described in West. So in Saunders, Petr 1999 SC 564, a petition for judicial review seeking reduction of a Sheriff Court decree was held to be incompetent because reduction of such decrees was dealt with under RCS r. 53.2.

Clearly for many purposes local authority decision making will fall with the scope of West. It is based on statutory powers which in general involve the exercise of discretion under a statutory provision. Decisions will be based on the general statutory power of an authority to do anything which could facilitate or be conducive or incidental to the carrying out of its functions. In addition an authority exercises particular functions all of which are in principle
amenable to judicial review such as for example education or planning or social work or in relation to the work of the authority as a police authority or a fire authority.

Licensing Boards are clearly amenable to judicial review as may be decision making delegated under the Licensing (Scotland) Act 2005 by the Clerk to a Licensing Board. Judicial review of Licensing Boards under the new Licensing (Scotland) Act 2005 will be competent, and if English experience under their recent and similar licensing law reforms is anything to go by, will be likely to increase as compared with experience under the 1976 Act.

Statutory or non-statutory bodies which have links to or of interest to local authorities and which have been held to be subject to judicial review include Housing Benefit Review Boards: **Macleod v Banff and Buchan HBR** 1988 SLT 753; the Forestry Commissioners: **Kincardine and Deeside DC v Forestry Commissioners** 1992 SLT 1180; public broadcasting authorities: **Wilson v IBA** 1979 SC 351 and **Wilson v IBA (No 2)** 1988 SLT 276; harbour and airport authorities: **Air Ecosse Ltd v CAA** 1987 SLT 751 and **Peterhead Towage Services Ltd v Peterhead Bay Authority** 1992 SLT 594; rail authorities: **Highland RC v British Railways Board** 1996 SLT 274; the Chief Constable: **Thomson v Chief Constable of Grampian Police** 2001 SC 443; the internal affairs of political parties: **Brown v. Executive Committee of Edinburgh Labour Party** 1995 SLT 98; housing associations: **Boyle v. Castlemilk East Housing Co-operative Ltd** 1995 SLT 56; the Keeper of the Registers of Scotland: **Millar & Bryce Ltd v Keeper of the Registers of Scotland** 1997 SLT 1000; **Short's Tr v Keeper of the Registers of Scotland** 1994 SC 122 and affirmed 1996 SC (HL) 14.

Of interest to local authorities contemplating judicial review proceedings as petitioners are the following.

The Scottish Parliament is subject to judicial review: **Whaley v Lord Watson of Invergowrie** 2000 SC 340. There the First Division held that as the Parliament was a creature of statute the Courts, not the Parliament were the ultimate arbiters of the powers of that body. The remedies open to the Court are more limited than the remedies otherwise open to it under r. 58 as result of section 40 of the Scotland Act 1998.

The Crown and Ministers of the Crown and Scottish Ministers exercising the common law prerogative powers of the Crown are probably amenable to judicial review even although on one view there is no delegation of power in **West** terms, the Crown being “one and indivisible” as was held in constitutional law terms in **Town Investments Ltd v Department of the Environment** [1978] AC 359.

If the prerogative powers were not amenable to judicial review the result would mean that golf clubs were amenable to judicial review (**Crocket v Tantallon Golf Club** 2005 SLT 663) but that important public law decisions by the Crown were not. To hold otherwise would mean that these powers of the Crown in Scotland were not reviewable when there are growing
indications in the English case law that such powers are, in a modern constitutional state governed by the Rule of Law, amenable to review.

Thus in R (Bancoult) v Secretary of State for Foreign Commonwealth Affairs [2006] EWHC 1038 (Admin), the Court held that “The suggestion that a minister can, through the means of an Order in Council, exile a whole population from a British Overseas Territory and claim that he is doing so for the ‘peace, order and good government’ of the Territory is, to us, repugnant” (para 142). That case related to the removal from the Chagos Islands of the indigenous population. Some 2000 people were moved from the archipelago in the late 1960s and sent to Mauritius and the Seychelles, after the UK government secretly leased Diego Garcia to the US to use as an air base. The base has been used to launch bombing raids in both Iraq and Afghanistan and the Islanders are excluded on the grounds that their presence on the Chagos Islands would represent a security threat to the base - albeit one posed from 150 miles away.

Sir Sydney Kentridge QC representing the Islanders argued that the prerogative order in council, made under the royal prerogative but applied with extraterritorial effect was “repugnant” and ultra vires. The focus was on the constitutional position of such a prerogative power and the fact that there is no precedent for using it to exclude an entire population from a British territory.

The High Court decision was in turn supported by the Court of Appeal ([2007] EWCA Civ 498) but reversed on 22 October 2008 by the House of Lords: [2008] UKHL 61.

However the reversal appears to have related not the general proposition that the power in question could not be the subject of review but rather whether on the facts of the case the exercise of the prerogative power was in fact repugnant to the general principles of administrative law.

With both Lords Bingham and Mance giving dissenting speeches their Lordships held that the principle of the sovereignty of Parliament was founded upon the unique authority Parliament derived from its representative character. An exercise of the prerogative lacked that quality. Although it might be legislative in character, it was still an exercise of power by the executive alone. There was no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.

However none of the provisions of the orders was open to challenge in the English courts on the ground of repugnancy to any fundamental principle relating to the rights of abode of the Chagossians as "belongers" in the islands. The right of abode was a creature of the law, not a constitutional right. In a ceded colony, the Crown had plenary legislative authority. There was no basis for saying that the right of abode was so fundamental that the Crown's legislative powers simply could not touch it. Legislative powers were traditionally conferred on the legislature of a colony with the requirement that laws had to be made for the "peace, order and good government" of the
territory. However, the words had never been construed as words limiting the power of a legislature; they had always been treated as apt to confer plenary law-making authority. The courts would not inquire into whether legislation within the territorial scope of the power was in fact for the "peace, order and good government" or otherwise for the benefit of the inhabitants of the territory. Her Majesty in Council exercised her powers of prerogative legislation for a non-self-governing colony on the advice of her ministers in the United Kingdom, and would act in the interests of her undivided realm. There was no support for any proposition that, in legislating for a colony, either Parliament or Her Majesty in Council must have regard only, or even predominantly, to the immediate interests of its inhabitants. The Chagossians’ right of abode was purely symbolic; there was no prospect of them being able to live on the islands in the foreseeable future. Taking fully into account the practical interests of the Chagossians, the decision to impose immigration control on the islands could not be described as unreasonable or an abuse of power. There had been no clear and unambiguous promise to the effect that the Chagossians would be free to return to the islands even if they could not be resettled there. Accordingly, no legitimate expectation had been created.

Some prerogative powers are probably not justiciable though: McCormick v Lord Advocate 1953 SC 396; Gibson v Lord Advocate 1975 SC 136. A recent example of the difficulties the Courts face in reviewing prerogative power came on 12 December 2006, the Court of Appeal gave judgment in R (on the application of Gentle & Clarke) v the Prime Minister, the Secretary of State for Defence and the Attorney General [2006] EWCA Civ 1690. That case concerned a judicial review of the refusal by the government to hold an independent inquiry into the circumstances which led to the invasion of Iraq. The Court held at [84] that “Such an inquiry would inevitably involve, not only questions of international law, but also questions of policy, which are essentially matters for the executive and not the courts”. Mrs Gentle was from Glasgow and her son had been killed serving with the British Army in Iraq. The House of Lords adopted essentially the same approach when dismissing her appeal-see R (on the application of Gentle) v The Prime Minister [2008] 2 WLR 879.

Clearly the exercise of power under statute by Ministers is amenable to judicial review.

Contractual matters will therefore, not be within the scope of the tripartite test which the concept of jurisdiction implies. Employment disputes as between employee and employer (of which West was an example) are not within the supervisory jurisdiction.

In the Outer House the view had been expressed that the tripartite test is not an inflexible template: Naik v University of Stirling 1994 SLT 449 at 451L-A per Lord Maclean; Joobeen v University of Stirling 1995 SLT 120 at 122F-K per Lord Prosser. In Blair v Lochaber DC 1995 SLT 407 Lord Clyde seemed to follow a different route from West when he dismissed a petition brought by the suspended Chief Executive of a local authority because the substance of the decision making was not in essence “administrative” (which seems closer
to the public/private test used in England). It was closer to being an employment matter.

A tripartite relationship is not formed when one of two parties to a relationship delegates a decision to an employee or an agent: *Fraser v PGA* 1999 SCLR 1032; *Crocket v Tantallon Golf Club* 2005 SLT 663. At para. [40] of that case Lord Reed indicated that the concept of a tripartite relationship should not be applied inflexibly.

A person to whom a decision can be delegated may be a natural or non-natural person. It is not always clear if there has been a delegation and to whom: *Thomson v Chief Constable of Grampian Police* 2001 SC 443.

There was a recent case of some interest and where the facts where quite unusual, *Mrs SC v Advocate General for Scotland* decided 3 August 2011 and reported at [2011] CSOH 124. It emphasises the importance of getting your case into a “*West triangle*”.

Here a widow (C) of a soldier (X) who had died during the course of a training mission, petitioned for judicial review of a decision of the Service Personnel and Veterans Agency of the Ministry of Defence (S) to release X's body to his mother (M), seeking inter alia suspension of that decision. C and M could not agree on the place of X's interment, C claiming that her choice represented X's wishes. X's will named C as the universal legatee and M as executrix, and following X's death, S had written to C intimating that, following legal advice to the effect that, under the laws of both England and Scotland, the executor retained certain legal rights and responsibilities in regards to ensuring X's burial or cremation, and where there was no documentary evidence that another party had been given the responsibility of arranging the funeral, it would transfer the body to M and thereafter liaise with her regarding funeral arrangements.

C submitted inter alia that S's decision deprived her of the opportunity of taking custody of X's body, arranging his funeral and determining where he was to be interred, and of the opportunity to establish a family burial lair, which together with S's proposal to liaise with M over funeral arrangements, engaged and impinged on her rights to a family life under the European Convention on Human Rights 1950 art.8(1).

The petition was dismissed as incompetent. It could not be said that simply because an operational choice had been exercised, or had been exercised on behalf of the Secretary of State, that the resulting outcome could be the subject of judicial review, no power had been identified that might be the subject of the supervisory jurisdiction beyond the practical control which flowed from S having custody of the body, the concept of ultra vires did not sit happily with power of that nature, and the tripartite relationship referred to in *West v Secretary of State for Scotland* 1992 SC 385, appeared to be absent and *West* was followed.
S's letter was a statement of intention to transfer the body to the party that it understood to be entitled to its custody as a matter of law, and whether or not that understanding was correct, neither the writing of the letter nor the implement of the intention expressed therein altered parties' respective rights or interests, therefore, although the existence of a tripartite relationship might not be essential, there was in any event nothing to judicially review, Crocket v Tantallon Golf Club 2005 SLT 663, followed.

Lord Brodie went on to say that C would require to bring an ordinary action in order to vindicate any entitlement she might have to custody of the body, but in such an action she would not be able to seek interdict or specific performance due to the terms of the Crown Proceedings Act 1947.

That on the authorities, art.8 might be engaged by an act of the state which touched on a family's freedom to determine what might be described as the place and modalities of a deceased family member's burial, to have custody of the body for the purpose of burial and to participate in any funeral ceremony, but that could only be the case if the particular matters in question remained entirely within the private and family sphere.

C's art.8(1) right to respect for her family life was engaged by an act which resulted in X's body being interred in a location which was not of her choosing, but that same right was not engaged by S liaising over funeral arrangements where that concerned the incorporation of a military element in the public and ceremonial aspects of the funeral.

That where C could argue that by transferring the body to M, S was putting it in the control of someone who intended to thwart C's wishes as to the place of X's burial, the transfer of X's body would amount to an interference with C's art.8 right to respect for family life. That in Scots law, near relatives to the deceased as well as the executor or prospective executor had rights or interests in respect of the deceased's body, albeit of a distinct nature. M had not yet confirmed as executor and it was unlikely that she would do so, however, where she was X's near relative, the transfer to her of X's body for burial would be according to law. Further that the act of transferring the body of a deceased to a mother for the purpose of burial could be regarded as being necessary for the protection of the rights and freedoms of others, and in all the circumstances, the proposed act was art.8(2) compliant.

**CONDUCT SUBJECT TO REVIEW**

The conduct under challenge must involve the exercise of a jurisdiction. So a decision to enter into a contract is not amenable to judicial review nor would a decision to implement the term of a contract.

That is why of course employment disputes are not amenable to judicial review unless on a proper analysis the employment decision in question turned on the exercise of a power conferred in terms of West, such as under the Police Discipline Regulations as occurred in Rooney v Chief Constable of Strathclyde Police 1997 SCLR 367.
An example of the rejection of a judicial review of contractual matters involving a local authority occurred in **UNISON and GMB, Pets** [2006] CSOH 193. There Lady Dorrian dismissed the petition as incompetent. There a petition was brought seeking judicial review of a resolution of Falkirk Council which had the effect of altering the terms and conditions of council employees by the insertion of terms based on the Single Status Agreement which was designed to resolve sex based wage discrimination. She held:

“The nub of the argument was that the heart of this dispute was a contractual employment dispute not an administrative matter. I agree. Essentially the attack is on the individual consequences of the resolution on a number of individual employees who have been offered regrading or otherwise offered terms different to their previous contracts of employment. It is only in respect of those employees who have refused these terms that reduction of the notices it sought. All the other notices served would remain standing. There are very clear, competent and obvious remedies in employment law relating to unfair dismissal which could be taken by these employees and would address what is in reality the only issue in this case. The petitioners' argument that the application is limited because a wide application would have caused problems relating to the balance of convenience is not persuasive. Had they sought to reduce all dismissal notices they would have faced very serious substantive problems based on the fact that they were seeking to reduce notices which had been superseded by contractual agreement. The situation here is quite the opposite of that which existed in Watt. There, to deal with the dispute under employment law would have had wider consequences likely to affect all teachers in the respondents’ area. To address the present issue according to employment law remedies would have no such consequence. The present complaint is not one of general application to all employees affected by the resolution or its consequences, it is brought on behalf of a limited number of those affected and is essentially in the nature of a private employment dispute not suitable for the supervisory jurisdiction of the court. I will accordingly dismiss the petition.”

In **Importa Ltd, Pet** 1994 GWD 26-1542, July 13 1994, Lord Kirkwood sitting in the Outer House held a petition for judicial review of a decision by a local authority to convey land was held to be incompetent. The petitioners alleged that the disposition had been signed by local authority officials who had not had the requisite power delegated to them. The correct remedy would have been an action of production and reduction of the disposition. However decisions to award or not to award contracts under statutory tendering procedures are amenable to judicial review: **Stannifer Developments Ltd v Glasgow Development Agency** 1998 SCLR 870.

There is no need for there to be a “decision” for review to be competent. Acts, omissions and statements denying the rights alleged by a petitioner are amenable to review: **Elmsford Ltd v City of Glasgow Council (No 2)** 2001 SC 267 (declaration of rights of access over a strip of land where a local authority by its acts, omissions and statements was said to have denied the existence of the alleged rights.
Sometimes the court has to analyse the “true nature of the dispute” to determine if the matter is truly one for judicial review. So in **WM Fotheringham & Son v British Limousin Cattle Society**, 6 August 2002, the Outer House held that the true nature of the action was one of reparation for breach of section 18 of the Competition Act 1998 for abuse of a dominant position and not to a challenge to the validity of the bye-laws which had caused the loss.

Notwithstanding the landmark decision in **Napier v Scottish Ministers** 2004 SLT 555, Lord Carloway expressed the view in **McKenzie and others v Scottish Ministers** 2004 SLT 1236 that petitions for judicial review seeking damages for slopping out in prison should have been raised by way or ordinary action. He thought that the use of the expedited judicial review procedure was not appropriate to such claims.

Challenges under the Human Rights Act 1998 based on breach of the section 6 statutory duty which applies to local (and other public) authorities are best analysed as a form of illegality challenge. Note though that not all challenges brought under the HRA are to be brought by judicial review. Just because a case is a human rights case that does not make it a case which requires the use of judicial review. If the challenge falls within **West v Secretary of State for Scotland** then it should be brought by judicial review. If there is no “West triangle” then the challenge should be brought by another means such as an ordinary action for breach of statutory duty.

A petition should not be premature or it will be incompetent. A recent example of this arose in **William Morrison Supermarkets Plc v South Aberdeenshire Licensing Board** [2010] CSOH 66. There a supermarket retailer (M) petitioned for judicial review of actings of a local licensing board (B) in respect of whether M had a duty to trade in off sales during the whole hours set out in their premises licence. M were licensed to make off sales from 10 am to 10 pm at their supermarket every day of the week, as laid out in their operating plan. They sought (i) declarator that in terms of Licensing (Scotland) Act 2005 there was no legal duty upon them to trade in the sale of alcohol at the premises throughout the licensed hours granted by B; (ii) declarator that B's decision to maintain a register for those premises not trading for the full hours laid down in their operating plan, and to have those premises monitored by licensing standards officers and the police with a view to possible review of the licence was unlawful; (iii) interdict against B from reviewing or seeking to review M's premises licence on the grounds that, as they had not operated throughout the whole licensed hours granted by B, M were in breach of a condition of their licence, and for interdict ad interim. B raised preliminary pleas that (i) as they had taken no decision which was susceptible to review, the petition should be dismissed; (ii) the petition was speculative and should be refused; (iii) M had available to them an alternative statutory right of appeal against any review of its licence and the petition was incompetent.

M submitted that there was a reviewable decision, namely B's declared intention of monitoring M's premises and potentially instituting a review of the
licence, and the present action was neither hypothetical not premature; B's
decision to monitor the opening hours of M's premises was unlawful and
raised a disputed question of construction of a statutory provision which was
of immense practical importance and had an immediate and practical effect
on how M should run their business.

Petition dismissed. It was clear that a court would not adjudicate where there
was no immediate issue between the parties or where the issue was, at the
time the matter was brought before the court, hypothetical. The issue between
M and B, although important, had not yet developed into a justiciable cause, it
was possible that no justiciable cause would ever develop, and even if such a
cause did emerge, Parliament had expressly provided a jurisdiction to deal
with the issue and it would be both inappropriate and wrong to interfere with
that jurisdiction. Observed, that although M had a legitimate concern that even
if the appeal mechanism in the 2005 Act provided a method of challenging
review decisions, there was potential for injustice to them due to the possibility
of interim suspension of their licence pending hearing of the appeal,
Parliament had to be taken to have been aware of this when the legislation
was passed.

ALTERNATIVE STATUTORY REMEDY

Subject to exceptional circumstances a person is expected to exhaust any
alternative statutory remedy before seeking recourse to the supervisory
jurisdiction: British Railways Board v Glasgow Corporation 1976 SC 24. Faulty advice by an agent or adviser is not in general an exceptional
circumstance: Sangha v Secretary of State for the Home Department 1997
SLT 545. An exceptional circumstance could be where the decision maker
has done something to frustrate or impair the statutory appeal route: Moss’
Empires v Glasgow Assessor 1917 SC (HL) 1. The Wm Morrison
Supermarkets plc case is of course another recent example of failure to
exhaust a statutory remedy.

It would now appear that challenges to the vires of the licensing policy of
Licensing Boards and local authorities under the Licensing (Scotland) Act
2005 and Civic Government (Scotland) Act 1982 can (and should be taken)
by way of appeal to the Sheriff rather than by way of separate judicial
review—see Brightcrew Ltd v City of Glasgow Licensing Board [2011]
CSIH 46.

TITLE AND INTEREST

Issues of title and interest to sue were, until 12 October 2011, problematic.
Before looking at the change in the law let us look at what the law was. The
Scottish courts have enforced these rules (which derive from private law
cases) with relative vigour: Scottish Old Peoples Welfare Council, Petrs
1987 SLT 179. In England a looser test of sufficient standing allows for more
people to bring challenges than would be the case in Scotland. So for
example in **Rape Crisis Centre, Petr 2002 SLT 527**, a challenge to the decision of the Home Secretary to allow the convicted rapist Mike Tyson enter the UK to take part in a boxing match in Glasgow was rejected on title and interest grounds. In contrast in England a similar challenge was lost on the merits, the group challenging the decision their having sufficient standing on which see Lord Hope of Craighead “*Mike Tyson comes to Glasgow - a question of standing*” (2001) PL 294-307.

Recently in **UNISON and GMB, Pets [2006] CSOH 193** although there had been a challenge to title and interest, the issue was decided on the merits. In an earlier case the Court appears to have accepted that a Trade Union had title and interest to bring proceedings on behalf of its members: **EIS v Robert Gordon University [1997] ELR 1** in which Lord Milligan, at page 10, observed that

"Where...a trade union is able to allege that amongst its membership are persons who are likely to be adversely affected by an ultra vires decision of the respondents and that it is unrealistic for such members individually, both on timetabling and prospect of acceptance grounds, to challenge the decision individually, it seems to me that that trade union has not only an interest to challenge the decision but also title to do so."

Both title and interest must be present at the same time and not at some future point: **Shaw v Strathclyde Regional Council 1988 SLT 313 ; Air 2000 v Secretary of State for Scotland ( No 2 ) 1990 SLT 335.**

A council tax payer has clear title and interest to sue a local authority as a “person interested” under section 101 of the Local Government (Scotland) Act 1973 and his motive for doing so is irrelevant: **Stirrat v City of Edinburgh DC 1999 SLT 274.** A commercial interest, however, does not per se create title and interest: **Bondway Properties Ltd v City of Edinburgh Council 1999 SLT 127.**

Where the Human Rights Act 1998 is relied upon the test for standing to bring a challenge is the victim test which is based on art 34 ECHR and the case law of the Strasbourg Court: section 7(3), (4). It is a relatively strict test and under the present case law of the European Court will not allow pressure group challenges.

Just how far the approach in the EIS can be pushed to cover other “representative” bodies is unclear. It must be doubted if this approach could be extended to “pure” pressure or campaigning groups who fight for a cause with which people may be sympathetic but which may not have members as such affected by that cause. Groups like the League against Cruel Sports come to mind.

Petitioners understandably remain concerned about bringing challenges where title and interest might be an issue. As a result it is not uncommon to find challenges being brought by a representative body but only on the basis that individual members of that body come into the proceedings. This can be
slow and cumbersome. Identifying members prepared to do this can be both time consuming and difficult as can providing comfort in relation to possible exposure to expenses if the proceedings are unsuccessful.

More recently in Scottish Beer & Pub Association and Others v Glasgow City Licensing Board, 2 May 2008 (OH, Lord Menzies), a petition for judicial review to challenge a key aspect of the policy of the Board under the Licensing (Scotland) Act 2005 had to be brought in the name of a multiplicity of petitioners. The SBPA is one of the main trade bodies for the licensed trade in Scotland and includes as members a number of the large brewers and small operators. The policy was of great concern to individual members. However the SBPA on advice did not feel that it could proceed with a petition unless individual members came forward to join the proceedings - again because of concerns over title and interest to sue. Those fears were justified. As matters developed the petition was no longer insisted on as the Board clarified their policy. In the subsequent argument on expenses (which went in favour of the petitioners) the Board sought to argue that the SBPA had no title and interest to sue. This is the second time in two years that the SBPA had challenged the Glasgow Board and the second time that it had to resort to the device of having individual members join the petition to avoid difficulties over title and interest. In 2006 the SPBA successfully challenged the Glasgow Board over the then policy of “banning” traditional glassware in licensed premises - see SBPA and Others v. City of Glasgow Licensing Board, 18 June 2006, (OH, Lady Paton).

In contrast in England the UK parent body for the SBPA, the British Beer & Pub Association has been able to raise and win judicial review challenges to licensing policy under the Licensing Act 2003 without recourse to the more cumbersome methods that the Scottish branch has had to resort to: British Beer & Pub Association v Canterbury Council [2005] EWHC 1318 (Admin).

All of this has changed because of the decision of the Supreme Court in AXA General Insurance Ltd v Lord Advocate [2011] UKSC 46 decided on 12 October 2011.

On the issue of title and interest or standing the decision Court changed Scots law. In England and Wales a party can seek judicial review if that party has “sufficient interest” in the matter. The courts in England and Wales have applied this fairly flexibly. In Scots law, by contrast, the test has been whether a party has “title and interest” and it has been applied rather strictly by the Scottish courts and there have been a number of cases where petitions have fallen down before they got started. Examples are given by Lord Hope at para 59 and by Lord Reed at para 166.

Both Lords Hope and Reed decided that the old phrase “title and interest” should no longer be applied in judicial review. Lord Reed says that “sufficient interest” should be the test in Scotland (para 171). Lord Hope says that a party should be required to show that he or she is “directly affected” (para 63).
Apart from issues of *forum non conveniens*, taken as a whole this case seems to provide a basis for arguing that where a decision maker acts under legislation which has an application throughout the United Kingdom and in effect exercises power which has effect on a United Kingdom basis with effects felt in Scotland, and where it is to be anticipated that a decision maker which does not sit in Scotland will nevertheless respect the decisions of the Court of Session, then the Court of Session should be treated as having jurisdiction.

**DELAY**

There is no time limit in r. 58 for the bringing of judicial review proceedings.

At common law a petitioner can be barred from proceeding with a petition if a plea of mora, taciturnity and acquiescence can be made out: *Hanlon v Traffic Commissioner* 1988 SLT 802 (ten months too late); *Ingle v Ingles Tr* 1997 SLT 160 (acquiescence in decision of the Sheriff of four years before). Delay or silence is not enough; there must be prejudice to the respondent *Somerville and others v. Scottish Ministers* 2007 SLT 96; *Edgar Road Property Co LLP v Moray Council* [2007] CSOH 88. The need for certainty and good administration are the sort of factors which are relevant to a plea of mora. The court will often have to consider the merits of a case before it can determine the issue of mora.

Section 7(5) Human Rights Act 1998 does now impose a time limit of one year from the date of the act or decision complained of for bringing a challenge. This applies to judicial review proceedings as well as challenges brought by other means. The court has an equitable jurisdiction to extend the time limit if it equitable to do so in all of the circumstances. So human rights challenges can be brought up to a year, or after that at the discretion of the court. It is however suggested that mora based on a shorter period could still be argued as the section 7(5) period is without prejudice to any other shorter period which might be applicable. There have been a couple of recent interesting cases on delay.

In *McAllister v Scottish Legal Aid Board* [2010] CSOH 112; 2011 S.L.T. 163 M petitioned for judicial review of a decision of the Scottish Legal Aid Board refusing to grant sanction for the employment of junior counsel at a trial to be held in the sheriff court in September 2010 on an indictment containing 10 charges against him.

M had been indicted in November 2006 and had lodged a devolution minute in the criminal process in order to argue that he could not receive a fair trial unless sanction were granted for counsel. A subsequent application to the Board for sanction was refused in 2007, and in 2008 the minute was heard, and refused, in the sheriff court. An appeal to the Court of Criminal Appeal was refused in 2009, and the petition for judicial review was raised in the Outer House.
M sought to have the application for sanction remitted to the Board for reconsideration, submitting that pursuant to the Legal Aid (Scotland) Act 1986 s.21(4), the Board had applied the wrong test; alternatively, that if it had applied the correct test, it had nevertheless reached a decision that was so unreasonable as to be ultra vires. The Board submitted that no test had been set out in the 1986 Act and the terms of s.21 were definitional; M had not raised the judicial review petition until 2010 and the Board, and the Court of Criminal Appeal, had been told by M's agents that he was not raising such an action. It argued that M had therefore unreasonably delayed and acquiesced in its decision and that refusal of his application for judicial review was justified.

Petition granted. (1) Section 21(4) set a test requiring the Board to consider whether or not it was appropriate in all the circumstances to sanction counsel. It was intended that the test would be governed by normal legal usage, which was a reference to the existing practice of granting sanction for counsel in sheriff court cases, and to the practice of the court granting expenses in civil cases with sanction for the employment of counsel in the sheriff court. (2) It was clear that the Board had considered the question of whether or not the case was beyond the capabilities or competence of a solicitor in deciding whether a grant of sanction would be appropriate, and that was a higher test than ought to have been applied. The Board's application of the incorrect test was significant and reconsideration was thereby necessary. (3) It could not be said that even if the Board had applied the correct test, its decision was one which was so unreasonable as to be ultra vires. The statistical information before the court was not sufficient to enable the court to draw any particular inference, and given that the Board was entitled to refuse the application if it thought it was not appropriate to grant it, it was difficult to argue that the decision was irrational. (4) There had clearly been delay in seeking judicial review. However, it was not entirely clear why that delay had occurred, or that M had ever indicated unequivocally that he did not intend to raise such an action at an appropriate time. In any event, delay was not in itself sufficient to operate as a bar to judicial review and there were no sufficient averments of taciturnity and acquiescence to hold that it could be inferred, from the whole circumstances, that M had acted in such a way as to show that he had abandoned his right to seek judicial review, Edgar Road Property Co LLP v Moray Council [2007] CSOH 88 followed.

In Buzzworks Leisure Ltd v South Ayrshire Licensing Board and JD Wetherspoon plc [2011] CSOH 146, decided 2 September 2011 the Temporary Judge summarised the current law on mora in rejecting an argument that there had been undue delay in bringing a challenge to the grant of a premises licence for a “superpub” in favour of JD Wetherspoon.

She said:

“32 It seems appropriate to deal first with the arguments in support of the plea of mora taciturnity and acquiescence. The most recent authoritative dicta on the requirements for such a plea to be sustained is that in Somerville v
Scottish Ministers 2007 SC 140. The First Division there set out the meaning of the words of the plea as follows (at para 94):—

“Mora, or delay, is a general term applicable to all undue delay (see Bell, Dictionary, sv ‘Mora’). Taciturnity connotes a failure to speak out an assertion of one’s right or claim. Acquiescence is silence or passive assent to what has taken place. For the plea to be sustained, all three elements must be present. In civil proceedings delay alone is not enough …

…we would emphasise that prejudice or reliance are not necessary elements of the plea. At most, they feature as circumstances from which acquiescence may be inferred. By its nature, acquiescence is almost always to be inferred from the whole circumstances, which must therefore be the subject of averment to support the plea.”

33 It was accepted in the arguments before me that in cases of judicial review the plea was likely to be invoked where the delay was much shorter than in other types of cases. It was also accepted that the correct approach was to consider whether someone looking objectively at the petitioners’ actions during the period of delay would have concluded that they had decided not to challenge the Board’s decision. If a reasonable person would so conclude, then it could be inferred that the petitioners had acquiesced in the Board’s decision. In Swan v Secretary of State for Scotland 1998 SC 479, a petition for judicial review had been raised more than seven months after the relevant decision letter. The main reason for the delay had been doubt about the legal position in relation to a European Directive. During the first two months of the seven month period, the petitioners had made clear that they were unhappy with the decision in question. In those circumstances it was thought that the delay of some months thereafter before proceedings were raised would not in itself justify the inference that they departed from their strongly stated position. In United Co-operative Ltd v National Appeal Panel for Entry to the Pharmaceutical Lists 2007 SLT 831 a plea of mora, taciturnity and acquiescence was sustained where there had been a delay of over four months between the intimation of the Panel’s decision to the petitioners and the commencement of proceedings for judicial review. In that case an initial letter had been sent indicating that there was an intention to challenge the decision. In the particular circumstances of that case the delay raising proceedings thereafter was held to be sufficient to infer acquiescence.

34 In the present case the written statement of reasons from the first respondent was received on 29 November 2010. Within four weeks the petitioners’ agents had written to the Board and to the second respondents indicating that they were taking counsel’s opinion on the potential grounds for a judicial review. In my view that is a relevant factor in considering whether there has been a complete failure on the petitioners part to speak out against the decision that was later made the subject of these proceedings. There was a response to that letter. While it is true that the second respondents were not told that a petition was being drafted or proceedings raised, the second respondents’ agent contacted the petitioners’ agents simultaneously with the petition being raised to enquire what was happening about the possible
judicial review proceedings. While there can be no criticism whatsoever of the second respondents’ agents in making such an enquiry, in my view it militates against an inference of acquiescence. It is clear that the second respondents had not taken the petitioners silence in the first two months of 2011 to mean that they had changed their minds and decided not to pursue any challenge to the Board’s decision. I do not consider the signing of the lease by the second respondents to be material as the agreement was completed on 19 November 2010 prior to the first respondent issuing the statement of reasons now being challenged. There has clearly been confusion about the impact, if any, of the decision in Tesco Stores Ltd v Aberdeen City Licensing Board. The decision to challenge the Board’s decision was not a straightforward one. In addition there were funding issues. In all the circumstances, I do not consider that the three elements of mora taciturnity and acquiescence have been established. The petitioners delayed in raising the petition. I respectfully agree with Lord Glennie’s general view in United Co-operative Ltd v National Appeal Panel for Entry into the Pharmaceutical Lists when he states that in assessing what is a reasonable time, account must be taken of the complexity of the matter, the need to take advice, gather information and draft proceedings. It seems to me that there may be subtle considerations in assessing what is a reasonable time and the circumstances of each case must be closely scrutinised. The same period of delay in different cases may result in opposite conclusions being reached on the plea as a result of the particular circumstances involved in each. In this case I consider that the delay was not beyond a reasonable time in the particular circumstances. The notification given in the letter of 23 December 2010 constitutes a partial breaking of the petitioners’ silence. The effect it had on the second respondents, namely that they wished to be clear about whether or not proceedings would be raised before doing anything, militates firmly against any inference of acquiescence being drawn. I do not consider it could be said that anyone looking objectively at the petitioners actions would have concluded that they had decided not to challenge the Board’s decision during the period prior to 9 March 2011.”

GROUND FOR JUDICIAL REVIEW

The grounds for judicial review are the same in Scotland as they are in England and Wales: West v. Secretary of State for Scotland 1992 SC 385 per Lord President Hope at 413 as confirmed by the Supreme Court in Eba.

Until Eba this was not quite true as the scope for error of law for errors which are not jurisdictional is different in Scotland: Watt v. Lord Advocate 1979 SC 120. It is narrower than in England and Wales where all errors of law are jurisdictional and amenable to review: Page v University of Hull Visitor [1993] AC 682.

The grounds for review of course fall under three broad heads-illegality, procedural impropriety and irrationality: CCSU v The Minister for the Civil Service [1985] AC 374 per Lord Diplock and Lord Roskill.
Challenges under the Human Rights Act 1998 based on breach of the section 6 statutory duty are best analysed as a form of illegality challenge.

Note though that not all challenges brought under the HRA are to be brought by judicial review. Just because a case is a human rights case that does not make it a case which requires the use of judicial review.

If the challenge falls within West v Secretary of State for Scotland then it should be brought by judicial review. If there is no “West triangle” then the challenge should be brought by another means such as an ordinary action for breach of statutory duty.

**ERROR OF LAW**

Error of law is also apt to cover appeal on the basis of error of law. This is a commonly invoked ground of appeal in licensing appeals and even where not conferred as an express ground of appeal will be readily implied. An error of law will clearly found an appeal under section 20 of the 2001 Act from decisions of the Care Commission.

In Watt the Inner House drew a distinction between errors of law which were of the nature of the decision maker “going wrong” as opposed to errors of law which involved the decision maker “doing wrong.” In broad terms “going wrong” is a failure to ask the correct question such as by misconstruction of a relevant statutory provision. “Doing wrong” on the other hand is where the decision maker asks the right question and correctly understands the law but nevertheless reaches a result which might be regarded as wrong. This raises the question of whether it is possible to make an error of law but yet remain with the jurisdiction of the decision maker.

Watt says that such a distinction is tenable. Page, following the earlier landmark decision in Anisminic v Foreign Compensation Commission [1969] AC 147 rejected the continuation of any distinction between errors of law which went to jurisdiction and those which did not. This is odd because Watt considered and purported to apply Anisminic but did not consider that it required the distinction between jurisdictional and non-jurisdictional errors of law to be abandoned. In fact in Watt the Lord President Lord Emslie said (at 129):

“Not every misconstruction of a statutory provision by a statutory tribunal in the course of reaching its decision will render that decision a nullity.”

With regret he went on to say (at 131):

“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 jurisdiction.”
By contrast in *Boddington v British Transport Police* [1998] 2 WLR 639, HL at 646A Lord Irvine of Lairg said:

“[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.”

Applying this approach even a gross error as to a matter of fact could not be treated as a reviewable error of law: *Rae v Criminal Injuries Compensation Board*, 1997 SLT 291 per the late Lord Macfadyen and *O’Neill v Scottish Joint Negotiating Committee for Teaching Staff*, 1987 SLT 538 (“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.”)

Of course Eba has now removed any distinction between intra vires and ultra vires errors of law.

All are now reviewable. Along the way the Supreme Court decided that *Watt v Lord Advocate* which maintained the distinction between *intra vires* error of law and *ultra vires* error of law should be abandoned. This distinction had been rejected in the English case of *Anisminic v Foreign Compensation Commission*. Although on one view by so doing the Supreme Court widened the scope of the grounds of judicial review in Scots law, this was in fact the route by which the Court held that the approach to the judicial review of the Upper Tribunal should be the same in Scotland as in England and Wales—a case of giving with one hand and taking with the other perhaps!

Lord Hope of Craighead delivered the main Speech and had this to say in relation to the distinction between the Scots and English grounds of judicial review.

“10. There are however two further issues which need to be considered in Ms Eba’s case. The first arises because there are significant differences between the circumstances in which the remedy of judicial review is available in England and Wales and Northern Ireland and the right of the citizen to invoke the supervisory jurisdiction of the Court of Session in Scotland. The first question, then, is whether in Scotland too the scope for judicial review of unappealable decisions of the Upper Tribunal should be restricted in some way. The Advocate General’s position is that the intention of Parliament was that the Upper Tribunal should be amenable to judicial review to the same extent in the Court of Session as in the High Court in England, and that the First Division of the Court of Session was wrong to hold otherwise. For Ms Eba it is submitted that this argument should be rejected as, whatever may be held to be the position in England, the suggestion that the grounds of judicial review of decisions of the Upper Tribunal should be restricted in Scotland is not supported by authority and to adopt it would destroy the consistency of Scots law.
11 The position in Scotland is also more complicated than that which arises in England and Wales. The 2007 Act can be said to have effected a complete re-ordering of the system of administrative justice in England and Wales. But that is certainly not true of Scotland. There are a large number of tribunals and other similar bodies which sit in Scotland which have not been included within the new structure. They are mainly confined to the Scottish tribunals that deliver administrative justice in matters devolved under the Scotland Act 1998 whose functions cannot be transferred to either the First-tier or the Upper Tribunal by order of the Lord Chancellor: section 30(5)(a). Various Scottish tribunals which exercise functions in relation to devolved matters have been restructured under legislation that applies only in Scotland. These measures include the Mental Health (Care and Treatment) (Scotland) Act 2003, the Planning etc (Scotland) Act 2006, the Judiciary and Courts (Scotland) Act 2008 and the creation of Additional Support Tribunals under the Education (Additional Support for Lifelong Learning) (Scotland) Act 2004. However, at least one tribunal exercising functions in Scotland in relation to reserved matters – the Pensions Appeal Tribunal – remains at first instance mainly outwith the structure of the 2007 Act. So too do the Employment Tribunals and the Employment Appeal Tribunal.

12 So there is this further question. Should there be a different approach to the grounds on which judicial review of unappealable decisions is available in the case of tribunals over which the supervisory jurisdiction of the Court of Session is exercised that are within the scheme of the 2007 Act from those that lie outside it?"

Apart from the statutory provisions noted at the start of this discussion of Eba Lord Hope observed-

“22 There is one other provision in the 2007 Act which should be mentioned. Section 13(6) provides that the Lord Chancellor may, as respects an application for permission or leave to appeal to the Court of Appeal in England and Wales or Northern Ireland from any decision of the Upper Tribunal on an appeal under section 11 from a decision of the First-tier Tribunal, make provision by order for permission or leave not to be granted on the application unless the Upper Tribunal or the relevant court considers

“(a) that the proposed appeal would raise some important point of principle or practice, or

(b) that there is some other compelling reason for the relevant appellate court to hear the appeal.”

An order to this effect has been made by the Lord Chancellor: see The Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008 No. 2834), which came into force on 3 November 2008.

23 The 2007 Act did not confer an equivalent power on the Lord President in relation to Scotland, perhaps because the question of second appeals was being considered in the Scottish Civil Courts Review that was then taking
place under the Chairmanship of Lord Gill. But a provision broadly to the same effect as section 13(6) was made by SSI 2008/349 with effect from 3 November 2008 by inserting into the Rules of the Court of Session 1994 a new rule 41.59. It provides:

“(1) This rule applies where an application is made to the court under section 13(4) of the Tribunals, Courts and Enforcement Act 2007 for permission to appeal a decision of the Upper Tribunal which falls within section 13(7) of that Act and for which the relevant appellate court is the Court of Session.

(2) Permission shall not be granted on the application unless the court considers that –

(a) the proposed appeal would raise some important point of principle or practice, or

(b) there is some other compelling reason for the court to hear the appeal.”

As a result the position in relation to the granting of permission for a second appeal is now the same in the Court of Session as it is in the High Court under the statute. But it should be noted that the Scottish Rule of Court does not apply to applications made to the Upper Tribunal as opposed to the Court of Session, while the Order in other parts of the United Kingdom applies to applications to either the Upper Tribunal or the Court of Appeal.”

On Watt v Lord Advocate Lord Hope said-

“Watt v Lord Advocate

29 It is also common ground that the history and nature of the supervisory jurisdiction in Scotland shows that, contrary to what was said in Watt v Lord Advocate 1979 SC 120, the Court of Session has power to correct an error of law made by a statutory tribunal that acts within its statutory jurisdiction but has misunderstood the question that it has been given power to decide. In that case the pursuer sought and was granted reduction of a decision of a National Insurance Commissioner that he was not entitled to unemployment benefit. Lord President Emslie said that it was not necessary for him to express a concluded view on the point, as he had held that the Commissioner had exceeded his statutory powers and that his decision was ultra vires, but that he had the gravest doubt whether, if that had not been so the Court would have had power to review it.

30 The Lord President went on to say this at p 131:

“…it seems clear that, however much this is to be regretted, the Court Session has never had power to correct an intra vires error of law made by a statutory tribunal or authority exercising statutory jurisdiction. As Lord Justice Clerk Moncrieff said in Lord Advocate v Police Commissioners of Perth (1869) 8 M 244 at p 245 – ‘In the ordinary case it would now, I think, be held that where statutory powers are given, and a statutory jurisdiction is set up, all
other jurisdictions are excluded …’ There is no indication in any subsequent authority that this view has been doubted or even questioned and I entirely agree with the Lord Ordinary for the reasons which he gives that the fact that the Court of Session may have exercised a comprehensive corrective jurisdiction over determinations of parochial aid in the 18th and early 19th Centuries does not in any way support the existence of a jurisdiction in this court to correct errors by a statutory tribunal in the due performance of its statutory duties.”

31 As the Advocate General has pointed out, this approach suggests that the supervisory jurisdiction of the Court of Session is restricted to what is commonly referred to as pre- Anisminic error. That is not the way that Lord Fraser of Tullybelton seems to have understood the position to be, as in Brown v Hamilton District Council 1983 SC (HL) 1, 42, he said:

“It is not necessary for me to consider the grounds on which judicial review may be open. The decisions in the English cases of Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, and Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147, so far as they relate to matters of substance and not of procedure, are accepted as being applicable in Scotland: see Watt v Lord Advocate 1979 SC 102. There is no difference in substance between the laws of the two countries on this matter.”

It does appear however that, in expressing the position as narrowly as he did in Watt, the Lord President failed to appreciate the significance of the decision in Anisminic, which abolished the distinction between errors of law that went to jurisdiction only in the strict sense and those that did not: Clyde and Edwards, Judicial Review, paras 22.21-22.24.

32 In a passage from his speech in Anisminic at p 171 which the Lord President quoted in Watt at p 130, Lord Reid said:

“It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word ‘jurisdiction’ has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity.”

There then followed a list of examples which, as Lord Reid said was not intended to be exhaustive of errors that fell into that category, including where the tribunal has misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question that was not remitted to it, has refused to take into account something that it was required to take into account or has based its decision on some matter which it had no right to take into account.
He ended this passage with these words, which indicate precisely where the boundary lies between what is open to review and what is not:

“But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.”

33 As the Lord President observed in the present case, Anisminic has come to be interpreted and applied in the English courts in a way that does not appear to sit easily with Lord President Emslie’s dictum: 2011 SC 70, para 43. The distinction between jurisdictional and other errors, which he was endorsing, has been abandoned. Furthermore, the way that his dictum has been applied in practice appears to have been somewhat patchy. It was applied in O’Neill v Scottish Joint Negotiating Committee for Teaching Staff 1987 SC 90, by Lord Jauncey at p 94 and in Rae v Criminal Injuries Compensation Board 1997 SLT 291, by Lord Macfadyen at 295I-J. More recently, since the decision in West v Secretary of State for Scotland 1992 SC 385 in which the court said at p 413 that 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, it has been ignored, as in Mooney v Secretary of State for Work and Pensions 2004 SLT 1141 and Donnelly v Secretary of State for Work and Pensions 2007 SCLR 746. In Diamond v PJW Enterprises 2004 SC 430, paras 37-38 the Lord Justice Clerk referred to the argument that Anisminic had made obsolete the traditional distinction that was recognised in Watt between an error of law as to jurisdiction and an error of law made intra vires but found it unnecessary to decide the issue. In Hyaltech Ltd, Petitioners 2009 SLT 92, para 53 too, as there had been no misapplication of the relevant law, the court found this not be necessary. But the dictum has never been expressly disapproved.

34 In my opinion the time has come for it to be declared that Lord President Emslie’s dictum in Watt v Lord Advocate 1979 SC 102, 131 is incompatible with what was decided in Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147. In In re Racal Communications Ltd [1981] AC 374, 382 Lord Diplock said that the decision in Anisminic was a legal landmark which proceeded on the presumption that, where Parliament confers on an administrative tribunal or authority power to decide particular questions defined by the Act, it intends to confine that power to answering the question as it has been so defined and that, if there is any doubt what that question is, this is a matter that the court must resolve. I would hold that the dictum in Watt cannot be reconciled with that interpretation of the decision and that it should no longer be followed. Once again it must be stressed that there is, in principle, no difference between the law of England and Scots law as to the substantive grounds on which a decision by a tribunal which acts within its jurisdiction may be open to review: Brown v Hamilton District Council 1983 SC (HL) 1, 42 per Lord Fraser; West v Secretary of State for Scotland 1992 SC 385, 402 and 413.”

In relation to the issue of whether the Court of Session should intervene when the Upper Tribunal has chosen not to, the question will be one of whether the
residual review jurisdiction of the Court of Session will treat any given case as falling within the area where it should still exercise the power of ultimate review. If it chooses to do so the Court will no longer be troubled by any arcane distinction between these types of error of law. This will also be the case of course in relation to all allegations of error of law whether or not they arise in the context of the First and Upper Tier system of Tribunals.

A recent and interesting example of challenge for error of law arose in M v Scottish Legal Aid Board [2011] CSOH 134 decided 16 August 2011. There M sought judicial review of the refusal of the Scottish Legal Aid Board (B) to grant her application for legal aid in order to instruct a parenting assessment report for the purposes of her application to the children's hearing in respect of her son. M had previously received advice and assistance in terms of the Legal Aid (Scotland) Act 1986 to an expenditure limit of £95 and sought an increase from B to allow the report to be instructed where her agents considered that the report was vital to her case. This was refused by B on the basis that obtaining the report was "assistance by way of representation" as defined in s.6(1)(b) of the Act, and such assistance was not available in respect of children's hearings. B thereafter refused several requests by M seeking reconsideration of its refusal.

B submitted that had M sought sanction for the report prior to the raising of the children's hearing proceedings it would have fallen within the "advice and assistance" regime as defined in s.6 of the 1986 Act, however, it had been made after and was therefore a request for sanction relating to a step in those proceedings, in particular, it related to M's agents conducting those proceedings on her behalf and thus fell within the scope of assistance by way of representation.

The Court held that B's decision should be reduced. The proposal to seek an expert report was not part of the proceedings but a prerequisite to giving advice as to whether M had a stateable case to be put to the children's hearing; it was, at most, a preparatory step and not one which could properly be characterised as conducting proceedings within the meaning of the definition of advice by way of representation in terms of s.6, and B ought to have considered M's request on its merits. Observed, that the distinction between "advice and assistance" and "advice by way of representation", both of which were defined in s.6, was less than clear, and had the boundary between the two required to be resolved, emphasis would have been placed on the concept of "representation" in the latter; it would be difficult to categorise the instructing of an expert report as representing a client in any sense or to describe it as taking a step on that client's behalf in the conduct of proceedings.

ERROR OF LAW-"PURE" ULTRA VIRES

There have been a number of recent challenges to health based legislation from the Scottish Parliament. These might be classed as pure vires challenges as the main contentions have been that the legislation was outside the competence of the Parliament on a range of grounds, including conflict
with the 1707 Union, ECHR and EU law as well as “simple” conflict with the reserved areas in the Scotland Act 1998.

In Imperial Tobacco Ltd, Petitioner [2010] CSOH 134; 2010 S.L.T. 1203, the Tobacco and Primary Medical Services (Scotland) Act 2010 s.1 and s.9 were not challengeable as outwith the legislative competence of the Scottish Parliament in terms of the Scotland Act 1998 s.29(2)(b) and s.29(3), s.29(4), s.29(2)(c) read with Sch.4 para.2, or Sch.4 para.1.

Tobacco manufacturers (T) petitioned for judicial review of the Tobacco and Primary Medical Services (Scotland) Act 2010 s.1 and s.9, seeking declarator that those provisions were outwith the legislative competence of the Scottish Parliament and were not therefore law, and reduction thereof.

The disputed provisions were designed to prohibit the display of tobacco products at points of sale and the use of vending machines to sell tobacco products. No commencement order in respect of the relevant part of the 2010 Act had yet been made.

T submitted that (1) s.1 and s.9 of the 2010 Act were challengeable under the Scotland Act 1998 s.29(2)(b) and s.29(3), where they were properly to be regarded as measures directed to the regulation of the sale and supply of goods to consumers, which was a reserved matter under Sch.5 para.C7(a) of the 1998 Act. Schedule 5 para.C7(a) ought to be given a wide construction, and the regulation of the sale and supply of goods and services went beyond the regulation of contracts; (2) if the disputed sections did not otherwise relate to reserved matters in terms of s.29(2)(b), they were deemed to do so by virtue of s.29(4) as they made modifications to Scots criminal law as it applied to reserved matters; (3) pursuant to s.29(2)(c) read with Sch.4 para.2 of the 1998 Act, s.1 and s.9 of the 2010 Act modified a rule of Scots criminal law special to a reserved matter, being the existing list of offences relating to the sale and supply of tobacco products, and the rule that it was an offence under the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002 reg.14 to supply tobacco products if they did not comply with any requirement of reg.4 to reg.10; (4) the disputed provisions were challengeable under Sch.4 para.1 of the 1998 Act where they modified the Union with England Act 1707 s.6 and the Act of Union 1706 art.IV, so far as those articles related to freedom of trade.

Held petition dismissed. (1) The approach in Sch.5 para.C7, of listing individual reserved matters, suggested that each of these should be given a narrow reading, further, the ordinary meaning of the word "covers" in the sense that it was used in the explanatory note would indicate that the reserved matter in Sch.5 para.C7(a) was restricted to the regulation of the terms on which goods and services were sold and supplied to consumers. (2) Section 1 of the 2010 Act did not prevent a sale being made, nor did it affect the terms of sale between the business selling tobacco products and the consumer purchasing them, even if a sale was made in circumstances where, contrary to the prohibition, there was a display and the seller had thereby committed an offence. It was therefore difficult to see how, on the reading of
Sch. 5 para.C7(a), prohibiting the display at the point of sale could be said to relate to the regulation of the sale and supply of tobacco products to consumers; similar difficulties arose in respect of s.9 of the 2010 Act, and any impact by these sections on the regulation of sale and supply of tobacco products was indirect. (3) Having regard to relevant governmental reports and surrounding documents, and the parliamentary debates following the introduction of the Bill, the purpose of s.1 and s.9 was to reduce smoking of tobacco among children and young persons and thereby improve public health in the long term, and these provisions did not, accordingly, relate to a reserved matter in terms of s.29(2) and s.29(3) of the 1998 Act, and did not constitute an unlawful means of achieving a legitimate end. (4) Section 29(4) had no application where, even if it was accepted that, by creating new offences, s.1 and s.9 did make modifications to the existing criminal law, they did not modify any general provision of Scots criminal law which applied to reserved matters, but simply modified the circumstances in which a sale might lawfully take place. (5) It was difficult to envisage how a collection of offences, each of which comprised a rule of law, could be said to be a rule of Scots criminal law, and it seemed that s.1 and s.9 simply created new, additional offences which fell to be added to the existing list of offences relating to the sale of tobacco products; further, the 2002 Regulations related to product safety and labelling, which were reserved matters in terms of Sch.5 para.C8 of the 1998 Act, and s.1 and s.9 of the 2010 Act had no bearing thereon. T had accordingly failed to identify a rule of law being modified, and the question whether the rule of Scots criminal law being modified was special to a reserved matter did not arise. (6) Having regard to the historical context of the Acts of Union and the ordinary meaning of the phrase “freedom of trade”, the prohibition on modification contained in Sch.4 para.1 of the 1998 Act was restricted to interference with the common market created by the Union, and understood in this way, the prohibitions and restrictions introduced by s.1 and s.9 of the 2010 Act could not be said to interfere therewith.

Next up is Sinclair Collis Ltd v Lord Advocate [2011] CSOH 80; 2011 S.L.T. 620. There a cigarette vending operator (S) petitioned for judicial review of the Tobacco and Primary Medical Services (Scotland) Act 2010 s.9 on the prohibition of vending machines for the sale of tobacco products, and sought declarator that s.9 was invalid, and reduction thereof.

The Scottish Ministers intended to bring s.9 into force in October 2011. S contended that, in terms of the Scotland Act 1998 s.29(1) and s.29(2)(d), s.9 of the 2010 Act was outside the legislative competence of the Parliament and was not law as it was incompatible with the right to peaceful enjoyment of possessions under the European Convention on Human Rights 1950 Protocol 1 art.1, and with the TFEU art.34 on free movement of goods.

S further submitted that (1) the ban in s.9 of the 2010 Act was not a “selling arrangement”, in terms of Criminal Proceedings against Keck (C-267/91) [1993] E.C.R. I-6097, which fell outside the scope of art.34 of the Treaty: a selling arrangement regulated trade in cross border goods after they had been imported, and a measure which operated, in effect, to prevent the importation of tobacco vending machines could not qualify; (2) it was acte
clair that art.34 was engaged by s.9; (3) s.9 was not proportionate and there was no proper factual basis justifying it under art.36 of the Treaty or as a mandatory requirement; (4) given its nature as a subordinate legislature with limited competence, the Scottish Parliament ought not to be accorded as wide a margin of discretion as would be accorded to the UK Parliament; while a wider margin was appropriate in respect of legislation involving social policy or moral issues, s.9 was simply a measure directed towards the regulation of trading activity; (5) the Regulatory Impact Assessment (RIA), relied on by Parliament in enacting s.9, was useless where it had underestimated the number of machines in Scotland and had overestimated the proportion of cigarettes obtained from machines by under eighteens; (6) permitting the vending of tobacco from radio frequency controlled machines was a less restrictive alternative to s.9 that could achieve the aim of preventing children and under eighteens from having access to cigarettes from machines; (7) s.9 did not seek to achieve the legislative aim in a consistent and systematic manner as radio frequency controlled machines were no worse a source of cigarettes to under eighteens than independent newsagents, yet the latter were not prohibited from selling cigarettes; further, tobacco vending machines were to be banned but not machines used for cigarette storage behind bars; (8) a ban on tobacco vending machines infringed their right to peaceful enjoyment of their assets, being their machines and, ultimately, their business and goodwill; in enacting s.9, Parliament had failed to strike a fair balance between the interests of the public and of S, and the fact that no compensation had been offered to S for the interference with their property rights was a matter which ought to be taken into account when considering fairness.

The petition was refused. (1) S's contention that s.9 of the 2010 Act was not a selling arrangement, and that it fell within the scope of art.34, had considerable force, however, the issue was not acte clair as the European Court of Justice did not appear to have considered a scenario similar to that in the present case, Keck, considered. (2) Acts of the Scottish Parliament shared most of the characteristics of primary legislation and were far more proximate to it than to ordinary subordinate legislation. On the spectrum of decision makers the Scottish Parliament was close to that of the national legislature, and any enactment thereof ought to be accorded a margin of discretion similar to, and approaching, that which would have been accorded to the measure had it been enacted by the UK Parliament. (3) Where s.9 was motivated by public health concerns in relation to smoking and a resultant policy of reducing the availability and attractiveness of tobacco to children and young persons, it was erroneous to suggest that the section was simply a measure regulating trading, and which involved no considerations of social policy or social reform. (4) The material available to Parliament provided sufficient objective justification for s.9 under s.36 of the Treaty, and S had overstated the significance of the RIA in the legislative process as it was one piece of evidence within a large corpus of material before Parliament, and whether its contents were wholly accurate or not appeared to be of marginal importance in determining the issue of justification. (5) Had a satisfactory less restrictive measure been available which would have been equally effective in achieving Parliament's aim of
reducing underage smoking, s.9 would have been a disproportionate exercise of Parliament's legislative power, but on the material before it, Parliament had been entitled to conclude that the suggested alternative of permitting machines with age restriction mechanisms, whether radio frequency or other devices, would not be as satisfactory or effective as s.9. (6) Whether an aim was pursued in a consistent and systematic manner might be relevant when considering the proportionality of a restriction, but no authority referred to in respect of art.36 vouched that it was an essential requirement of justification and proportionality that, in imposing restrictions, a lawmaker had to always seek to achieve its object in such a manner. (7) The matters adverted to by S did not show that Parliament was not pursuing its aim in a consistent and systemic manner. It was disingenuous to equiparate sales from machines with sales by independent newsgents where, in respect of the latter, verification of age and delivery of cigarettes occurred contemporaneously in a single transaction between the seller and the purchaser, in contrast to sales from radio frequency controlled machines; moreover, allowing machines to be used for cigarette storage behind bars did not give rise to inconsistency as it was plain that storage machines would not be used as tobacco vending machines, and the contract of sale was between the purchaser and publican, and not purchaser and vending machine operator. (8) Section 9 was not directed towards restricting imports of cigarette machines and parts, and any interference with the free movement of goods was incidental to the interference with the operation of cigarette vending machines in the domestic market. Section 9 struck a fair balance between the public interest and the interests of those affected by the restriction on the free movement of goods which it gave rise to, and the measure neither employed nor caused disadvantages which were disproportionate to the aim pursued. R. (on the application of Countryside Alliance) v Attorney General [2007] UKHL 52, [2008] 1 A.C. 719, considered. (9) Having regard to the court's reasons for rejecting S's claim under Community law, the interference with S's right to peaceful enjoyment of their possessions was justifiable in the public interest and proportionate. Parliament's decision to enact s.9 was not manifestly without reasonable foundation and it had not exceeded or misapplied its discretionary area of judgment; s.9 was not outwith Parliament's legislative competence. Observed, that in a control of use case, compensation was not a prerequisite of proportionality, and whether, and if so, to what extent, compensation should be provided was normally a matter for the discretionary area of judgment of the legislature and the margin of discretion was wide, Adams v Scottish Ministers 2003 S.C. 171, and Adams v Scottish Ministers 2004 S.C. 665, followed. Opinion, that where s.9 was justified under art.36 of the Treaty, it was neither necessary nor appropriate to seek a preliminary ruling from the European Court of Justice on the question whether s.9 fell within the scope of art.34

The broad question of the scope of judicial review of Acts of the Parliament was considered in the Inner House in AXA General Insurance Ltd v Lord Advocate [2011] CSIH 31; 2011 SLT 439.

here insurance companies (X) reclaimed against a decision of

X also reclaims against the grant of a motion by eight individuals (P), who had been diagnosed with pleural plaques, to enter the process under the Act of Sederunt (Rules of the Court of Session 1994) 1994 Sch.2 para.58.8 as individuals directly affected by the issues raised in the judicial review (AXA General Insurance Ltd, Petitioners [2010] CSOH 36). The 2009 Act was enacted following the House of Lords’ decision in Grieves v FT Everard & Sons Ltd [2007] UKHL 39, [2008] 1 A.C. 281 that pleural plaques were not and never had been compensatable in England and Wales, in order to ensure that Grieves did not have effect in Scotland and that pleural plaques were an actionable injury in Scots law. X argued that the 2009 Act infringed their rights under the European Convention on Human Rights 1950 Protocol 1 art.1 and was outwith the legislative competence of the Scottish Parliament by virtue of the Scotland Act 1998 s.29(2)(d), and further, that it was invalid on the grounds of irrationality and should be reviewed and reduced. The Lord Advocate (L) and P claimed that legislation of the Scottish Parliament could only be reviewed by the court on the grounds set out expressly in the 1998 Act, to the exclusion of any common law basis of judicial review, and that the 2009 Act was neither irrational nor infringing of any of X's rights. As a preliminary matter, L and P challenged X's title and interest to bring the petition and X challenged P's title and interest to oppose it.

The outcome was that the reclaiming motion allowed to the extent of repelling P’s answers, quoad ultra refused.

The Lord Ordinary was correct to recognise that, in considering X’s title, it was appropriate to look at the reality of the situation underlying X’s position, which was that notwithstanding that a legal action by a pleural plaques claimant based on the 2009 Act would normally be raised against his allegedly negligent former employer without the employers’ liability insurer being convened as defenders, it was the insurers who ex contractu asserted the right to take over the control and direction of legal proceedings and assumed liability for the payment of damages; allied to those factors a possible preclusion on X from challenging the validity of the 2009 Act, on the basis of which a pursuer might have obtained decree against the insured, and it was clear that X were within a class who might be directly affected by the 2009 legislation and that was sufficient to enable them to have victim status in terms of art.34 of the Convention.

The Lord Ordinary had rightly reached the view that were it open to X to challenge the validity of the 2009 Act on some ground other than those expressly contemplated by the 1998 Act, X had advanced sufficient title and interest to do so. There was no reason why an individual member of the public who was adversely affected by legislation could not challenge such legislation provided always that he or she could qualify an interest to do so. The Lord Ordinary was not formulating a new test but merely recognising the
development of the broad test enunciated in D&J Nicol v Dundee Harbour Trustees [1915] A.C. 550; moreover, his test was not at variance with that set out in Forbes v Aberdeenshire Council [2010] CSOH 1, [2010] Env. L.R. 36, where the application of his test would have led to the same conclusion, D&J Nicol and Forbes considered.

There was no authority supportive of P’s proposition that any beneficiary, or potential beneficiary, of a legislative measure was entitled to be convened as a respondent to counter any challenge to its validity, and there was a practical difficulty of identifying all those who might benefit from such a measure. Moreover, it could only be for the taker of the decision to adopt the norm conferring a benefit on third parties to justify that decision. The fact that P might be among beneficiaries or potential beneficiaries did not give them title and interest to be convened as respondents; therefore, being seen as a beneficiary of the legislation could not properly be said to give an entitlement to be convened, as a respondent, as a person “directly affected” in terms of r.58.8(2).

The scope of the supervisory jurisdiction of the Court of Session, and in particular whether it extended to the review of Acts of the Scottish Parliament was a matter, subject to any express or clearly implied provision to the contrary, for the courts, using due restraint, to decide, and there was at least no express statutory provision which altogether excluded such review. Further, the fact that devolved competence was defined identically for legislation and for executive acts did not mean that both were challengeable on the same grounds.

Legislation enacted by the Scottish Parliament should be described as sui generis where, notwithstanding its classification for the purposes of the Human Rights Act 1998 s.21(1) as subordinate legislation, it was law essentially of a primary nature and the processes which led to its enactment, taken together, distinguished it from Acts or instruments subject to judicial review on traditional grounds. There was, however, nothing either expressly or impliedly in the 1998 Act which gave enactments of the Scottish Parliament the status of Acts of Parliament of the United Kingdom and its legislation was open to abrogation or supersession by Acts of the Westminster Parliament.

The traditional grounds of common law judicial review, including irrationality, were not, without modification, apt for Acts of the Scottish Parliament. Conferring benefits on those who were perceived to be deserving and the manner of funding such benefits were essentially political questions which, absent any infringement of a Convention right, a court could not and should not enter upon. However, that did not mean that there were no circumstances in which the Court of Session could strike down, on common law grounds, legislation of the Scottish Parliament, and moreover, the circumstance that any such enactment might also be challengeable on Convention grounds did not exclude that possibility.

No exceptional circumstances had been made out to justify striking down the
2009 Act. Although the issue of whether pleural plaques were an actionable injury had never been litigated to a conclusion in Scotland, insurance companies had in practice conceded liability to pay damages in pleural plaques claims and the Scottish Parliament, in determining to pass the 2009 Act, had clearly taken into account that concession and sought to ensure, following the decision in Grieves, that in Scotland, compensation would continue to be paid.

The imposition by the state of a liability to pay money thereto by way of taxation had been found in Burden v United Kingdom (13378/05) [2008] S.T.C. 1305 to be an interference with the right guaranteed in Protocol 1 art.1 and it was thus difficult to see why the imposition by the state, at least retroactively, of a liability on one citizen to make payment to another citizen should not equally constitute an interference with the former's patrimony for the purposes of that article, Burden considered.

The decision by X not to pursue a challenge under art.6 of the Convention, which challenge had been rejected by the Lord Ordinary, could not be construed as an acceptance by them that the same difficulties had to apply respecting their argument under Protocol 1 art.1. The art.6 challenge related, and could only relate, to the pending pleural plaque actions and was thus of limited practical value to X. More importantly, the protection afforded by art.6 related to procedural fairness of court proceedings and the independence and impartiality of the tribunal, which was very different to Protocol 1 art.1.

It could not be said that X's liability under the 2009 Act, being derivative, was too remote to amount to an interference with their patrimony under Protocol 1 art.1 as the legislative landscape into which the 2009 Act had been inserted contained the known feature of obligatory insurance arrangements. Further, X's secondary or derivative liability having been seen, correctly, as no obstacle to their title to complain, should not then be seen as an obstacle in the actual advancement of their complaint.

There was never any doubt that, were the 2009 Act to come into effect, its intention was that employers' liability insurers would be bound by it and would have to meet the claims of those having benign pleural plaques, and it was competent for an anticipatory declarator to be granted in appropriate circumstances and it was not inappropriate to consider at this stage whether the 2009 Act constituted an interference with X's patrimony. In the circumstances, X had demonstrated that the liability to meet claims for benign pleural plaques constituted an interference with their possessions for the purposes of Protocol 1 art.1.

The 2009 Act pursued a legitimate aim in the public interest. The Scottish Government and the Scottish Parliament were entitled to reach the view that the judgment in Grieves amounted to a social injustice in the case of those diagnosed with pleural plaques and other benign asbestosis related conditions which ought to be rectified. It could not be said that there was no basis upon which the legislature could proceed on the consideration, amongst others, that it was endeavouring to secure continuity of law and
practice as it existed prior to Grieves.

It could not be said that the decision to place financial responsibility on the insurers was one which lay outside the margin of appreciation which the legislature enjoyed in that sphere. The Scottish Government and Parliament were entitled to take into account that the premia charged by insurers would in general be reflective of their belief that their insured were liable to meet pleural plaques claims, and further, costs to insurers in future could also be more widely diffused to employers through the level of premia charged. Moreover, the 2009 Act required that exposure to asbestos be shown to have occurred through fault on the insured employer's part and in that respect the insurer took the risk that the law might develop in a way which resulted in the employer having a liability in circumstances which at the time of concluding the insurance contract might not have been envisaged as giving rise to such a liability.

In the whole circumstances, the 2009 Act did not amount to an infringement of Protocol 1 art.1.

The opinion was also advanced that (a) the court could exercise a discretion under r.58.8(2) and allow a representative sample of beneficiaries to become respondents. However, if the basis for entering the judicial review process was one of some representational capacity, that basis was catered for by r.58.8A, and so far as P were said to be representative of beneficiaries, or potential beneficiaries, of the legislation in issue, they should have proceeded under that route with the conditions of participation which it laid down; (b) even if irrationality was a sufficient basis on which to challenge the validity of an enactment of the Scottish Parliament, it had not been demonstrated that the 2009 Act was irrational.

Matters did not rest there. AXA went to the Supreme Court. The decision of the Court was handed down on 12 October 2011 and can be found at [2011] UKSC 46.

Two issues of law arose on the appeal to the Supreme Court. We have looked at the related issue of title and interest/standing already.

First was the Act in breach of AXA’s Convention right to property under Article 1 of Protocol 1 to the ECHR.? 

Second, could an Act of the Scottish Parliament (“ASP”) be judicially reviewed under common law grounds of review? That attack was on the rationality of the Act.

On the Convention issue the Supreme Court agreed with the Court of Session. A1P1 was engaged but not violated. There was a legitimate aim for the interference with property, and the interference was proportionate.

The Court of Session had ruled that Acts of the Scottish Parliament are
potentially subject to judicial review on grounds of illegality or irrationality but only in the extreme circumstances where bad faith, improper motive or manifest absurdity could be shown.

The Supreme Court approached matters differently. has taken a different approach. The key passages are in the judgments of Lords Hope and Reed.

For Lord Hope, such Acts are in principle amenable to the supervisory jurisdiction of the Court of Session at common law, they are in principle subject to judicial review. He noted that cases on the extent to which delegated legislation that has been approved by Parliament can be subject to judicial review are of little assistance-as “we are in this case in uncharted territory”. While “the dominant characteristic of the Scottish Parliament is its firm rooting in the traditions of a universal democracy” (para 49), the “guiding principle”, for Lord Hope, was “the rule of law enforced by the courts”. This was the “the ultimate controlling factor on which our constitution is based” (para 51).

Lord Hope states that, in the context of reviewing legislation, the courts should “intervene, if at all, only in the most exceptional circumstances” (para 49). He then went on to give examples of legislation which curtailed the power of the Courts. He said that “The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise” (para 51). It is notable that he did not limit this just to Acts of the Scottish Parliament.

Lord Hope makes it clear that the rule of law can conflict with the sovereignty of the United Kingdom Parliament. However as this is a case about a devolved Parliament that conflict did not arise.

Overall Lord Hope decided that Scottish Acts are not subject to judicial review at common law on grounds of irrationality, unreasonableness or arbitrariness. He limits that view not by reference to bad faith or improper purpose but by reference to the rule of law. By this he means that the Court should not treat as law any legislation that aims to get rid of judicial review or to reduce the power of the Court in the protection of individual rights.

Lord Reed was in broad agreement with what Lord Hope said.

BIAS AND PRE-DETERMINATION

In Paton, Petitioner [2011] CSOH 40 the Court held that an adjudicator had not acted unfairly or breached the rules of natural justice in awarding an extension of time under a building contract where he had made it clear that the approach he intended to take to the assessment of the delay claim was broadly that put forward by the parties to the contract thus it had properly been put before him and both parties had made detailed comments thereupon. P and J had entered into a contract for the construction by J of a dwellinghouse and the works achieved practical completion approximately six
months after the date on which completion was due according to the work programme. J had been dissatisfied with the grant of an eight week extension awarded to him by P’s architect following his request for an extension of time and had initiated an adjudication challenging the award, contending before X that he was entitled to an extension of approximately 20 weeks, with which X had largely agreed. X stated that he had not assessed the delay claim on the basis of a critical path analysis but had identified the critical events from the contract programme and from the terms of the minutes of the meetings. X opined that the first critical event, namely the event which was of such a nature that its delay would of necessity cause other events in the work programme to be delayed, was the supply of stonework by P to the site, and additionally, this was the principal or dominant critical event in terms of the contract.

P submitted that X had applied his own knowledge and experience to reach material conclusions on critical issues which were essential to the extension of time award but he had not referred these matters back to P and J for their comment before issuing his decision, and moreover, his entire approach to the assessment of the delay claim in relation to the stonework was not one which P and J had known he was going to take, therefore, they had been unable to comment on the suitability of his approach.

The Court held that there was no breach of natural justice. (1) X had made clear in a communication to J and P prior to the adjudication the approach he intended to take, which approach had broadly been presented to him by J, and both P and J had made detailed comments thereupon. P and J should therefore have been well aware of his intended approach to the assessment and it could not be said that X had undertaken a delay analysis without affording them an opportunity to address him on the proposed analysis so that any factual or other errors might be identified. (2) The issue of the criticality of the delivery date of the stonework was clearly a matter which was before X and upon which P and J had been able to lead evidence and make submissions. J had relied on certain detailed sections of minutes of site meetings in support of his claim of which P were aware and were therefore also aware that X would inevitably be required to consider whether the delay in delivery of stonework was a critical event. (3) X had required to use his own knowledge and experience, however, he was applying it to the submitted contract programme, the site minutes and the submissions made to him, therefore, he had not acted unfairly where he had not applied it to matters which were not before him.

There have been a series of interesting local authority cases in England on the possible dangers of involvement in the subject matter of the dispute.

An important reminder of the dangers of members becoming too closely involved in particular cases prior to decisions being taken came in Ghadami v Harlow DC [2004] EWHC 1883 (Admin). Here, the chair of the planning committee had become deeply involved in a proposal by a developer for the major reconstruction of the town centre. He was close to the developer, and knew a lot about the development and it’s financing. The claimant, Mr
Ghadami, owned commercial premises affected by the development, to which he was opposed. Prior to the granting of planning permission, Mr Ghadami had various telephone conversations with the chair, in which the chair threatened the making of a compulsory purchase order against Mr Ghadami’s premises to enable the development to proceed. Mr Ghadami challenged the subsequent grant of planning permission to the developer.

Richards J, adopted this approach from his own previous decision in Georgiou v London Borough of Enfield [2004] EWHC 799 (Admin), [31]

“...in considering the question of apparent bias in accordance with the test in Porter v. Magill, it is necessary to look beyond pecuniary or personal interests and to consider in addition whether, from the point of view of the fair-minded and informed observer, there was a real possibility that the planning committee or some of it’s members were biased in the sense of approaching the decision with a closed mind and without impartial consideration of all relevant planning issues. That is a question to be approached with appropriate caution, since it is important not to apply the test in a way that will render local authority decision-making impossible or unduly difficult…”

Previous case law, had distinguished a pre-disposition towards a certain point of view from bias or pre-determination: see R v Amber Valley District Council, ex p Jackson [1985] 1 WLR 298; and R (Cummins) v. Camden London Borough Council [2001] EWHC Admin 1116 at [254].

The judge held in Ghadami at [106]:

“I have very real concerns about the position of Councillor Garnett [the chair] in this case. It seems to me that what happened here went well beyond the normal relationship of elected councillor and constituent. The impression that I have got from the transcripts of the telephone conversations is that Councillor Garnett was anxious to see the proposed development take place and was seeking to remove the potential blockage or delay that the claimant could cause. That was why he was asking whether the claimant would be prepared to be brought out by the developers for a lower figure than the £15 million he had demanded; why he was pointing out to the claimant that a CPO might be made against him...; and why he was also discussing the possibility of another site for the claimant and of a joint development between the claimant and Stannifer (as agent for Sapphire). Moreover, he was discussing the matter closely with Mr Patterson, the Chief Executive, and was involved directly or indirectly (through Mr Patterson) in discussions with [the developer]. It looks as though he shared Mr Patterson’s desire to avoid the development going “pear-shaped”. He was, or appeared to be, acting in effect as a broker in trying to resolve the problem created by the claimant or at least to keep everyone in discussion with a view to resolving that problem.”

In R (Island Farm Developments Ltd) v Bridgend CBC [2006] EWHC 2189 (Admin), Collins J confronted the problem of allegations of bias and
predetermination arising from members’ manifesto promises. He took a robust approach in favour of democratic reality.

The background concerned a proposal to sell the authority’s land to a developer, which had been progressed under the authority’s former administration to a stage just short of exchange or contracts. The development (for which planning permission had been granted by the former administration) had, however, been a contentious local issue. There was a change of political control in the authority as a result of local elections in which the question of the development was considered to have played a part. The authority’s new executive then decided not to proceed with the sale of the land. Some members of the new executive had publicly expressed or allied themselves to opposition towards the development; others had previously voted against the development or been involved in decisions critical of the sale of the authority’s land. The developer challenged the involvement of the members on grounds of actual apparent predetermination and bias.

Collins J held at [23]:

“In principle, councillors must in making decisions consider all relevant matters and approach their task with no preconceptions. But they are entitled to have regard to and apply policies in which they believe, particularly if those policies have been part of their manifestos. The present regime believed that the development… in accordance with the planning permission was wrong and they had made it clear that that was their approach. In those circumstances, they were entitled to consider whether the development would lawfully be prevented. … It follows that in the context of a case such as this I do not believe that bias can exist because of a desire to ensure if possible that the development did not take place. If that approach had been taken, it would have been lawful.”

The legal analysis used by Collins J was significantly different from – and directly questioned – that which had been used in a number of recent cases, most particularly the decision of Richards J in R (Georgiou) v Enfield LBC [2004] EWHC 779 (Admin), above, where it had been held that a grant of planning permission was vitiated by a real possibility of bias arising from prior support for the planning application from some members, regardless of whether there was any actual bias or predetermination. In contrast, Collins J advanced an analysis of realpolitik:

“[30] … Councillors will inevitably be bound to have views on and may well have expressed them about issues of public interest locally. Such may, as here, have been raised as election issues. It would be quite impossible for decisions to be made by the elected members whom the law requires to make them if their observations could disqualify them because it might appear that they had formed a view in advance.”

“[31] The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must
have regard to all material considerations and be prepared to change their views if persuaded that they should. ... Unless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision.”

On the facts, Collins J held that the evidence demonstrated that the members of the executive were prepared to and did consider the respective arguments, and were prepared to change their minds if the material persuaded them to do so. He held that weight could be attached to the members’ own witness statements in this regard, departing again from the approach of Richards J in Georgiou.

The decision in Island Farm Developments is a re-affirmation of principles long-recognised in cases such as R v Amber Valley DC ex p Jackson [1985] 1 WLR298, QBD, and R v Waltham Forest LBC ex p Baxter [1988] 1 QB 419, CA, the effect of which had become diluted in the developing case law on apparent bias.

Re-taking decisions

It is compatible with actual and apparent fairness for an officer who has taken an earlier decision which is being reviewed also to conduct the review? In Feld v Barnett LBC (2004) Times, October 26, CA, the court concluded that a claim of apparent bias could not be sustained, and the same officer could therefore conduct the review.

The issue in Field arose in the context of two homelessness cases, the legislative framework for which comprises a right to an internal review, followed by a right of appeal to the county court. The framework provides that the statutory review, if carried out by an officer, must be carried out by a person who was not previously involved and who is more senior to the initial decision-maker. In some cases, however, the review process may be followed by a fresh decision, rather than an appeal to the county court; and in turn a second review. The legislative framework, though, does not provide who should carry out such a review. In each of the present cases, the same reviewing officer was involved –indeed Barnet employed only one reviewing officer.

The court applied the test for apparent bias in Porter v Magill [2002] 2 AC 257, HL, ie whether a fair-minded and informed observer, having considered the facts, could properly conclude that there was no possibility of apparent bias on the officer’s part. There was no suggestion here that the reviewing officers were actually biased. In Porter v Magill Lord Hope of Craighead persuaded the English judges to adopt the Scottish test for bias which in turn was said to be consistent with the requirements of art 6 ECHR. .

The court’s pragmatism was evident in the finding that local authorities should not be required to employ additional staff to conduct reviews, within already stretched budgets. The court also referred to the principle of preserving
public confidence in the decision-making process, but referred to the availability of the county court appeal as the ultimate means to correct any unfairness.

**Bias, freemasonry and other beliefs**

The fact of local authority members being freemasons was held in *R (Port Regis School Ltd) v North Devon DC* [2006] EWHC 742 (Admin) not to give rise to apparent bias in respect of the members’ involvement in the grant of a planning permission benefiting other freemasons. The court applied the *Locabail* test (*Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, QB), i.e., whether a fair-minded observer informed of the facts would conclude there was a real possibility of bias. On the evidence, the court concluded that test would not be satisfied, even though there was a suspicion of bias which was likely to be shared by a large section of people. Freemasons were obliged only to show charity or mercy to those in need, and were required to obey the law; the members were moreover bound by the declarations to observe the authority’s code of conduct, and had declared that they were freemasons.

In *Helow v Secretary of State for the Home Department and Lord Advocate* [2008] UKHL 62, the membership of a Court of Session judge of an organisation which had from time to time expressed strong views about the situation in the Middle East and was often critical of the PLO did not mean that she should have recused herself from determining a petition for statutory review of the refusal of the appeal brought by a Palestinian asylum seeker who claimed links to the PLO.

**CONSULTATION AND PERSUASION**

Consultation is seen as an example of the right to a fair hearing. Sometimes there is an express right to be consulted. Sometimes it has to be implied on the back of the common law duty of fairness. The cases which follow help illustrate the width of the principle.

In *R (Beale) v Camden* [2004] EWHC 6 (Admin), two of Camden’s tenants challenged the way in which Camden had consulted their tenants about the transfer of the management of the housing stock to an “arm’s length management organisation” (ALMO). In short, the claimants contended that the information provided by Camden was one-sided and positive about the ALMO, and did not put the contrary arguments in what was a highly contentious issue.

The judge, Munby J, rejected the challenge. The statutory requirement for consultation under s105 Housing Act 1985 did not require Camden to canvass the disadvantages, if any, of the proposals. On the general law about consultation, the judge relied on *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213, [112]:

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“consultation is not litigation: The consulting authority is not require to publicise every submission it receives ... It’s obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.”

The judge also considered the publicity Code issued under s4 Local Government Act 1986 and in particular paras 19 and 20.

“...Publicity campaigns can provide an appropriate means of ensuring that the local community is properly informed about a matter relating to the function of the local authority and about the authority’s policies in relation to that function and the reasons for them. But local authorities, like other public authorities, should not use public funds to mount publicity campaigns whose primary purpose is to persuade the public to hold a particular view on a question of policy.”

A consultation argument succeeded in the unusual case of **L v Board of State Hospital** [2011] CSOH 21; 2011 SLT 233 where a decision of the board of the state hospital placing restrictions on patients’ food and drink fell to be reduced as the board had failed to consult the patients as required in terms of the Mental Health (Care and Treatment) (Scotland) Act 2003 s.1. Limitations arose from the nature of the hospital, but only did so because they were justified in terms of the European Convention on Human Rights 1950 art.8(2): the loss of control over those aspects of life which would otherwise be under a person's sole and direct control were all concominants of the justifiable deprivation of liberty which followed on imprisonment or detention in the state hospital.

The board decided that visitors would no longer be allowed to bring food parcels for patients, and patients would no longer be allowed to order food from outside sources, other than one take away meal a month. The ultimate reason for recommending the changes related to patients' health, and issues with obesity. L sought reduction of the decision on the basis that the board had failed to consult the patients as required in terms of the Mental Health (Care and Treatment) (Scotland) Act 2003 s.1, and, it being a public authority for the purposes of the Human Rights Act 1998, the decision constituted a breach of L's rights under the European Convention on Human Rights 1950 art.8. The board relied on the notification of changes to the availability of snacks and refreshments at a single meeting of the Patient Partnership Group (PPG), attended by 12 patients, and an email from the hospital's lead dietician (D) referring to the response of patients when asked about the nature of items they purchased from the hospital shop, and the reason for their purchase.

L submitted, inter alia, that interference with his right to choose what to eat and to restrict what had otherwise generally been available to him was an interference with his right to respect for his private life and home, and the exception based on the protection of health and morals did not entitle the
board to act as it had, as that referred to action necessary for protection of public health in general.

Lady Dorrian decided that the board had not been entitled to reach the decision.

(1) From such consultation as had taken place, it appeared that patients had been opposed to restrictions on external purchasing but their views had not been recorded or presented to the board prior to its decision. Moreover, it had been recorded that patients felt that visitors should continue to be able to bring in parcels.

(2) There was no indication that D had advised patients of the proposals which were being considered, or that she had asked them to give their views thereon.

(3) The PPG meeting had failed to have an opportunity to consider the actual proposals made to the board in relation to visitors. The recommendation put to the meeting was simply that visitors should not be allowed to bring food into the hospital, and the rationale for that was said to be infection control and storage space, which was an explanation that played no part in the board's decision. Further, it appeared that the issues discussed on external purchasing related to limits on spending rather than an outright ban.

(4) It was highly questionable whether even such feedback as was obtained was properly put before the board and, in any event, such consultation did not enable patients to consider and to comment on the three options eventually put to the board regarding visitors. The option selected by the board in relation to purchasing did not appear to have been put before patients at all. Accordingly, the board had failed to consult as required by the legislation, and its decision fell to be reduced.

(5) The opinion was expressed, that (a) although the state hospital was L's home, it was not and could not be treated as equivalent in all respects to a private home, and while limitations did arise from the nature of the place, they only did so because they were justified in terms of art.8(2). The loss of control over those aspects of life which would otherwise be under a person's sole and direct control were all concominants of the justifiable deprivation of liberty which followed on imprisonment or detention in the state hospital, R. (on the application of G) v Nottinghamshire Healthcare NHS Trust [2009] EWCA Civ 795, [2010] P.T.S.R. 674 considered; (b) a person's right to choose what they ate and drank was a matter in respect of which art.8 was engaged, and the general restrictions which applied in the state hospital prior to the board's decision were justified. Thus, the additional restrictions which the board sought to impose had also to be justified, but it was unnecessary to pass further comment on the matter with regard to the views expressed by the court on the lack of consultation, except to say that a health reservation under art.8 did not have to refer to public health. In general, it was perfectly capable of applying where one particular section of the community which required protection had been identified.
LEGITIMATE EXPECTATION

An example of the application of the principle can be found in R (Lindley) v Tameside MBC [2006] EWHC 2296 (Admin), a case involving a decision to close a care home where the court rejected the notion of any enforceable legitimate expectation. The decision had been challenged by residents at the home, including the claimant, though by the time of the hearing all of them apart from the claimant had abandoned the challenge. The claimant had originally alleged that his needs had not been properly assessed and that they could not be met at a new facility to which the local authority had previously sought to reassure the residents that they would be able to move. When the claimant’s needs were later assessed by the authority, however, they were found to be such that they could not be met at the new facility. The claimant amended his challenge to allege that he had a legitimate expectation that he would after all be moved to the new facility.

The court held that, at the time when he was alleging that the new facility could not provide for his needs, the claimant was accepting that in so far as there was any expectation it could not legitimately be met. He had accordingly not relied on any commitment which may have been made by the authority. In any event, the court held it would not require the authority to move the claimant to the new facility, even if there were a legitimate expectation, because to do so would be contrary to his welfare needs (and accordingly contrary to the public interest).

In R (Begum) v Tower Hamlets LBC, 2 May 2006, CA, nomination papers for candidates for the Respect Party were declared invalid, because the electoral numbers had been taken from an old register. The candidates sought judicial review and an order that a new election be called, complaining that the returning officer had created a legitimate expectation that she would check the nomination papers to make sure they had been completed properly, but she had failed to do so until after the deadline for nominations had passed. At first instance, the judge had allowed the claim.

On appeal, it was held that the judge had been wrong to hold that the returning officer had created any legitimate expectation. It was clear that she had not made any clear and unequivocal statement that she would check every nomination paper. The offer of help made at the meeting of prospective candidates had been entirely informal. Further it could not affect the legal responsibility of the nominee to put the correct name on the nomination papers and to present valid papers in time.

The Court of Appeal also held that although the returning officer had acted unlawfully by failing to examine the nomination papers as soon as was reasonably practicable, the Court would not intervene. The election scheme was governed by statute and under it there was no provision for the Court to intervene. Even if there was a common law basis for intervention the Court should be extremely slow to countermand an election.
The case is a further illustration of a general trend in the case law that the courts are slow to find that a legitimate expectation has been created. Conversations with local government officials need to be seen in a practical context and against the relevant legal framework. Informal advice from officers is often sought and given but in the context of an established statutory process in which such informal conversations have no status.

Another example of this is **Tidman v Reading BC [1994] 3 PLR 72**. There the claimant alleged that a planning officer had made a negligent misstatement in relation to informal planning advice given over the telephone. The relationship was insufficient to create a duty of care. The nature of the assistance and guidance given was such that there was no sufficient foreseeable reliance or responsibility which could be expected or assumed. **Begum** seems to confirm that cases like **Tidman** are correct. There has to be a practical and workable approach. Other examples include **R (Thompson) v Secretary of State [2003] EWHC 2382 Admin** where a police solicitor said that it was normal practice for the police authority to meet the costs of T’s tribunal in any event. However no legitimate expectation was held to arise as the advice from the solicitors for T was more qualified and the Tribunal chairman had also qualified the position. In **R (NFU) v Secretary of State [2003] EWHC 444 (Admin)**, a statement in a meeting by the Prime Minister was held not to have created an unequivocal promise.

Likewise in **Fargie, Petitioner [2008] CSOH 117; 2008 SLT 949** statements made in the Scottish Parliament (about compensating victims of blood infected with Hepatitis C) were held not to be capable of conferring a legitimate expectation on either an individual or on a group.

**Is there an underlying rationale?**

In **Nadarajah v Home Secretary [2005] EWCA Civ 1363, The Times, 14 December 2005** (a case where there was rejected an argument of legitimate expectation based upon the Home Office family links policy on immigration), Laws LJ attempted to draw out the underlying principle behind legitimate expectation. His view was that the underlying principle was that public bodies ought to deal in a straightforward and consistent manner with member of the public. This was a principle of good administration. It was a legal standard and stood alongside ECHR principles. It followed that ECHR principles could be used to delimit the scope of the principle. If ECHR principles were relevant (and in the instant case, art 8 was relied upon), the practical outcome was that a promise or practice, if departed from would only result in a breach of a legitimate expectation if the departure from the practice or procedure was disproportionate. It would be easier to depart from a practice or promise in cases which involved a wide-ranging policy as opposed to a clear promise made to an individual or a specific group who in turn had relied on that promise to their detriment.
THE DEMISE OF WEDNESBURY AND THE RISE OF PROPORTIONALITY

In R(Daly) v Home Secretary [2001] 1 AC 532 at 547-A-G, Lord Steyn described the principle of proportionality in the following terms. Before doing that he examined the Wednesbury test and the concept of “heightened Wednesbury scrutiny” which had been developed (in England and Wales at least) in the lead up to the incorporation of the ECHR. In Daly the blanket policy of excluding prisoners during the conduct of cell searches was held to be unlawful as being both unreasonable in the heightened Wednesbury sense but also disproportionate as being in breach of art 8 ECHR. He said:

“25 There was written and oral argument on the question whether certain observations of Lord Phillips of Worth Maltravers MR in R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840 were correct. The context was an immigration case involving a decision of the Secretary of State made before the Human Rights Act 1998 came into effect. The Master of the Rolls nevertheless approached the case as if the Act had been in force when the Secretary of State reached his decision. He explained the new approach to be adopted. The Master of the Rolls concluded, at p 857, para 40:

"When anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the Convention. When considering the test of necessity in the relevant context, the court must take into account the European jurisprudence in accordance with section 2 of the 1998 Act."

These observations have been followed by the Court of Appeal in R (Isiko) v Secretary of State for the Home Department The Times, 20 February 2001; Court of Appeal (Civil Division) Transcript No 2272 of 2000 and by Thomas J in R (Samaroo) v Secretary of State for the Home Department (unreported) 20 December 2000.

26 The explanation of the Master of the Rolls in the first sentence of the cited passage requires clarification. It is couched in language reminiscent of the traditional Wednesbury ground of review (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223), and in particular the adaptation of that test in terms of heightened scrutiny in cases involving fundamental rights as formulated in R v Ministry of Defence, Ex p Smith [1996] QB 517, 554e-g per Sir Thomas Bingham MR. There is a material difference between the Wednesbury and Smith grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake.

27 The contours of the principle of proportionality are familiar. In de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671; Professor Paul Craig, Administrative Law, 4th ed (1999), pp 561-563; Professor David Feldman, "Proportionality and the Human Rights Act 1998", essay in The Principle of Proportionality in the Laws of Europe edited by Evelyn Ellis (1999), pp 117, 127 et seq. The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R v Ministry of Defence, Ex p Smith [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in Smith the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: Smith and Grady v United Kingdom (1999) 29 EHRR 493. The court concluded, at p 543, para 138:

"the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court’s analysis of complaints under article 8 of the Convention."

In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.
The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in Mahmood [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in Mahmood, at p 847, para 18, “that the intensity of review in a public law case will depend on the subject matter in hand”. That is so even in cases involving Convention rights. In law context is everything.

Some cases are already beginning to use aspects of the proportionality test in Daly to flesh out the principle of reasonableness.

In Wandsworth (Schools Adjudicator) [2003] EWHC 2969Admin, judicial review was granted because the remedy chosen by the decision maker was not rationally capable of achieving the objective being pursued. In Watford Grammar School [2003] EWHC 2480 Admin, judicial review was granted for failure to appreciate less intrusive ways of achieving the intended result.

However this piecemeal and incremental approach still falls short of embracing the full principle of proportionality as a common law ground for judicial review.

However outside cases which engage the ECHR or principles of European Union law, the Courts on both sides of the Border have rejected any role for proportionality as a ground for judicial review.

Thus in R (Association of British Civilian Internees) v Secretary of State for Defence [2003] 3 WLR 80, the Court of Appeal held that apart from a decision of the House of Lords, proportionality is not part of English law. Wednesbury unreasonableness or irrationality remains the test.

The Court held:

“33 It is true that the result that follows will often be the same whether the test that is applied is proportionality or Wednesbury unreasonableness: see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223. This is particularly so in a case in the field of social and economic policy. But the tests are different: see, for example, Lord Steyn in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, 547a-g. It follows that the two tests will not always yield the same results. A clear instance of this is Smith and Grady v United Kingdom (1999) 29 EHRR 493, where despite the heightened scrutiny test developed in R v Ministry of Defence, Ex p Smith [1996] QB 517, 554, the European Court of Human Rights upheld the challenge which had failed in the UK domestic courts and
said 29 EHRR 493, 543, para 138: “the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court’s analysis of complaints under article 8 of the Convention.”

34 Support for the recognition of proportionality as part of English domestic law in cases which do not involve Community law or the Convention is to be found in para 51 of the speech of Lord Slynn of Hadley in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, 320-321; and in the speech of Lord Cooke of Thorndon in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532, 548-549, para 32. See also de Smith, Woolf & Jowell, Judicial Review of Administrative Action, 5th ed (1995), p 606. It seems to us that the case for this is indeed a strong one. As Lord Slynn points out, trying to keep the Wednesbury principle and proportionality in separate compartments is unnecessary and confusing. The criteria of proportionality are more precise and sophisticated: see Lord Steyn in the Daly case, at pp 547-548, para 27. It is true that sometimes proportionality may require the reviewing court to assess for itself the balance that has been struck by the decision-maker, and that may produce a different result from one that would be arrived at on an application of the Wednesbury test. But the strictness of the Wednesbury test has been relaxed in recent years even in areas which have nothing to do with fundamental rights: see the discussion in Craig, Administrative Law, 4th ed (1999), pp 582-584. The Wednesbury test is moving closer to proportionality and in some cases it is not possible to see any daylight between the two tests: see Lord Hoffmann’s Third John Maurice Kelly Memorial Lecture 1996 “A Sense of Proportionality”, at p 13. Although we did not hear argument on the point, we have difficulty in seeing what justification there now is for retaining the Wednesbury test.

35 But we consider that it is not for this court to perform its burial rites. The continuing existence of the Wednesbury test has been acknowledged by the House of Lords on more than one occasion. The obvious starting point is R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696. The Home Secretary had issued directives to the British Broadcasting Corporation and the Independent Broadcasting Authority prohibiting the broadcasting of speech by representatives of proscribed terrorist organisations. The applicant journalists challenged the legality of the directives on the ground that they were incompatible with the Convention, and also on the ground that they were disproportionate in a sense going beyond the established doctrine of reasonableness. Mr Pannick submits that the Brind case [1991] 1 AC 696 does not stand in the way of this court holding that proportionality has supplanted the Wednesbury test in English domestic law, even where no human right or European Community law issues are raised. We do not agree. It is true, as Mr Pannick points out, that Lord Bridge of Harwich and Lord Roskill left the door open for the possible future introduction and development
of the doctrine of proportionality into English domestic law. But all of their Lordships rejected the proportionality test in that case and applied the traditional Wednesbury test. In other words, they closed the door to proportionality in domestic law for the time being.

36 In R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd [1999] 2 AC 418, the House of Lords was asked to apply both tests in the context of a case about what was alleged by the applicant to be the inadequate response by the police to the obstruction by protesting animal rights groups of shipments of livestock. The applicant said in relation to domestic law that the police response was unreasonable (i.e. in the Wednesbury sense). In relation to Community law (the enforcement of the EU Treaty which prohibits restrictions), the applicant's case was that the police response was disproportionate. The challenge failed on both grounds. Separate consideration was given to the two grounds and to the application of the two tests, although Lord Slynn pointed out, at p 439f, that "the distinction between the two tests in practice is in any event much less than is sometimes suggested". The suggestion that it is open to this court to hold that the Wednesbury test is no longer part of English domestic law is entirely at odds with the approach of the House of Lords in the Brind case and in the International Trader's Ferry case.

37 Finally, the passages in the speeches of Lord Slynn in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, 320-321 and Lord Cooke in the Daly case [2001] 2 AC 532, 548-549 to which we have referred, themselves imply a recognition that the Wednesbury test survives, although their Lordships' clearly expressed view is that it should be laid to rest. It seems to us that this is a step which can only be taken by the House of Lords. We therefore approach the issues in the present appeal on the footing that the Wednesbury test does survive, and that this is the correct test to apply in a case such as the present which does not involve Community law and does not engage any question of rights under the Convention.”

In Somerville and others v Scottish Ministers 2007 SLT 96, the First Division reached a similar conclusion. In that case a group of prisoners argued that their segregation in a form of solitary confinement for reasons said to be based on reasons of good order and discipline breached arts 3 and 8 of the ECHR. They also argued that even if the ECHR was not engaged, the segregations were unreasonable in the Wednesbury sense and were also disproportionate at common law. As was said:

“[121] The concept of proportionality has an established, albeit recently attained, place in our law. First, it is one of the general principles of Community law. Secondly, it plays an important part in determining whether, when a Convention right is engaged, it has been infringed. It has not, however, yet been recognised as a generally-available common law test of the validity of administrative action. In these petitions, the petitioners invite us to innovate upon the law, and accept proportionality as such a general test of
validity. Alternatively, they invite us to hold that their complaints relate to infringement of fundamental rights, and that, in that context at least, proportionality is a recognised test of validity.

[122] As counsel pointed out in their submissions, the possibility that proportionality might be adopted as a general test of the validity of administrative action has been the subject of judicial observation in England since 1985 (CCSU v Minister for the Civil Service, per Lord Diplock at page 410). These observations have, however, all been obiter. When the House of Lords was invited to adopt proportionality in Brind (see page 736F) it declined to do so. Twelve years later, in the British Civilian Internees case, the Court of Appeal held that it was not open to it to accept proportionality in place of Wednesbury reasonableness as the general test of validity of administrative action.

[123] We accept, of course, that the grounds for review of administrative action are not closed for all time (CCSU, per Lord Diplock at page 410; West per Lord President Hope at page 413). Moreover, we are not technically bound by Brind or the British Civilian Internees case. On the other hand, the submissions made by Mr Ross as to the desirability of maintaining the situation that the grounds for review are broadly the same in all the jurisdictions in the United Kingdom are, in our view, compelling. Much of the obiter discussion on the subject has been prompted by dissatisfaction with the test of Wednesbury unreasonableness. It would be possible in theory to recognise proportionality alongside Wednesbury unreasonableness as an alternative test of the validity of administrative action, although it would be unsatisfactory and confusing to have in simultaneous operation two tests which in many cases would overlap. The more extreme step of rejecting the Wednesbury test and adopting proportionality in its place is not one which we consider it appropriate for us to take. To do so would involve a failure to recognise the view taken of the matter in the House of Lords in Brind and the Court of Appeal in the British Civilian Internees case, and introduce an undesirable dichotomy between the approach to judicial review in Scotland and in England.

[124] We therefore reject the primary proposition advanced on the petitioners' behalf that the law recognises proportionality as the (or a) criterion by which to test the validity of administrative action generally.

[125] It was not disputed by the Scottish Ministers that authority can be found, in cases dealing with alleged infringement of common law fundamental rights, for testing the validity of the actions complained of by asking whether the interference complained of was the minimum necessary to achieve a legitimate objective, a formulation closely akin to proportionality. In order to rely on those authorities, however, the petitioners had to maintain that the segregation of which they complain amounted to infringement of a fundamental right at common law. The starting point for the argument in support of that contention was that a convicted prisoner retains all civil rights which are not taken away expressly or by necessary implication (ex parte St Germain; Raymond v Honey). That much we accept. We do not regard Hague
as necessarily standing in the way of such an argument, since the decision in that case turned on the nature of the (English) common law tort of false imprisonment (per Lord Bridge of Harwich at page 163B). However, in so far as the argument proceeds to rely on the concept of "residual liberty" derived from the Canadian case of Miller v The Queen, it is on uncertain ground. The concept has not been generally accepted in England. However, Lord Steyn (in his dissenting speech in Munjaz, at paragraph 42, page 810H) regarded the concept as a "logical and useful one". We see no objection to it in principle, provided it is used as no more than a label for those civil rights not lost on lawful imprisonment, and contains no implication that what is left is of the same character and importance as that which has been taken away. It does not follow from the fact that the incarcerated prisoner retains certain rights that, if segregation infringes a residual right, that right is a fundamental one.

We accept the submission made by Mr Ross that it is quite consistent with the principle that a convicted prisoner retains those civil rights that have not been taken away, to hold that the retained rights are not of the same fundamental character as the right to liberty which he possessed before being lawfully imprisoned. We are of opinion that such rights as the petitioners retained in relation to the manner and circumstances of their detention were not common law rights of a fundamental nature. The present petitions therefore do not fall within the class of cases to which the test akin to proportionality has been applied.”

The later appeal to the House of Lords left open the possibility of the development of proportionality as a new ground of review at common law. The House did not decide the point. There is therefore considerable scope for the further development of the line of argument that proportionality should be a common law ground for challenge—although the last Outer House consideration of the point followed the Court of Appeal in British Civilian Internees—see Fargie, Petitioner [2008] CSOH 117; 2008 SLT 949.

The test “akin to proportionality” means heightened rationality scrutiny or “Wednesbury plus” and has been recognised in the English courts as a way of protecting fundamental common law rights such as e.g. the right of access to the courts: R v Lord Chancellor, ex p Witham [1998] QB 575; Raymond v. Honey [1983] 1 AC 1; R v Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115.

The latter case arose from a prohibition on visits to serving prisoners by journalists seeking to investigate whether the prisoners had, as they claimed, been wrongly convicted, save on terms which precluded the journalists from making professional use of the material obtained during such visits.

The House considered whether the Home Secretary’s evidence showed a pressing need for a measure which restricted prisoners’ attempts to gain access to justice, and found none.

The more substantial the interference with fundamental rights, the more the court would require by way of justification before it could be satisfied that the
interference was reasonable in a public law sense. It held that the prohibition could not be justified.

In the pre-Human Rights Act case of R v Secretary of State for Defence, ex p Smith [1996] QB 517, this approach was applied to whether the blanker ban on homosexual persons serving in the armed forces was lawful.

Applying the heightened approach to the fundamental interest in private sexuality, the Court of Appeal held that it could be justified. The European Court of Human Rights held that heightened Wednesbury scrutiny was not a substitute for proportionality and that arts 3 and 8 ECHR had been violated: Smith and Grady v The United Kingdom (2000) 29 EHRR 493.

How then is proportionality to be applied? If Wednesbury is increasingly limited as the human rights jurisdiction broadens, how does the Court assess proportionality? Can a decision be struck down because the primary decision maker has not addressed the “Daly template” for proportionality?

In R (Begum) v Denbigh High School [2006] 2 WLR 719, HL, Shabina Begum alleged that her rights, under art9 (freedom of religion) and art2 of the First Protocol (right to education – “art2/1”), had been interfered with by the application of a school uniform policy which meant that she could not wear the muslim jilbab at the school she had been attending. The Court of Appeal had held ([2005] 1 WLR 3371) that the school’s refusal to let her attend wearing the jilbab was not justified, the school not having properly addressed the legal issues which arose under art 9.

The House of Lords, however, reversed that finding. The majority concluded there had been no interference at all with the art9 right, holding that the right did not require that a person should be allowed to manifest their religion at any time and place of the person’s own choosing. What constituted an interference depended on all the circumstances of the case. The claimant’s family had originally chosen the school with knowledge of the uniform policy and, when she later came to manifest her religious belief by seeking to wear the jilbab, the assistance of the school and the local education authority could have been sought, there being nothing to stop the claimant from attending a school where the jilbab was permitted. The minority concluded that, although there had been an interference with the art9 right, the uniform policy was nonetheless objectively justified; the formalism of the Court of Appeal’s approach, which had concentrated on the decision-making process of the school, had been incorrect. The claim under art2/1 was furthermore unanimously rejected in the light of the House of Lords’ decision in Ali, below.

The conclusion that there was no interference at all with the art9 right is contentious. It was based on an approach by the Strasbourg authorities which, as Lord Bingham recalled at [24], had been criticized elsewhere by the Court of Appeal as being overly restrictive. He concluded, however, that the Strasbourg case law established a coherent and consistent body of authority showing that interference with the right was not easily established; and he held that Strasbourg cases supported the proposition that an interference was
not readily found where a person had voluntarily accepted an employment or role in which a person's religious practice was not accommodated but other means were open to the person to practise their religion without undue hardship or inconvenience. There is clearly scope, as the minority preferred, for English law to develop a more generous approach on that issue; but in this case the school’s legitimate aim of protecting the rights and freedoms of others provided, in any event, a proper basis for the uniform policy, the application of which had been justified and proportionate.

In another education case, Ali v Head and Governors of Lord Grey School [2006] 2 WLR 690, HL, (and on the same day as the Begum judgment), the House of Lords addressed the application of art2/1 in a case concerning the exclusion of a pupil from school on suspicion of involvement in arson. The prosecution of the claimant was later discontinued but, for a variety of reasons arrangements were not made for the pupil to return to school, and his exclusion effectively continued for more than a year. The Court of Appeal had held ([2004] QB 1231) that the exclusion was unlawful under domestic law, and that in respect of the later part of the period the exclusion had been incompatible with art2/1, for which the claimant was entitled to damages.

The majority of the House of Lords held, however, that the claimant’s Convention right had not been infringed. The question was not whether the exclusion had been unlawful under domestic law, but whether there had been a systemic failure of the educational system which resulted in the claimant not having access to a minimum level of education at all. It was accordingly necessary to look at the education system as a whole, and at the availability of suitable and adequate alternative arrangements. Since other educational arrangements had been available, the exclusion was not incompatible with art2/1.

Baroness Hale, however, took a different course of reasoning, albeit to the same result (having also been in the minority in Begum). She held that the school had not done all that was reasonable in the circumstances to achieve the claimant’s re-instatement, given the possibility of misunderstanding or confusion on the part of the claimant’s parents (who knew little English) as to the school’s proposals once the prosecution had been discontinued. Baroness Hale accordingly agreed with both the Court of Appeal and the judge at first instance that the claimant’s Convention right had been infringed. She nonetheless concurred in allowing the school’s appeal, because the correct remedy under the Human Rights Act for the infringement was not the damages which the claimant had sought, but merely a declaration (which had not been sought).

Looking at the role of proportionality and regulatory decision making more broadly there is also the recent case in the House of Lords when human rights met licensing in April of last year. This was the wonderfully named Belfast City Council v Miss Behavin’ Limited [2007] UKHL 19. Although it arose in the context of licensing it has direct application to any field in which it is alleged that a regulator has acted in a manner which is disproportionate.
Under the Northern Irish version of the Civic Government (Scotland) Act 1982 Belfast City Council resolved that the number of sex shops within the locality of Belfast City should be zero.

Miss Behavin’ had applied for a licence and this had been refused by the council. The Northern Ireland Court of Appeal reversed the council.

Both the first instance judge in the Court of Appeal agreed that the council had acted fairly and properly in the exercise of its powers under the legislation. They disagreed over whether the council had complied with the Human Rights Act.

The NI Court of Appeal said that the council in exercising its statutory powers had not sufficiently taken into account the respondent’s right to freedom of expression under Article 10 of the ECHR and its right to a peaceful enjoyment of its possessions under Article 1 of Protocol 1. It is of course the case that the Scottish courts have already held that a licensing decision can engage Article 1 of the First Protocol.

The Court of Appeal accepted that Parliament was entitled to restrict these rights by requiring that sex shops be licensed.

The problem with the approach of the Court of Appeal was that it did not in fact hold that the human right of the operators to have a sex shop had been infringed, instead it held that the convention rights had been violated by the way the council had arrived at its decision. In particular in the reasons it gave, the council had not shown that it was conscious of the convention rights which were engaged.

The Court of Appeal reached the conclusion that the decision was unlawful unless it was inevitable that a reasonable council which instructed itself properly about convention rights would have reached the same decision.

The House of Lords disagreed with this. In general terms it took the approach that it was wrong of the Court of Appeal to concentrate on the form of what the council did in its reasoning, but to look at the substance. This was in accordance with an earlier House of Lords decision: R (SB) v Governors of Denbigh High School [2007] 1 AC 100.

In essence what the House of Lords said in this case following the Denbigh High School case is that what is important in the Strasbourg Jurisprudence is not whether a challenged decision or action is the product of defective decision making, but whether the case under consideration that the convention rights of an applicant had been violated.

Lord Hoffman agreed with the judge at first instance to the effect that the convention rights of the sex shop had not been violated. Even if these convention rights were engaged, the right to operate a sex shop operated at a very low level.
He observed that the right to sell pornography was not the most important right to free expression in a democratic society and the licensing system did not prohibit it, it merely regulated it.

Lord Hoffman emphasised that this was an area of social control where the Strasbourg Court afforded a wide degree of deference to decision makers under the doctrine of the margin of appreciation.

Baroness Hale emphasised that in a human rights case the court was concerned with whether the human rights of the claim that has been infringed, not whether the administrative decision maker properly took human rights into account.

If that were otherwise, every policy decision taken before the Human Rights Act came into force but which engaged a convention right would be open to challenge, no matter how obviously compliant with the right in question it was.

In essence what the House of Lords appeared to have decided in this case in line with the earlier authority is that a public authority does not need to expressly address human rights or refer to convention rights in the process of reasoning adopted. This is because the regulatory system in question is likely to build in the balance struck between individual rights and control of that right in the general interest.

Key to understand the role of proportionality here is that it is the substance of the decision which matters rather than the decision making process itself.
About Scott Blair

Scott is a member of the Murray Stable (www.murraystable.com). He can be contacted via the Stable.

Scott worked as a solicitor in private practice before becoming an advocate in 2000. He specialises in public law and has considerable experience of judicial review and statutory appeals. A number of the cases mentioned in this paper involved Scott. He recently acted for the successful petitioner in the licensing judicial review of Buzzworks Leisure Ltd v South Ayrshire Licensing Board and JD Wetherspoon plc [2011] CSOH 146.

He has been instructed in reported cases in the European Court of Human Rights, Judicial Committee of the Privy Council, House of Lords, Court of Session, High Court of Justiciary, Sheriff Court and before various tribunals, licensing boards and local authority regulatory committees.

He is an Immigration Judge of the First- Tier Tribunal (Asylum and Immigration Chamber) and a Legal Convener of the Mental Health Tribunal for Scotland.

He is widely published in the public law field.

Much of his current public law practice is in the area of licensing law.

He is a member of the Licensing Law Sub-Committee of the Law Society of Scotland. He is a regular contributor to Scottish Licensing Law & Practice and has also contributed to English licensing law publications.