

COURTS REFORM (SCOTLAND) ACT 2014

EXPLANATORY NOTES

THE ACT

Part 3 – Civil Procedure

Chapter 2 – Court of Session

Section 89 – Judicial review

148. Section 89 inserts new sections 27A to 27D into the Court of Session Act 1988 which reform the procedures for petitions for judicial review as recommended in Chapter 12 of the Scottish Civil Courts Review. Previously, there have been no statutory time limits within which an application for judicial review must be made. Section 27A provides that a time limit of three months starting from the date that the grounds giving rise to the application for judicial review arose will apply to applications to the supervisory jurisdiction of the court. This is subject to the exercise of the court’s discretion to permit an application to be made outwith that period, for example, if there is good reason for delay in making an application, or where the court is satisfied that injustice would result if an application presented outwith the time period is not allowed to proceed. Subsection (2) provides that the time limit of three months will not apply to an application to the supervisory jurisdiction of the court under any enactment that specifies another period ending before the period of three months. Sections 27B, 27C and 27D add a new preliminary stage at which permission to proceed to judicial review is granted or refused. Each case will be considered by a judge from the Outer House of the Court of Session. There will be no necessity for a hearing at this stage. The judge will consider whether the applicant has sufficient interest in the subject matter and whether the application has a real prospect of success.
149. The Supreme Court, in *Axa General Insurance Ltd & Ors v the Lord Advocate & Others* [2011] UK SC 46¹, reviewed the law on title and interest to sue as regards judicial review provision – in particular, Lord Hope at paragraphs 62 to 63 and Lord Reed at paragraphs 170 and 175. The decision related to the “standing” of a third party to enter the process as respondents, but it is clear from the judgments that the statements on “standing” apply to applicants for judicial review, and that the substantive law in Scotland allows for a single test in which the petitioner for judicial review must demonstrate a sufficient interest in the subject matter of the proceedings. The Act reflects this in section 27B(2)(a) as part of the permission test.
150. The reference to a real prospect of success in section 27B(2)(b), reflects Lord Gill’s recommendations. In deciding whether or not to grant permission, the court will assess not whether the case is merely potentially arguable, but whether it has a realistic prospect of success subject to the important qualification that arguability cannot be judged without reference to the nature and gravity of the issue to be argued. Court rules will set out the process for the permission hearing. Lord Gill envisaged that the applicant would be required to serve upon the respondent and any interested party, within seven

¹ http://supremecourt.uk/decided-cases/docs/UKSC_2011_0108_Judgment.pdf

days of lodging the application, the application itself, a time estimate for the permission hearing, any written evidence in support of the application, copies of any document on which the applicant proposes to rely and a list of essential documents for advance reading by the court with the respondent having 21 days to answer the application and to decide whether to oppose the granting of leave.

151. The possible outcomes at the permission stage are that the court may:
 - grant permission for the application to proceed
 - grant permission for the application to proceed, but with specified conditions or only on particular grounds; or
 - refuse permission.
152. Section 27C provides that, if the permission to apply for judicial review is refused or granted subject to conditions or only on particular grounds and this was done without an oral hearing, then the applicant has seven days within which to request an oral hearing to review the original decision.
153. The request for review requires to be considered by a different judge. Section 27C(6) provides that section 28 of the Court of Session Act 1988 (reclaiming) 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 of the Court of Session 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.
154. Under section 27D, where the court refuses permission or grants permission subject to conditions or only on particular grounds following an oral hearing (whether at the first stage of permission or following a request under section 27C(2)), the applicant can appeal to the Inner House of the Court of Session within 7 days of the Outer House’s decision.
155. The provisions in the Act also deal (at section 27B(3)) with the interaction between the new judicial review permission stage and applications to the Court of Session for judicial review of unappealable decisions of the Upper Tribunal for Scotland. Section 50(4) of the Tribunals (Scotland) Act 2014 makes provision preventing the Court of Session and the Upper Tribunal for Scotland from granting permission for a second appeal unless the “second appeals test” set out by the Supreme Court in *Eba v Advocate General for Scotland [2011] UKSC 29*² is satisfied – that the second appeal raises an important point of principle or practice or there is some other compelling reason for allowing it to proceed.
156. The Act ensures that the same second appeals test is applied at the permission stage where the application for judicial review relates to a decision of the Upper Tribunal for Scotland in an appeal from the First-tier Tribunal for Scotland under section 46 of the Tribunals (Scotland) Act 2014 – see section 27B(3). Therefore, the court may only grant permission for the application to proceed if it is satisfied that the second appeals test is satisfied in addition to the new judicial review permission test set out in section 27B(3) (a) and (b). The second appeals test is set out in section 27B(3)(c).

Section 90 – Interim orders

157. The Scottish Civil Courts Review recommended at paragraphs 142 - 143 of Chapter 4 that powers to make orders *ad factum praestandum* (that is, orders requiring the performance of a certain act other than the payment of a sum of money) and orders for specific implement on an interim or final basis conferred on the Scottish Land Court by section 84 of the Agricultural Holdings (Scotland) Act 2003 should also be conferred

2 http://supremecourt.uk/decided-cases/docs/UKSC_2010_0206_Judgment.pdf

*These notes relate to the Courts Reform (Scotland) Act 2014
(asp 18) which received Royal Assent on 10 November 2014*

on the Court of Session and the sheriff court. Section 90 confers on the Court of Session in section 47 of the Court of Session Act 1988 a power to make an order (either final or interim) *ad factum praestandum*. Section 88 concerns similar provision as regards the sheriff courts.

Section 91 – Warrants for ejection

158. The Scottish Civil Courts Review recommended that the Court of Session should have jurisdiction to grant a decree of removing or warrant of ejection (paragraph 144, Chapter 4). The Court of Session can only grant a decree of removing if this is ancillary to another remedy sought. Section 91 inserts a new section 47A into the Court of Session Act 1988 giving the Court of Session competence to grant a warrant of ejection where it grants a decree for removing, so that no further order is required to compel the occupier of land to give up occupation.