FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 36
P514/18, P511/18 and P1136/17

Lord President
Lord Brodie
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motions by

(1) APRIL PRIOR; (2) GORDON BURNS; and JOSEPH MILLBANK

Petitioners and Reclaimers

against

(1) THE SCOTTISH MINISTERS; and (2) THE LORD ADVOCATE

Respondents

Petitioners and Reclaimers: O'Neill QC, Leighton; Drummond Miller LLP
Respondents: C O'Neill (Sol Adv); Scottish Government Legal Directorate

30 June 2020

Introduction

[1] In these reclaiming motions, the petitioners maintain that sections 27B to 27D of the Court of Session Act 1988 require a Lord Ordinary, when considering a request for a review of an earlier refusal by a different Lord Ordinary of permission to proceed in a petition for judicial review, to appoint an oral hearing. Without such a hearing, there is no avenue of appeal.

[2] Before the Lord Ordinary, the petitioners had adopted a contrasting position. This was that the legislation did allow a Lord Ordinary to refuse the request for a review, but that this was contrary to the European Convention on Human Rights and thus outside the legislative competence of the Scottish Parliament (Scotland Act 1998, s 29(2)(d)). They now adopt that argument only as a "fall-back" position. On this alternative argument, they would seek reduction of the statutory provisions and the rules of court, or at least a declarator that they are unlawful. In respect of both the principal and the alternative contentions, the petitioners seek reduction of the interlocutors in the original petition processes which had refused their requests for a review.

[3] Issues of both substance and procedure arise. First, is it legitimate for the petitioners to run an entirely different argument from that contained in their petitions and advanced before the Lord Ordinary? Secondly, is it competent to review a judicial decision in a petition process? In this context, if a separate action of reduction is required, does it follow from the identification of an error of law that the interlocutors of the Lords Ordinary in the original proceedings should be reduced? Thirdly, on a construction of the statutory provisions, is it competent for the second Lord Ordinary to refuse a request for a review of a refusal of permission without appointing an oral hearing? Fourthly, if the legislation does provide that a petitioner may be refused permission without an oral hearing and hence a right of appeal, is that compatible with the European Convention?

Statutory Provisions

Legislative history

[4] In September 2009, the *Scottish Civil Courts Review* (Vol I, p 265) recommended that:

> "152. A requirement to obtain leave to proceed with an application for judicial review should be introduced, following the model of Part 54 of the Civil Procedure Rules in England and Wales. … The papers should be considered by the Lord Ordinary, who will not normally require an oral hearing. If leave is refused, or granted only on certain grounds ... the petitioner should be entitled to request that the matter be reconsidered at an oral hearing before another Lord Ordinary. There should be a further right of appeal to the Inner House…".

The purposes of a permission stage were stated (Vol II, p 35) to be, *inter alia*, the prevention of unmeritorious claims from proceeding, thus creating additional capacity to expedite the resolution of other cases.

[5] Chapter 12 explained the recommendation in more detail:

> "42. One model suggested by respondents is the introduction of a procedure similar to that in England and Wales, where the court's permission is required before a claim for judicial review can proceed. …The papers are then considered by an Administrative Judge, who will generally consider the question of permission without holding an oral hearing. If permission is refused the claimant is entitled to request, within 7 days, that the matter be reconsidered at an oral hearing. A right of appeal lies to the Court of Appeal against a refusal to grant permission…
>
> …
>
> 51. …The Lord Ordinary will decide whether the petitioner has an arguable case. If leave is refused, or granted on certain grounds... the petitioner should be entitled to request, within 7 days, that the matter be reconsidered at an oral hearing before another Lord Ordinary. If leave is refused, there should be a right of appeal, within 7 days, to the Inner House which would look at the petition anew…".

[6] In England and Wales, section 31(3) of the Senior Courts Act 1981 provides that an application for judicial review cannot be made unless the leave of the High Court has been obtained in accordance with rules of court. Rule 54.4 of the Civil Procedure Rules (1998/3132) mirrors the Act. The courts in England and Wales may grant (CPR, r 54.10) or refuse (*ibid*, r 54.12) permission to proceed. That decision is generally made without an oral hearing (Practice Direction 54A, para 8.4). In respect of refusals, the claimant cannot appeal,

but he can request that the decision be reconsidered at an oral hearing (*ibid* 54.12(3); *R* (*MD (Afghanistan)*) v *Secretary of State for the Home Department* [2012] 1 WLR 2422, at para 21). At the time of the *SCCR*, the first instance judge could not, as is now possible, decline to have an oral reconsideration. That can now be done by the judge certifying that the claim is "totally without merit" (CPR, rr 23.12 and 54.12(7); cf *R (Wasif)* v *Secretary of State for the Home Department* [2016] 1 WLR 2793). Where there is such certification, the claimant may apply directly to the Court of Appeal for permission to appeal. That application is likely to be considered only on the papers by a single judge of that Court (CPR r 52.5 and 52.8(2)).

The new sections

[7] Sections 27B to 27D of the Court of Session Act 1988 were introduced by section 89 of the Courts Reform (Scotland) Act 2014 with effect from 22 September 2015. They provide as follows:

> "27B *Requirement for permission*
>
> (1) No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed.
>
> (2) …the Court may grant permission… only if it is satisfied that—
>
> …
>
> (b) the application has a real prospect of success.
>
> ...
>
> (4) The Court may grant permission… for an application to proceed –
>
> …
>
> (b) only on such of the grounds… as the Court thinks fit.
>
> (5) The Court may decide whether or not to grant permission without an oral hearing … .
>
> 27C *Oral hearings where permission refused, etc.*
>
> (1) Subsection (2) applies where …—

(a) the Court—

(i) refuses permission … or

(ii) grants permission… only on particular grounds, and

(b) the Court decides to refuse permission, or grant permission as mentioned in paragraph (a)(ii), without an oral hearing ... .

(2) The person making the application may, … request a review of the decision at an oral hearing.

(3) A request under subsection (2) must be considered by a different Lord Ordinary …

(4) Where a request under subsection (2) is granted, the oral hearing must be conducted before a different Lord Ordinary from the one who refused or so granted permission.

(5) At a review ... the Court must consider whether to grant permission; ...

(6) Section 28 does not apply—

(a) where subsection (2) applies, or

(b) in relation to the refusal of a request made under subsection (2).

27D *Appeals following oral hearings*

(1) Subsection (2) applies where, after an oral hearing…, the Court—

(a) refuses permission

…

(2) The person making the application may … appeal… to the Inner House (but may not appeal under any other provision of this Act).

(3) In an appeal under subsection (2), the Inner House must consider whether to grant permission …

…".

Section 28 of the 1988 Act provides a general right of a party to reclaim any interlocutor of a Lord Ordinary "except as otherwise prescribed" (eg by s 27C(6)).

Policy Memorandum, Explanatory Notes and Ministerial Statements

[8] The original Policy Memorandum which accompanied the Bill, as introduced to Parliament, stated:

> "173. [The *SCCR*]... recommended that 'A requirement to obtain leave to proceed with an application for judicial review should be introduced, following the model of Part 54 of the Civil Procedure Rules in England and Wales'. The respondent should be entitled to oppose the granting of leave. The papers should be considered by the Lord Ordinary, who will not normally require an oral hearing. If leave is refused, or granted only on certain grounds ... the petitioner should be entitled to request that the matter be reconsidered at an oral hearing before another Lord Ordinary. There should be a further right of appeal to the Inner House. …
>
> …
>
> 187. The procedure provided… allows a Lord Ordinary to take the initial decision on permission on the basis of the papers lodged either as a paper exercise or after an oral hearing. If permission is refused ... and an oral hearing was not held, the petitioner is entitled to request an oral hearing. The request and the oral hearing that is heard if the request is granted will be dealt with by a different Lord Ordinary. There is a right of appeal to the Inner House in relation to a refusal of permission ... following an oral hearing."

The Revised Explanatory Notes to the Bill as passed state:

> "137. The request for review requires to be considered by a different judge. Section 27C(6) provides that section 28 of the 1988 Act does not apply where there is a right to request a review at an oral hearing. In other words, there is no right of appeal to the Inner House against a decision made under section 27B – an applicant who wishes to challenge the decision must request a review under section 27B(2). Similarly, there is no right of appeal to the Inner House if the judge refuses the request for a review."

[9] During the passage of the 2014 Act, there were some ministerial comments about the purpose of the new sections. On 17 June 2014, during the Stage 2 debate before the Justice Committee, the Minister for Community Safety and Legal Affairs resisted certain amendments which would have deprived the reforms of their purpose, namely reducing the disproportionate amount of court time that was being taken up with unmeritorious petitions. Although at certain points, the Minister referred to there being a right of appeal from a refusal to grant permission to proceed, this was corrected to there being such a right only when the refusal had occurred after an oral hearing (see cols 4715-16). On 7 October 2014, during the Stage 3 Debate, the Cabinet Secretary for Justice stressed that refusals of

permission were not arbitrary decisions. The Bill envisaged that permission would be sought first on the basis of the papers and then on review at an oral hearing. If permission was again refused, the case could be appealed. If a case were potentially arguable but, after up to three separate assessments, it did not appear to have a real prospect of success, the case should not be allowed to proceed.

The Rules and Practices of the Court

RCS

[10] In order to give effect to sections 27B to 27D of the 1988 Act, the rules of court were amended by: (i) the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No 3) (Courts Reform (Scotland) Act 2014) 2015; and (ii) the Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Withdrawal of Agents and Judicial Review) 2017. Chapter 58 of the RCS now reads:

> "*The permission stage*
>
> 58.7.—(1) … the Lord Ordinary must—
>
> (a) decide whether to—
>
> (i) grant permission (including … only on particular grounds);
>
> … or
>
> (b) order an oral hearing ….
>
> …
>
> (2) Where permission is refused (or permission is granted … only on particular grounds) without an oral hearing, the Lord Ordinary must give reasons… .
>
> …
>
> *The permission stage: requesting an oral hearing*
>
> 58.8.—(1) A request to review a decision made without an oral hearing, under section 27C(2) of the Act of 1988, is made in Form 58.8.
>
> (2) Where a request is granted, the oral hearing must take place within 7 days.
>
> …

> *The permission stage: oral hearing*
>
> 58.9.—(1) Except on cause shown, an oral hearing must not exceed 30 minutes.
>
> (2) Where permission is refused (or permission is granted … only on particular grounds) at an oral hearing, the Lord Ordinary must give reasons… .
>
> *The permission stage: appeal to the Inner House*
>
> 58.10. An appeal under section 27D(2) of the Act of 1988 (appeals following oral hearings) is made by reclaiming motion (see rule 38.8(d)).”

Form 58.8, which is headed “Form of Request for Review”, contains a statement that the petitioner is requesting a review of the decision of the Lord Ordinary.

Practice Note No. 3 of 2017

[11] On 13 June 2017, the court issued Practice Note No. 3 of 2017 on *Judicial Review*. It makes clear (para [2]) that it is not mandatory. A Lord Ordinary may disapply its provisions in a particular case. The purpose of the Practice Note is to provide guidance and to set out the court’s expectations about how judicial reviews will be conducted. Under the heading “The permission stage”, it provides that:

> “12. The Lord Ordinary must make a decision on whether to grant or refuse permission or order an oral hearing (RCS 58.7). The Lord Ordinary will ordinarily order an oral hearing if considering refusing permission. In that event, the Lord Ordinary will normally produce a brief note that sets out the concerns which are to be addressed at the hearing. This will assist parties and the court in ensuring that hearings do not exceed 30 minutes (RCS 58.9).
>
> 13. Where permission is refused (or permission is granted subject to conditions or only on particular grounds) without an oral hearing, the petitioner may request a review of the decision at an oral hearing (RCS 58.8). A reclaiming motion to the Inner House may only be made following an oral hearing.”

The Procedural Background and the Lord Ordinary’s decision

[12] Each of the three petitioners had previously raised petitions for judicial review. One of them, Ms Prior, was partially successful. Her remaining grounds of challenge, and all of

those of Mr Millbank and Mr Burns, were refused permission to proceed. No oral hearings were appointed. The petitioners' requests for a review of the refusals were in turn refused without an oral hearing. The subject matter and merits of each petition, and the Lords Ordinary's substantive reasons for refusing both permission and the requests for a review, are not relevant.

[13] Each petitioner, aggrieved at the refusal of their requests for a review, raised the present petitions for judicial review of the earlier decisions. In Ms Prior's petition, the Lord Ordinary granted permission to proceed in respect of arguments based on Articles 5, 6 and 8 of the European Convention. She refused permission in respect of those based on article 10 and the common law. In Mr Millbank's and Mr Burns' petitions, the Lord Ordinary granted permission in relation to challenges based on Article 6 on its own and in conjunction with article 14, but refused permission in respect of those based on Articles 5 and 8 and the common law.

[14] It was accepted that the initial decision under section 27B could be made without an oral hearing. That was expressly provided (s 27B(5)). The challenge, as presented to the Lord Ordinary, was that an incompatibility with the Convention arose where the refusals denied a petitioner not only an oral hearing but also a right of appeal. The petitioners sought reduction of the legislation and the associated RCS, and a declarator of unlawfulness in the alternative in respect of the legislation. They also sought reduction of the interlocutors in the earlier petitions.

[15] The Lord Ordinary raised the question whether, if she were to find an incompatibility, she required to read the legislation compatibly, in line with the interpretive obligations in section 101 of the Scotland Act 1998 and section 3 of the Human Rights Act

1998. Contrary to their position in the reclaiming motion, the petitioners maintained that the legislation did not allow this. The respondents' position was that the provisions could be read down in a variety of ways whereby the incompatibility, which the petitioners contended existed, could be cured.

[16] The Lord Ordinary held that the legislation was compatible with Article 6 on its own and in conjunction with article 14. The petitioners had not submitted that Articles 5 or 8, which they had founded on in their petition, involved more stringent requirements. They were not considered separately. If there had been a violation of the Convention, the Lord Ordinary would have read down section 27C(3) in these terms:

> "(3) A request under subsection (2) must be granted by a different Lord Ordinary ...".

The Lord Ordinary found that reduction of the earlier interlocutors was not a competent remedy in a petition for judicial review. The remedy was a petition to the *nobile officium*. She expressed no view on whether reduction would necessarily follow.

Submissions

Petitioners

[17] The primary basis of the petitioners' challenge was that the legislation and rules guaranteed a petitioner an oral hearing on the issue of permission and a right of appeal in the event of a refusal. The current practice of the Lords Ordinary was that it was competent to deny a petitioner an oral hearing and a right of appeal. This was contrary to the legislation. Sections 27B to 27D of the 1988 Act required an oral hearing on the issue of permission. Statistical information for 2018 showed that 70% (91/131) of review requests were refused without an oral hearing. In 42 cases (32%) permission was granted after an

oral hearing. Only four cases (3%) involved a refusal after an oral hearing. In 2019, 47.5% (28/59) of requests for a review were refused without an oral hearing. Eighteen (30.5%) were granted permission after an oral hearing. Only 13 (22%) were refused permission after an oral hearing. This indicated that having an oral hearing was an advantage. The practice in the Outer House contravened the guidance in Practice Note No. 3 of 2017 (*Dinsmore* v *Scottish Ministers* [2019] CSOH 18, at para [19]).

[18] The correct interpretation was that the first Lord Ordinary may decide the issue of permission on the papers or after an oral hearing, although the Practice Note envisaged that the Lord Ordinary will ordinarily order a hearing if considering refusing permission. Only if a request for a review at an oral hearing is not made in accordance with the formal requirements and within the time limit, could it be summarily refused by a different Lord Ordinary. The problem was that the Lords Ordinary thought that section 27B(5) (grant or refusal without an oral hearing) applied to this second stage, when it did not. The real problem was the denial of an appeal. Appeals were incredibly important. A judge could get something wrong. The current practice enabled the second judge to rubber stamp the first judge's decision; a procedure smacking of tyranny. It was important, especially in cases involving asylum seekers, prisoners and those with mental health difficulties, that justice was seen to be done openly and fairly. Oral hearings were at the heart of Scottish civil procedure. Efficiency and speed did not trump justice and fairness (*R (Detention Action)* v *First-tier Tribunal (I&AC)* [2015] 1 WLR 5341 at para 22).

[19] It was not open to the second Lord Ordinary to decide the substance of the review without granting the request for review at an oral hearing. Whether to grant permission could only be decided by the second Lord Ordinary after an oral hearing. At that hearing,

the second Lord Ordinary would consider the test of a real prospect of success. The review procedure under section 27C differed from the initial consideration under section 27B. On a review, the petitioner had an opportunity to address, both in the written review application and at the oral hearing, any weaknesses in the petition which had led the first Lord Ordinary to refuse or limit permission. The right of appeal to, and a hearing before, the Inner House, was preserved by section 27D.

[20] This reading of the statute would bring the practice of the Outer House into line with Parliament's intention. It was seeking to implement the recommendation of the *SCCR* to introduce a permission stage along the lines of the procedure, which applied in England and Wales, which provided a petitioner with a right to renew the application orally before another judge. The provisions had to be read in this way, because that was the legislative intent (*R (Black)* v *Secretary of State for Justice* [2018] AC 215, para 36; *R (Morgan Grenfell & Co Ltd)* v *Special Commissioners of Income Tax* [2003] 1 AC 563, para 45).

[21] In England and Wales, the Administrative Court determined applications without an oral hearing. Only where permission was refused on the papers and the judge certified that the application was "totally without merit" were claimants deprived of their right to a reconsideration by another judge at an oral hearing (CPR 54.12(7)). The importance of an oral hearing was emphasised in several English cases (*R* (*MD (Afghanistan)*) v *Secretary of State for the Home Department* (*supra*), at para 23; *R (Siddiqui)* v *Lord Chancellor* [2019] EWCA Civ 1040 at para 8; *Sengupta* v *Holmes* [2002] EWCA Civ 1104) at paras 38 and 47; and *R (Wasif)* v *Secretary of State for the Home Department* (*supra*) at para 17(3)). There was a right to appeal against the refusal of permission and the certification. The claimant could make an application to the Court of Appeal for permission to appeal. The CPR were amended in

2016 to remove the right to an oral renewal hearing in the Court of Appeal unless the judge of that Court thought that the application could not be fairly determined without an oral hearing.

[22] The Lord Ordinary had erred in considering that permission to proceed would be refused if the petition was "totally without merit". This was a test introduced for exceptional cases in England and Wales. It was not a criterion or separate category to be considered by Lords Ordinary in determining permission or a request for a review. The only substantive threshold was "real prospect of success".

[23] If the court accepted the petitioners' primary submission, the appropriate remedy was to recall the interlocutors which refused the requests for a review in the petitioners' original petitions. The Inner House could exercise its powers to remedy any deficiency in courts below (*Davidson* v *Scottish Ministers (No 2)* 2003 SC 103) by using the court's *nobile officium* (*Lord Advocate* v *Johnston* 1983 SLT 290 at 293-295; *Helow* v *Advocate General* 2007 SC 303 at para [2]; Thomson: *The Nobile Officum* at 21) or its inherent powers (*Hepburn* v *Royal Alexandra Hospital* 2011 SC 20 at para [19]-[20]). Procedural niceties should not stand in the way of due observance of the law (*Taylor* v *Scottish Ministers* 2019 SLT 288 at paras [15] and [18]; *Wightman* v *Secretary of State for Exiting the EU* 2019 SC 111 at para [67]).

[24] If the court took the view that there was no right to an oral hearing and, therefore, no right of appeal, then the 1988 Act was incompatible with the right of access to a court under Article 6 (*Zubac* v *Croatia* (2018) 67 EHRR 28 (GC)). Whether the requirements of Article 6 were met depended on a consideration of the nature of any filtering procedure and its significance in the context of the proceedings as a whole (*Hansen* v *Norway* (2014) 39 BHRC 89 at paras 71-74). The statistics revealed a disproportionate systematic interference with the

right of access to a court. Exceptional circumstances were needed to deny a party an oral hearing (*Pönkä* v *Estonia* [2016] ECHR 961 at paras 31-34; *Altay* v *Turkey* (2020) 70 EHRR 4 at paras 74-77 citing *Nunes de Carvalho e Sá* v *Portugal*, unreported, App 55391/13, 6 November 2018 at paras 190-191).

[25] An appeal had been intended by the *SCCR* (ch 12, para 51) and was, in the Lord Ordinary's view, removed from the proposals when they became legislation (Policy Memorandum, at paras 186-189). A less intrusive measure, that is one allowing either an appeal or an oral hearing, could have been used. The balance could and should have been struck differently (*Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29, at para 90). Through the combination of being denied an oral hearing and a right to appeal, the very essence of the right of access to the court had been impaired (*Golder* v *United Kingdom* (1979-80) 1 EHRR 524, para 36). The appropriate remedies were recall of the Lords Ordinary's interlocutors which refused the present petitions, reduction of the interlocutors refusing the requests for a review in the original petitions, declarators of unlawfulness and reduction of the statutory provisions and court rules.

Respondents

[26] The respondents contended that sections 27B to 27D of 1988 Act, and the associated RCS, allowed the judges at first instance to refuse permission for a judicial review to proceed without an oral hearing or a right of appeal. The argument, that the Lord Ordinary's decision was vitiated because she adopted the interpretation of the legislation which was contained in the premise of the petitions, was a complete departure from the case at first instance. It was not supported by a plea-in-law or reflected in any of the orders sought. It

should be refused on that basis. It was not merely a new argument (cf *Varney (Scotland) Ltd* v *Lanark Burgh Council* 1974 SC 245).

[27] The submission now presented, that the legislation provided for an oral hearing, was incorrect. Section 27C(4) provided that the Lord Ordinary could grant or refuse a request for a review in terms of section 27C(3). The power to refuse a request for review was not constrained in the manner contended for by the petitioners. Where such a request was refused, that was the end of the petition. The second Lord Ordinary was not limited to considering whether the relevant formal requirements had been followed. Section 27C(4) was not limited in that way either expressly or impliedly. The second Lord Ordinary should have regard to the test for permission (*Wightman v Secretary of State for Exiting the EU* (*supra*), at para [9]), when considering whether to grant a request for an oral hearing.

[28] To the extent that the petitioners found on the contrary intention of the Scottish Parliament, the challenge was unfounded. The petitioners did not plead or argue before the Lord Ordinary that Parliament had intended that, in every application for judicial review, there should be a right to an oral hearing and a right of appeal. There had been no suggestion that the Scottish Parliament legislated in error. The Policy Memorandum (para 187) reflected an understanding that the request for a review at an oral hearing might be refused. The policy objective of the permission stage would be compromised if there were a guarantee of an oral hearing and an appeal. The Lord Ordinary correctly observed that that would diminish the effectiveness of the measure, insofar as it was directed at avoiding the expenditure of resources, which included the costs of both parties and the court, associated with the holding of a hearing on unmeritorious claims.

[29] The statutory provisions did not violate article 6. There was no requirement for the sifting mechanism to guarantee an oral hearing. It was common ground that the decision to grant or refuse permission was not a determination of a petitioner's civil rights and obligations for the purposes of Article 6. It was a procedural step which had to be taken before a petition could progress. It was a procedural hurdle capable of being characterised as a restriction on a party's access to the court (*H* v *United Kingdom* (1985) 45 DR 281). The right of access to the court may be limited, provided that it did not impair the very essence of the right, and pursued a legitimate aim which had a reasonable relationship of proportionality to the restrictions adopted (*Bhamjee* v *Forsdick* [2004] 1 WLR 88, at para 16, citing *Golder* v *United Kingdom* (1979-80) 1 EHRR 524, *Ashingdane* v *United Kingdom* (1985) 7 EHRR 528 and *Miloslavsky* v *United Kingdom* (1995) 20 EHRR 442). Decision-making wholly on the papers was a permissible limitation (*Bhamjee* v *Forsdick* (*supra*), para 33; cf *R (Wasif)* v *Secretary of State for the Home Department* (*supra*)).

[30] Sections 27B to 27D, and the manner in which they were given effect, did not impair the very essence of a petitioners' right of access to the court. The procedure involved an application to the court, and consideration by the court against the legal tests set out in statutory provisions which set out criteria for permission. At each stage the Lord Ordinary was required to determine whether the application had a real prospect of success (1988 Act, s 27B(2)(b)). That test was intended to sift out unmeritorious cases, but not to create an unsurmountable barrier which would prevent what could be a weak case being fully argued (*Wightman* v *Advocate General* 2018 SLT 356, at para [9]). The statutory scheme explicitly envisaged that a second Lord Ordinary must address whether or not an oral hearing should be held.

[31] An absolute requirement for an oral hearing, whether at first consideration or on review, would reduce the effectiveness of permission in minimising the impact on resources of the court and the parties of unmeritorious applications, by unjustifiably prolonging an apparent uncertainty about the lawfulness of a challenged decision (*R (Wasif)* v *Secretary of State for the Home Department* (*supra*), para 16). Even in substantive proceedings in which the protections of article 6 apply, the right to an oral hearing was not absolute (*Pursiheimo* v *Finland* (2004) 38 EHRR CD 138 at CD142; *Jussila* v *Finland* (2007) 45 EHRR 39, para 41). *A fortiori* it was not absolute in the context of a filtering mechanism such as the permission stage. A decision on permission did not attract the procedural protections of article 6, which in any event did not guarantee such a right (cf *Delcourt* v *Belgium* (1979-80) 1 EHRR 355). Where a right of appeal was created by statute, limitations on the exercise of that right, including filtering mechanisms, may be imposed (*R* v *Dunn* [2011] 1 WLR 958). The exclusion of a right of appeal in the legislation was legitimate and proportionate.

[32] The Lord Ordinary clearly understood that the test for permission was that of "real prospect of success" (cf *Wightman* v *Advocate General* (*supra*), para [9]). She drew on the language of "totally without merit" merely by analogy and did not consider it was relevant to the test for permission, but to whether an oral hearing should be ordered.

[33] Reduction of an interlocutor of a Lord Ordinary in a petition for judicial review was incompetent (*West v Secretary of State for Scotland* 1992 SC 385 at 413, *Moss' Empires* v *Assessor for Glasgow* 1917 SC (HL) 1, at 6-7). This is not a mere question of procedure, but one of the scope of the supervisory jurisdiction of the court. Even if the Lords Ordinary had erred in law by refusing permission without an oral hearing, the court would still have to be satisfied that reduction was necessary to prevent oppression and injustice (*Helow* v *Advocate General*

(*supra*), at para 2). If an oral hearing would not have made any difference, reduction would be refused. The petitioners were, by invoking the *nobile officium*, trying to create an appeal against a discretionary decision when no such right of appeal existed. That was impermissible (*Meechan* v *Procurator Fiscal, Airdrie* 2019 SLT 441, at para 27; Clyde & Edwards: *Judicial Review* para 3.09; Thomson: *The Nobile Officum* at 102).

[34] The statistical material did not assist in resolving the legal issues. Although in 2018 65% (91/138) of applications had been refused without an oral hearing, in 2019 only 47% (28/59) had been refused. In 2019, a much larger number of petitions (99/263) had oral hearings appointed. Out of 263 petitions in 2019 only 28 had been refused permission without an oral hearing.

Decision

The Pleadings

[35] The petition for judicial review was introduced as a potentially "speedy and cheap" method of reviewing the actions of public authorities in the wake of the remarks of Lord Fraser in *Brown* v *Hamilton District Council* 1983 SC (HL) 1 (at 49). It is a hybrid process which is intended to combine the flexibility of petition procedure, especially in relation to remedies (RCS 58.13.(2)(b)), within the context of an otherwise adversarial system. The form of petition is prescribed (Form 58.3). It must contain averments of fact, similar to those in an ordinary action. It then departs radically from the customary rules of written pleading by requiring the petitioner not only to formulate appropriate pleas-in-law but also to set out, albeit "briefly", "the legal argument with reference to enactments or judicial authority" on which it is intended to rely.

[36] The nature of the grounds of challenge which a petitioner wishes to advance should be readily ascertainable within the averments of fact and legal argument. That has been done in each of the three petitions. These averments are, in large measure, repeated in each petition. The petitioners request reduction of sections 27B-D of the Court of Session Act 1988 and RCS 58.7-10 (*sic*), or alternatively a declarator of their unlawfulness, in so far as these provisions do not permit an oral hearing and/or a right of appeal in some cases. In addition, there is a crave for reduction of the interlocutors of the Lords Ordinary in the original petitions which refused the requests for a review of the refusal to grant permission to proceed without an oral hearing. The petitioners' pleas-in-law mirror the nature of the remedies sought. The pleadings reflect the issues which were determined by the Lord Ordinary; that is whether the statutory sections and the RCS were incompatible with, *inter alia*, Articles 6 and 14 of the European Convention and the common law principle of open justice.

[37] The respondents take exception to the petitioners being able to advance a quite different argument from that which is contained in the pleadings and was argued before the Lord Ordinary. There is considerable force in this objection. Rules of procedure are an important element in the judicial system. It is not a question of efficiency or speed trumping fairness and justice. The need to determine cases expeditiously and to achieve finality is not a separate or subordinate consideration to the interests of justice. Expedition and finality are not opposed concepts to fairness and justice but are integral parts of them (see *Toal* v *HM Advocate* 2012 SCCR 735, LJC (Gill) at para [107]). As Honoré (*About Law* p 77) put it:

> "One might think that, in contrast with content, requirements of form and procedure are not important. That would be a mistake. Forms and procedures are important

> for a number of reasons. They make for certainty, they encourage careful reflection, and they promote fairness."

[38] The RCS, and associated practices, are designed to ensure both fairness and efficiency in the civil process. Although there is a degree of flexibility in the selection of remedy, the RCS specifically require a petitioner for judicial review to aver the legal basis for challenge in the body of the petition, in addition to formulating an appropriate plea-in-law. It follows from this that, in the event of there being a significant change of tack in the ground of challenge, a petitioner ought to lodge an appropriate Minute of Amendment which will reflect that change and, if the Minute is received, permit the respondent a formal and fair opportunity to amend his Answers in response. Whether amendment will be allowed will, as always, depend on the interests of justice. In the intended "speedy and cheap" process of judicial review, the time at which the Minute is introduced can be a particularly important factor in deciding this (*King* v *East Ayrshire Council* 1998 SC 182, LP (Rodger) at 196).

[39] There is a further important reason why the lodging of a Minute of Amendment should be insisted upon before allowing a petitioner to deploy an entirely new argument in judicial review proceedings. Permission to proceed is now a requirement of these proceedings. The legitimacy of having some form of sifting system is not under challenge. The reasons for having such a system were outlined by the *Scottish Civil Courts Review* (*supra*). The petitioners do not have permission to proceed on the ground now advanced. Had it been contained in the petition, the sifting Lord Ordinary may or may not have granted permission on that ground (1988 Act, s 27B(4)(b)). Where a new ground is to be advanced, it requires to be the subject of a judicial decision which can be seen as the

equivalent of the grant of permission. That decision is one which allows the petition to be amended.

[40] The need for amendment applies equally in the context of an appeal or a reclaiming motion. A substantial change of tack may merit either a refusal of the amendment; possibly leaving the petitioner to attempt to lodge a new petition, or a remit for reconsideration by the Lord Ordinary (RCS 38.17(2)). What is not legitimate is for the petitioner to lodge a Note of Argument (RCS 38.13(2)(c)) which is not consistent with the pleadings. It is equally not legitimate, without permission of the court, to raise new arguments which do not conform to the written Note (Practice Note No 3 of 2011 *Causes in the Inner House* para 84). These are not procedural niceties standing in the way of due observance of the law. They are important rules which ensure fairness and promote the determination of where the justice of the cause lies.

[41] For this reason alone, the court would have been entitled to reject the principal argument now advanced by the petitioner. It will not, however, rest its decision on this ground.

Reduction of a Lord Ordinary's Interlocutor

[42] The petitioners seek, *inter alia*, reduction of the interlocutors of the Lords Ordinary, who refused permission, in the original judicial review processes. This is manifestly incompetent. The supervisory jurisdiction of the Court of Session does not include the power, in such a process, to review judicial decrees (Clyde & Edwards: *Judicial Review* para 9.03 citing *Moss' Empires* v *Assessor for Glasgow* 1917 SC (HL) 1, Lord Kinnear at 6-7); even those of the Sheriff Court (*Bell* v *Fiddes* 1996 SLT 51, Lord Marnoch at 52 citing *West* v

Secretary of State for Scotland 1992 SC 385). The Court can reduce its own decrees, but only in the context of an ordinary action.

[43] If the court were to hold that the failure to appoint an oral hearing before refusing a request for a review was incompetent in terms of the petitioners' principal argument, or that it was incompatible with the European Convention, a subsequent or parallel ordinary process would be required to reduce the interlocutors of the Lords Ordinary. The determination in that event would depend upon the application of the conventional principles in relation to the reduction of court decrees, *viz.* whether, as a matter of equity, reduction was necessary, in exceptional circumstances, to ensure that substantial justice was done (*McLeod* v *Prestige Finance* [2016] CSIH 87, LP (Carloway), at para [11] under reference to the Lord Ordinary's (Lord Tyre's) analysis of *Adair* v *Colville & Sons* 1926 SC (HL) 51 and *Bain* v *Hugh LS McConnell* 1991 SLT 691; see also *Campbell* v *Glasgow Housing Association* 2011 Hous LR 7, Lord Woolman at para [48]). These principles apply even in cases where it is accepted that, in the reasoning which resulted in a particular interlocutor, the Lord Ordinary erred in fact or law. In the present cases, the court would have to consider whether the appointment of an oral hearing would have made a difference to the outcome of the original petitions.

[44] A petition to the *nobile officium* would not have been competent to reduce the interlocutors of the Lords Ordinary. Such a petition is competent only where there is no ordinary remedy available (*Gibson's Trustees* 1933 SC 190, LJC (Alness) at 205, citing More's Notes on Stair). Here an ordinary action of reduction is open to the petitioners (cf *Royal Bank of Scotland* v *Gillies* 1987 SLT 54, LJC (Ross), delivering the opinion of the court, at 55 quoting from *Glasgow Magdalene Institution Petrs* 1964 SC 227, LP (Clyde) at 229).

Construction of the statutory provisions

[45] The structure of sections 27B to D of the 1988 Act, and the relative RCS, are unusual in the context of a court (as distinct from a tribunal) process, and especially that of the Court of Session. Apart from it being uncommon for Court of Session procedure to be regulated so closely by statute (cf Senior Courts Act 1981, s 31(3)), the provisions introduce a unique procedure whereby it is possible for the decision of one judge to be reviewed and reversed by a different judge of equal standing. The provisions also refer to an appeal to the "Inner House", which is not a court but a collective name for the Divisions of the court (1988 Act, s 2(2)). These are matters which would merit re-consideration in due course, in favour of a scheme which would better fit with the court's structure. However, the unusual nature of the provisions does not prevent them from being, as they are, clear and unambiguous.

[46] The first stage is for the first Lord Ordinary to consider whether or not to grant the application for permission (1988 Act, s 27B(2)). He or she may do so without having an oral hearing (*ibid* s 27B(5); RCS 58.7(1)). The process so far is not challenged by the petitioners. The Guidance to Lords Ordinary (Practice Note No 3 of 2017 para 12) is that, if the Lord Ordinary is considering refusing permission, an oral hearing should "ordinarily" be appointed. In that event, the Lord Ordinary ought to produce a note which sets out the concerns which are to be addressed at the oral hearing. If the Lord Ordinary refuses the application without an oral hearing, he must give reasons for doing so (RCS 58.7(2)).

[47] Where a Lord Ordinary refuses an application after an oral hearing, the applicant has a right of appeal to the "Inner House" (1988 Act, s 27D(1) and (2)). This procedure is again not the subject of challenge. In terms of section 27C of the 1988 Act, where the Lord

Ordinary refuses an application (in whole or in part) without an oral hearing, the applicant "may…request a review of the decision at an oral hearing" (*ibid* Act, s 27C(2)). The applicant does not have a right to have a review at an oral hearing. The right is only to "request" such a review. That request is to be considered by a different Lord Ordinary (*ibid* s 27C(3)).

[48] If the request for a review is granted, the subsequent oral hearing will also be conducted by a different Lord Ordinary from the one who initially refused permission (in whole or in part) without an oral hearing. The second Lord Ordinary can either grant or refuse the request to have an oral hearing. If he grants the request, an oral hearing will then be conducted either by that (second) Lord Ordinary or, potentially, a third Lord Ordinary. In practice, efforts are made to ensure that it is the same Lord Ordinary who will conduct the oral hearing as the one who appointed it. The oral hearing is not the same as the consideration of whether to grant the request for a review. The hearing occurs later, as the RCS make clear (RCS 58.8(2)). It is to last no more than 30 minutes (RCS 58.9(1), but that is in the context of the Lord Ordinary having considered the papers in advance.

[49] If a decision to refuse permission to proceed occurs after an oral hearing, reasons must again be given (RCS 58.9(2) and an appeal is available (1988 Act, ss 27D(1) and (2)). These reasons ought to be produced as soon as reasonable practicable. If the request for a review at an oral hearing is refused, there is no right of appeal or scope for a reclaiming motion (*ibid* s 28 excluded by s 27C(6)). That refusal brings an end to the application for permission process. Although it is not specified in the RCS, a Lord Ordinary is expected to give reasons for a refusal of a request for a review at an oral hearing.

[50] In the absence of any ambiguity, there is no need to have recourse to the materials which preceded or accompanied section 89 of the Courts Reform (Scotland) Act 2014. However, *quantum valeat*, the interpretation which the court has adopted is consistent with these materials. The *Scottish Civil Courts Review* did not state that an applicant would be entitled to an oral hearing. Rather, it said that the papers would be considered by a Lord Ordinary who would "not normally require on oral hearing". In the event of a refusal of permission to proceed, the *SCCR* said that the petitioner "should be entitled to request that the matter be reconsidered at an oral hearing" (*SCCR* Vol I para 152 (*supra*)). That is what was enacted. The entitlement is to make the request to a different Lord Ordinary. It is not a right to an oral hearing. Although the system in England and Wales was to be a model for the new provisions, there is no suggestion that the English provisions were to be copied slavishly.

[51] The original Policy Memorandum (paras 173 and 187 *supra*) reflected the *SCCR* recommendations whereby the papers were to be considered by a Lord Ordinary who would not normally require an oral hearing. The petitioner would only be entitled to request that the matter be reconsidered at an oral hearing before another Lord Ordinary. The Revised Explanatory Notes (para 137 *supra*) were to the same effect. Although some of the ministerial statements (*supra*) might be regarded as ambiguous, they did not contradict the terms of the Memorandum, the Explanatory Notes or the final version of the Bill as enacted. In all of this, it should be borne in mind that the purpose of the permission stage was to avoid the waste of precious court time in having lengthy oral hearings, including those in reclaiming motions, on petitions which had no real prospects of success.

[52] The petitioners' principal argument is accordingly rejected.

The European Convention

[53] The petitioners did have access to the court in so far as they were entitled to lodge their petitions and request permission for them to proceed. The need for that permission may be seen as restricting a person's Article 6 right to access to the courts. The degree of access has to be sufficient to secure the individual's "'right to a court', having regard to the rule of law in a democratic society" (*Ashingdane* v *United Kingdom* (1985) 7 EHRR 528 at para 57, citing *Golder* v *United Kingdom* (1979-80) 1 EHRR 524). The right of access "by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals" (*ibid, a*gain citing *Golder* v *United Kingdom* at para 38). The right of access may thus be subject to limitations in the form of regulations by the state (*Miloslavsky* v *United Kingdom* (1995) 20 EHRR 442, at para 59). The state enjoys a margin of appreciation when imposing such limitations. However, the court must be satisfied, first, that they "do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (*ibid; Ashingdane* v *United Kingdom (supra)* at para 57). Secondly, "a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (*ibid*).

[54] The question is whether, in the context of their application for permission to proceed with their petitions, an oral hearing be held so that, *inter alia*, a right of appeal was opened up. The right to a public hearing under Article 6(1) of the Convention includes a right to an oral hearing unless there are circumstances which justify dispensing with such a hearing (*Saccoccia* v *Austria* (2010) 50 EHRR 11 at para 71). The purpose of holding an oral hearing is

not because there is any magic in the power of oral advocacy. It is to ensure that justice is transparent and is not conducted in secret (*ibid* para 70). That is also the purpose in domestic law (Court of Session Act 1693). In Convention terms, an oral hearing will not be required where there are no issues of credibility or contested fact which necessitate such a hearing and the court can fairly and reasonably decide the application on the basis of parties written submissions and any relevant documents (*Saccoccia* v *Austria*, at para 73; *Altay* v *Turkey* (2020) 70 EHRR 4, at para 75 citing *Nunes de Carvalho e Sá* v *Portugal*, unreported, 6 November 2018, App 55391/13, at para 190; *Pönkä* v *Estonia*, [2016] ECHR 961, at paras 31-34). Forgoing a hearing may be justified in cases which raise legal issues of a limited nature or involve no particular complexity (*Saccoccia* v *Austria* (*supra*), at para 76; *Altay* v *Turkey* (*supra*) at para 75 citing *Nunes de Carvalho e Sá* v *Portugal* (*supra*) at para 190). The overarching principle of fairness is the key consideration (*Saccoccia* v *Austria* (*supra*) at para 74).

[55] As the Lord Ordinary held (at para [39]), even when Article 6 applies with full force, there are circumstances in which an oral hearing is not required. Whether such a hearing can be dispensed with will depend on the nature of the case and whether it can be fairly disposed of without an oral hearing. The application of sift type procedures, whether in the context of a judicial review of an administrative decision or an appeal from a court or tribunal, is a common feature of many systems. It is seen as necessary, and proportionate, in order to avoid wasting precious judicial resources on cases where there is no real prospect of success. Such systems will comply with Article 6 provided that the case is one that can be dealt with fairly on the papers (see eg *Martin* v *United Kingdom* 1999 SCCR 941).

[56] The system which is under consideration involves a judge first considering whether an oral hearing is necessary or desirable before taking a decision to grant or refuse an application. This is unobjectionable because, in the event of a refusal, the petitioner has the opportunity of asking for a review of that decision at an oral hearing. It is the ability of a second, different judge to refuse that request that is under challenge on two grounds: first, it deprives the petitioner of presenting an argument at an oral hearing; and secondly, its effect is that there is no onward appeal to one of the Divisions of the court.

[57] A judicial review petition requires to identify an error in law which vitiates the decision which is challenged (*Wightman* v *Advocate General for Scotland* 2018 SC 388, Lord President (Carloway) at para [32]). That error ought to be capable of accurate and succinct expression in the written pleadings (*ibid* para [9]). The petitioner is then given two opportunities. First, he will set out in writing the reasons why his application should be granted. This is not a difficult exercise. The judge may afford the petitioner an oral hearing and should normally do so, when considering a refusal (Practice Note No 3 of 2017 on *Judicial Review*, para 12). If an oral hearing is appointed, the judge ought to produce a brief note setting out the concerns which he considers should be addressed at the oral hearing. The judge is nevertheless specifically entitled to refuse the application without such a hearing (1988 Act, s 27B(5)). This is intended to apply to situations in which the judge considers that there are no issues which he or she wishes to pursue because the petition is devoid of any real prospect of success. In order to decide that, the Lord Ordinary must have reasoned that an oral hearing would make no difference and thus serve no purpose.

[58] The second opportunity afforded to a petitioner arises in the context of a refusal, whether or not an oral hearing has been appointed. If the refusal is after an oral hearing,

there is a right of "appeal" to the "Inner House" and no difficulty arises. If the refusal has been made without an oral hearing, the Lord Ordinary must give the reasons for doing so (RCS 58.7(2)). The petitioner has no right of appeal. That is not a breach of the Convention (*Zubac* v *Croatia* (2018) 67 EHRR 28 (GC), at para 80; *Delcourt* v *Belgium* (1979-80) 1 EHRR 355, at para 25). In any event, the petitioner has another route, akin to an appeal, which is the right to request a review at an oral hearing. The request is made to a different Lord Ordinary. It is effectively a review of the first Lord Ordinary's decision not to hold an oral hearing but to refuse the application without one. The petitioner can state (in Form 58.8) the basis for seeking a review under reference to the Lord Ordinary's reasons. The second Lord Ordinary must, in light of the stated grounds, again ask himself or herself whether the appointment of an oral hearing would make any difference to the decision to refuse. Where the question is simply one of determining whether the error of law, which ought to have been clearly identified in the petition, has any real prospect of success, this system is one which is designed to achieve fairness in the decision making process. There is no reason to suppose that it does not do so. It does not impair the very essence of the right of access to a court. It provides a route to the court other than in circumstances in which two different judges have considered that there is no real prospect of success.

[59] In assessing the proportionality of the statutory provisions, regard must be had to the considered process through which they emerged. They were proposed in the *Scottish Civil Courts Review*, which was produced after consultation with the profession and the public. The *SCCR* had identified a particular mischief, which it thought ought to be remedied. This was the excessive amounts of time which were taken up in listening to oral argument on petitions which had no real prospect of success. This was using precious

resources in terms of court time, which was required in order to deal with other substantive business. The proposals were subjected to Parliamentary scrutiny before being enacted. The provisions have now been in force for some time. Although, as was identified in *Dinsmore* v *Scottish Ministers* [2019] CSOH 18 (Lord Doherty at para [19]) there may have been a point at which the level of refusals without an oral hearing might have been regarded as somewhat high, that situation has been remedied. This has been partly as a consequence of the error in approach being identified and partly because of the clarity now provided in relation to the meaning of the test to be applied (*Wightman* v *Advocate General* (*supra*), LP (Carloway) at para [9]).

[60] The statistics produced for 2019 indicate that approximately 44% of applications to proceed are granted without the need for an oral hearing. About 38% are appointed to oral hearings, when about a third are granted permission. Only 20% of the total are refused permission at this first stage. There were some 59 requests for a review at an oral hearing. This constituted almost all of the permission refused cases. Some 28 of these were refused. That represents only just over 10% of the total number of petitions lodged. This demonstrates a reasonable relationship of proportionality between the means employed (the scrutiny of two different judges and a defined test for the grant of permission) and the aim sought to be achieved (the elimination *in limine* of petitions without merit and the consequent preservation of judicial resources).

[61] The reclaiming motions are refused.