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Judicial Review

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Judicial review is an important type of court action in which a judge assesses the lawfulness of a decision or action by a public body. This briefing provides an introduction to judicial review in Scotland.



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Executive Summary

Judicial review is the court process by which a judge reviews a decision, an action or a failure to act by a public body or other decision maker. Judicial review is only available where other effective remedies have been exhausted and where there is a legally recognised ground of challenge.

There have been recent, high-profile judicial review cases associated with the UK's departure from [the European Union](#) ('Brexit'), as well as cases associated with the UK and Scottish governments' public health response to the COVID-19 pandemic. These cases have raised the public profile of judicial review as a form of legal challenge to official decision making.

Who can bring an action for judicial review?

The rules on **standing** determine who may bring an action for judicial review. The previous law on standing in Scotland was widely criticised and [was changed by the UK Supreme Court in 2011](#).

The current test requires that the person or body raising an action has **sufficient interest** to do so. This test is thought to be beneficial to those seeking to represent a public interest, such as the protection of the environment.

Time limits

The [Courts Reform \(Scotland\) Act 2014](#) introduced a **three month time limit** in which to bring judicial review proceedings. There is discretion for the courts to depart from this time limit, where 'equitable' (i.e. fair) to do so.

The costs of raising a judicial review action

Someone raising a judicial review action can be exposed to considerable financial risk. Depending on the circumstances (for example, whether **legal aid** is available) cost can act as a barrier to using judicial review in an individual case.

Developments in the law relating to judicial review

There have been some significant developments in the nature of judicial review since the introduction of the current judicial review procedure in Scotland in 1985.

Some of these developments created new grounds of judicial review. They have opened up the possibility of challenge to legislation by way of judicial review to a much greater extent than was the case previously.

The legality of decision making, not its substance

However, despite recent developments, judicial review remains primarily concerned with **the process or legality of official decision making**. For the most part, judicial review is **not** focused on the merits of the decisions themselves.

An action for judicial review is not equivalent to a **statutory right of appeal**, which may involve examination of the merits of a decision. Even after a successful action for judicial review, the decision maker may be able to make the same decision again, so long as it

does so in a lawful way and following the correct process.

Overall, judicial review should be seen as part of a wider system for addressing grievances in relation to official decision making.

Introduction and background

This **introductory section** explains:

- [why judicial review is vitally important in today's society](#)
- [what the rest of this briefing covers.](#)

Why judicial review matters

Every day, official decisions are taken that affect the lives of individuals and which have an impact on businesses and other organisations. As one leading textbook notes, it is important for a free society that decision makers can be held to account for their decisions.

¹ Judicial review is one mechanism that aims to provide that accountability.

Judicial review is traditionally the remedy of last resort. Individuals and organisations applying for judicial review can also face significant challenges, financial and otherwise. However, in the right set of circumstances, judicial review is also one of the most high-profile and effective types of legal action that can be brought in Scotland. ²

A key point is that judicial review doesn't just enable some administrative decisions to be challenged and set aside. [It also has the wider effect of encouraging more careful decision making in the first place,](#) ³ because of the knowledge that decisions may later be tested in court. ¹

What this briefing covers

The [overview section of this briefing](#) provides a summary of the topic of judicial review as a whole. This section is intended as a useful introduction to the subject, and it can be read as a stand-alone briefing.

The **next section of the briefing** looks in more detail at [judicial review in practice](#). It considers what we know from [the published statistics](#) and [summarises some of the key cases that have recently made media headlines](#).

The briefing goes on to consider **important constitutional developments** relating to judicial review, with sections looking at:

- [human rights legislation and judicial review](#)
- [the impact of the UK's changing relationship with the EU on the law of judicial review](#)
- [how the Scotland Act 1998 affects a judicial review action against the Scottish Parliament or the Scottish Government.](#)

Later sections of the briefing **explore important practical topics in greater detail** than [the overview](#) at the start of the briefing provides. For example, there are sections on:

- [who can bring an action for judicial review \(standing\)](#)
- [how to fund an action for judicial review](#)
- [what the grounds for bringing a judicial review action are](#)
- [the remedies that can be awarded by the court if the court action is successful.](#)

The **final sections of the briefing** look at:

- [judicial review as part of a wider system for addressing grievances](#)
- [various recent and current policy initiatives relevant to judicial review](#), not otherwise covered in earlier sections of the briefing.

An overview of judicial review in Scotland

This section provides an **introductory overview** to judicial review in Scotland.

Which court?

A court action for judicial review in Scotland can only be raised in the **Outer House** of the [Court of Session](#) in Edinburgh.

A decision of the **Outer House** can be appealed (**reclaimed**) to the Court of Session's **Inner House**. A decision of the Inner House can, in turn, be appealed to the [UK Supreme Court](#) in London. In some circumstances, appealing against a decision requires a court's permission to do so.ⁱ

In some limited circumstances, a judicial review case beginning in the [Court of Session](#) may be later transferred to the tribunal system. A tribunal is a specialist forum for resolving disputes.

Some key terms

In Scotland, a court action for judicial review is begun using a document known as a **petition**. The person or body bringing the court action is called a **petitioner**. The person or body defending the action is called the **respondent**.

The court may permit [interventions in court proceedings](#) by third parties (**interveners**) who are not litigants in the case. These involve third parties providing written or verbal arguments on key legal issues relating to the case.

How the court decides what to do

When considering a petition for judicial review, the [Court of Session](#) will apply the following:

- **legislation**, including the [Court of Session Act 1988](#), as amended by the [Courts Reform \(Scotland\) Act 2014](#)
- **case law**, i.e. the branch of law developed by the decisions of judges in earlier cases
- the **court rules**, which determine how the court proceedings relating to judicial review operate (especially [Chapter 58](#) and [Chapter 58A](#) of those rules).

ⁱ [Court of Session Act 1988](#), sections 28, 40 and 40A; [Court of Session Rules](#), Chapter 41A.

There are some key differences between the law and court procedure associated with judicial review in Scotland, compared to their equivalents in other parts of the UK.

However, there are also aspects of judicial review where the law is virtually identical UK-wide. Consequently, when making decisions, the Scottish courts regularly take into account case law from other parts of the UK.

Public bodies and government ministers

A judicial review action can be raised against a wide range of different **public bodies**, including, for example:

- UK and Scottish government departments and ministers
- [non-departmental public bodies](#) (NDPBs)
- [NHS health boards](#)
- [local authorities](#).

[A full list of Scottish public bodies can be found on the Scottish Government's website.](#)

Just because a body is a public body does not mean that all of its acts and decisions can be subject to judicial review. For example, **private contractual disputes** between a public sector employer and its employee cannot be judicially reviewed.

Private bodies

A key difference between judicial review in Scotland, compared to judicial review in England and Wales, relates to the **scope of judicial review**.

In Scotland, it is possible, where certain conditions are satisfied, [for the acts and omissions of private bodies in Scotland](#), such as the governing bodies of sporting or trade associations or private clubs, to be the subject of an action for judicial review. In England and Wales, an action for judicial review is only possible in relation to bodies exercising public functions.

Legislation

Legislation of both the UK and Scottish Parliaments can be the subject of an action for judicial review in Scotland. There are two main types of legislation:

- **primary legislation** - Acts of Parliament, the method by which major new laws, or significant changes to existing laws, have traditionally been made

- **subordinate or secondary legislation** ('subordinate legislation' for the remainder of this briefing) - this is the law created by ministers, or other bodies, under powers given to them by an Act of Parliament.

Subordinate legislation has traditionally been used to fill in the details of primary legislation or to bring specific provisions of primary legislation into force. However, [more significant policy changes are likely to be included in subordinate legislation after Brexit](#).

A key point is that **subordinate legislation** can be reviewed [on the full range of judicial review grounds](#) that are available in other circumstances. However, although primary legislation can be subject to judicial review, **the opportunities for review are more limited**.

The costs of a judicial review action and how to pay for it

[A petitioner in a judicial review action can be exposed to considerable financial risk](#). The **costs of using lawyers** to present this type of case can be high. Significant **court fees**, payable directly to the court by the litigants, can be payable.

Crucially, it is also the usual practice for **the losing person or organisation** in a civil court case to be **responsible for paying the winning person's or organisation's legal expenses** in relation to the case, as well as their own.

[Depending on the circumstances, legal aid may be available to an individual raising a judicial review action](#). This has a range of benefits.

Crowdfunding, where a large number of people donate money online to a fundraising cause, appears to be becoming a more common for judicial reviews.^{4 5 6 7}

Where the petitioner is **acting in the public interest**, [a court may grant a protective expenses order](#). This shields the petitioner, at least to some extent, from the normal rule relating to the other side's legal expenses.

Some preliminary requirements associated with a judicial review action

[Where an effective alternative statutory remedy exists](#), a person or organisation is required to use it before seeking judicial review,ⁱⁱ unless special or exceptional circumstances apply.⁸

The petitioner **usually has three months to lodge an application for judicial review** from the date on which the grounds giving rise to the application first arise. However, the

ii [Court of Session Rules](#), rule 58.3(1).

court may extend the time limit in an individual case, where **equitable** (i.e. fair) , to do so.ⁱⁱⁱ

Under case law, a petition can also be rejected by the court because it is **premature** or **raises a hypothetical or academic issue**.

Key stages of a judicial review action

A judicial review action has **three main stages** in the Outer House of [the Court of Session](#).

First, there is **the permission stage**, a significant hurdle to clear in practice,⁹ but not intended to be an 'insurmountable barrier'.¹⁰

At this stage, the court must decide that the petitioner has **standing**. In other words, [whether it considers whether the petitioner has a 'sufficient interest' in the outcome of the case](#). The petition must also have **a real prospect of success** according to one or more of [the grounds of review](#).^{iv}

If permission is granted, the court will then look to set dates for **two court hearings**:

- **the procedural hearing**, if the court considers one is required^v
- **the substantive hearing**, the main hearing in relation to the case.

The aim of the **procedural hearing** is to establish that the case is well-prepared and ready to proceed to the substantive hearing.^{vi}

The **substantive hearing** is set for a date **no later than 12 weeks** from the date permission was granted, except where the judge is satisfied a longer period is necessary.^{vii}

At the substantive hearing, the court takes an in-depth look at [whether one or more of the grounds for judicial review have been established](#). If so, the court will consider [whether the remedy asked for by the petitioner](#) to resolve the case should be granted.

The court may also determine [how the parties' legal costs should be divided up between the parties at this stage](#), although this can be dealt with in a separate hearing.

At the end of the substantive hearing the court may give its **decision**, for example, if there is a particular urgency associated with the case. Otherwise, a **written judgement** will follow the substantive hearing, **usually within about three months**.¹¹

iii [Court of Session Act 1988](#), section 27A.

iv [Court of Session Act 1988](#), section 27B (2).

v [Court of Session Rules](#), rule 58.11(1)(b).

vi [Court of Session Rules](#), rule 58.12(1).

vii [Court of Session Rules](#), rule 58.11(1)(a).

The grounds of review

Traditionally, the **grounds of judicial review**, a key part of the case, have been divided into three main categories:

- the decision maker acted unlawfully (**illegality**)
- the decision was made using an unfair procedure (**procedural impropriety or unfairness**)
- the decision was so unreasonable as to be irrational (**irrationality or unreasonableness**).

However, the categories are overlapping and the grounds are still evolving. For example, there are now grounds of review associated with **breaches of Convention rights**.

Convention rights are rights protected by the **European Convention on Human Rights** which have been incorporated into UK domestic law.^{viii} They are not affected by the departure of the UK from **the European Union**.

The **Scotland Act 1998** says that **an Act of the Scottish Parliament** is not law in so far as any of its provisions are **outwith the legislative competence** of the **Scottish Parliament**.^{ix} The Act imposes similar restrictions on Scottish **subordinate legislation** and **the activities of the Scottish Government**.^x Consequently, the Scotland Act also created additional grounds of challenge.

Legal remedies

If a judicial review action is successful, the court has discretion to decide what **legal remedy** it should grant to resolve the case. **A variety of remedies are possible**. Some remedies require a decision maker to take a decision again. However, in keeping with the nature of judicial review, the court will not stipulate what the content of any new decision should be.

An **award of financial damages** to an aggrieved individual or organisation is only available in limited circumstances.

viii **Human Rights Act 1998**.

ix **Scotland Act 1998**, section 29.

x **Scotland Act 1998**, section 57.

Judicial review in practice: the statistics and the headlines

This section considers how the law of judicial review is used in practice. It looks at both [the official statistics available in Scotland](#), as well as [some recent, high-profile judicial review cases](#).

A very small part of the courts' total caseload

Judicial review actions consistently comprise a very small percentage of the total court actions begun in the civil courts in any given year in Scotland.

This is because most civil cases are heard by [the local sheriff courts](#), not [the Court of Session](#).

For example, in **2020-2021**, judicial review actions were **less than 1% of cases** initiated in the civil courts overall (**238 judicial review cases** out of **43, 632 civil cases**).¹²

However, judicial review cases do represent a significant proportion of the [Court of Session](#)'s workload. For example, they were **around 17% of the cases** started there in **2019-20** and **around 11% of the cases** started there in **2020-21**.¹²

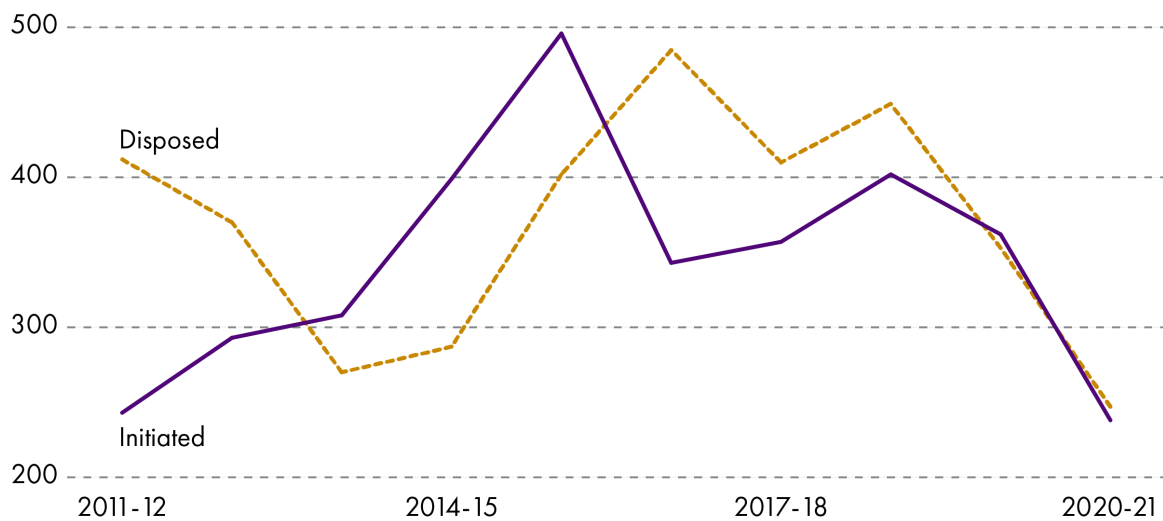
Trends in the judicial review caseload

For a long time after the judicial review procedure was **introduced in 1985**, there was a **steady increase in the judicial review caseload**.

For example, there was only an average of around **50 cases initiated a year** in the first full five years of the judicial review procedure.¹³ This compares to an average of:

- around **320 cases a year** in the five years between 2010-11 and 2014-15
- around **390 cases a year** in the five years between 2015-16 and 2019-20.¹⁴

Figure 1: Scottish judicial review cases initiated and disposed of between 2011-12 and 2020-21



SPICe and [Scottish Government Civil Justice Statistics 2020-21](#), Table 25

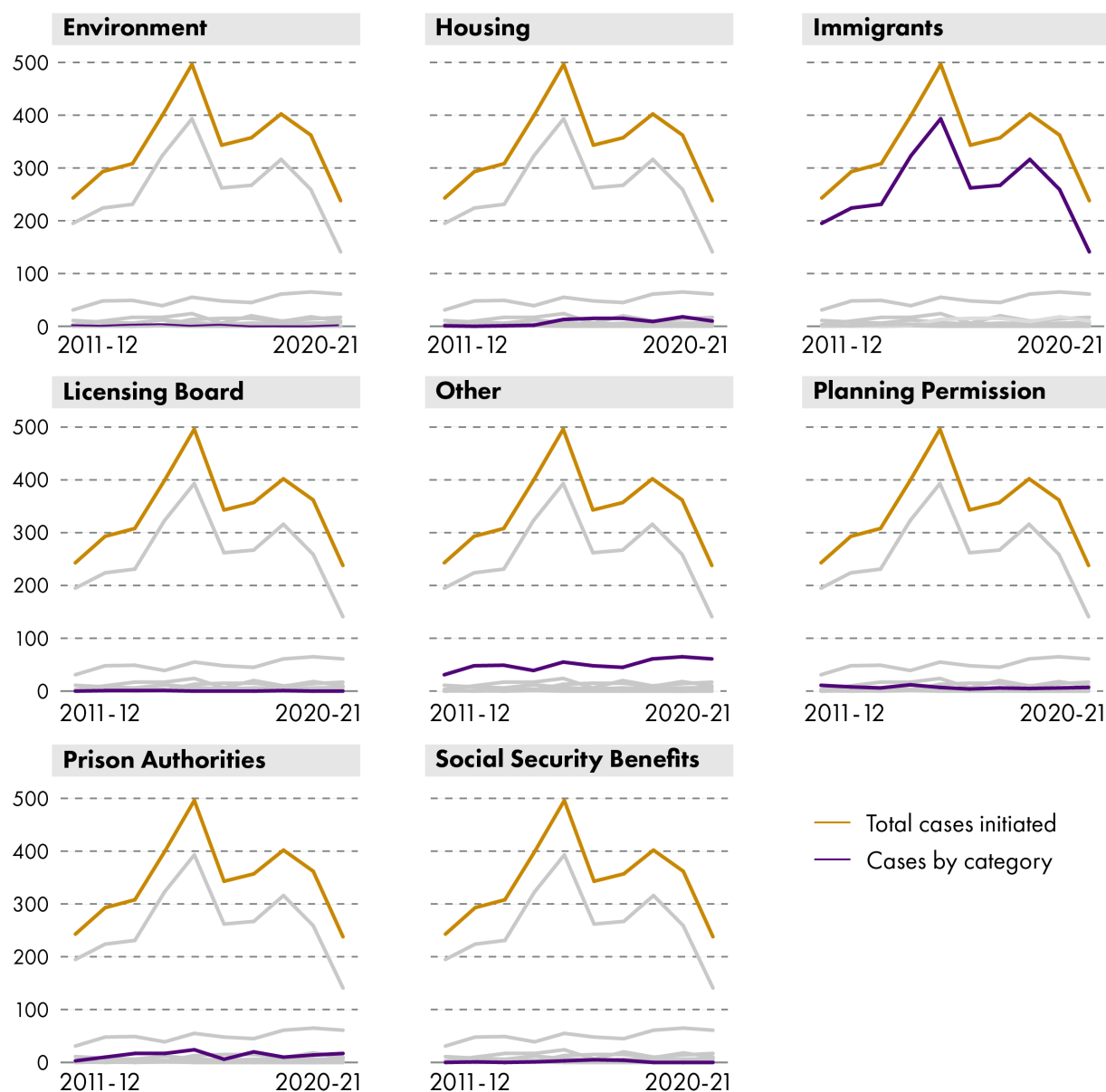
As Figure 1 shows, over the last ten years, the number of judicial review actions initiated in any given year has been variable.

Between **2015-16** and **2016-17** there was a **large decrease in the number of cases** initiated. This is partly due to a rise in number of judicial reviews in the preceding year, ahead of the reforms specified in the [Courts Reform \(Scotland\) Act 2014](#).¹⁵ Some of these reforms were unfavourable to would-be petitioners, likely encouraging them to initiate proceedings before the law changed.

There were **238 judicial review cases** initiated in **2020-21**, a **34% decrease** on 2019-20.¹⁶ This decrease relates to the drop in the number of judicial review cases on immigration and asylum during the pandemic, [a topic discussed in more detail in the next section of the briefing](#).

What are judicial review cases raised on?

Using [the Scottish Government's categorisation](#),¹⁴ **Figure 2** shows the trends in judicial review cases initiated over the last ten years **by policy area**.

Figure 2: Scottish judicial review cases initiated by policy area between 2011-12 and 2020-21SPICe and [Scottish Government Civil Justice Statistics 2020-21](#), Table 25

Immigration and asylum cases

Immigration and asylum cases have been a significant driver of overall trends in judicial review cases, and typically make up a largest proportion of total cases initiated.^{17 18 16}

For example, immigration and asylum cases represented **between 70% and 80%** of judicial review cases started in Scotland over the five years between 2015-16 and 2019-20.¹⁶

Judicial review cases relating to a person's immigration or asylum status are often started in response to a decision to deport someone from Scotland.

An academic article (from 2015) ¹⁸ identifies the following factors as being present in policy areas where there are a lot of judicial review actions:

- the absence of alternative remedies - or the presence of gaps in available remedies
- the importance of the issue for the litigant
- the availability of suitably expert legal advice and representation
- the ability of the potential petitioners to finance the litigation (e.g. [through legal aid](#)).

The article argues that, in **immigration and asylum cases**, all these factors come together.

In **2020-21**, however, the number of immigration and asylum cases initiated **fell by 46%** compared to the preceding year. They made up **around 60%** of all judicial review cases initiated in 2020-21. ¹⁶ All of, or part of, the drop is likely to be because the Home Office made less decisions in relation to a person's immigration or asylum status during the height of the pandemic.

Other cases

The next largest set of cases in [the Scottish Government statistics](#) are a group of cases classified simply as **other**, without any further breakdown by subject area.

This category is rising as a percentage of the total cases. For example, it represented around **18% of the total cases in 2019-20**, compared to around **10% of cases in 2014-15**. ¹⁶

Overall, the 'other' category may obscure changes in the nature of the judicial review caseload which might otherwise attract policy and academic commentary.

There have been two main surges in cases involving prison authorities: one in **2003–2004**, and a second one in **2009–2010**. ¹⁹ Numbers have dropped dramatically since the second surge in 2009–10. ¹⁴ Both surges are thought to relate to cases connected to the use of 'slopping out'. It was ultimately established by case law that this contravened prisoners' human rights and gave rise to a claim for damages. ¹⁹

A snapshot of some recent high-profile cases

The snapshot of recent cases in this section, and other sections, of the briefing is not intended to be an exhaustive treatment of recent developments in judicial review.

The cases that make media headlines, and raise the public's awareness of judicial review,

are not those which [the published statistics](#) suggest make up the largest proportion of the judicial review caseload in Scotland.

High-profile judicial review actions tend to be those that involve legal challenges to key policy decisions by the UK and Scottish governments. Two areas of government activity have been particularly prominent in this regard in recent years:

- the UK's decision to leave the EU (Brexit) and the implementation of that decision
- the UK and Scottish governments' response to COVID-19 pandemic.

Some high-profile judicial review challenges in these areas are set out in the box below.

R (Miller) v Secretary of State for Exiting the European Union (2017) ²⁰

The [UK Supreme Court](#) ruled that the UK Government was not allowed to begin the process for leaving the EU (via [an Article 50 notification](#)) without explicit authority from an Act of Parliament. The unsuccessful argument of the UK Government had been that [its prerogative powers](#), i.e. special powers which can be used without Parliament's approval, could be used to invoke Article 50.

R (Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland (2019) ²¹

These joint cases explored the limits of [the prerogative power](#) to prorogue (suspend) the UK Parliament. The cases concerned whether the advice given by the Prime Minister, Boris Johnson, to Queen Elizabeth II that the UK Parliament should be prorogued was unlawful. At the time, withdrawal from the EU was imminent.

The [UK Supreme Court](#) found that an attempt to prorogue Parliament for a period of five weeks significantly interfered with Parliament's ability to carry out its constitutional functions, including that of holding the Government to account. With no reasonable justification offered for such an interference, it was found to be unlawful.

Philip v Scottish Ministers (2021) ²²

In this case brought by a number of Christian churches, the Court of Session found that the closure of places of worship by the Scottish Government under COVID-19-related regulations was unlawful. The successful ground of challenge was based on [the right to worship as a Convention right](#). The court found that [the legislative interference with that Convention right had been disproportionate](#).

Katherine Rowley v Minister for the Cabinet Office (2021) ²³

In this case, the High Court of Justice for England and Wales found that the UK Cabinet Office had discriminated against a profoundly deaf woman and breached its statutory duty to make reasonable adjustments in respect of a disability. This breach occurred when the Cabinet Office had failed to provide British Sign Language interpretation for two live scientific briefings for the public in September and October 2020.

Night Time Industries Association v Scottish Ministers (2021)

This case involved [a challenge to the introduction in Scotland of a statutory 'vaccine passport scheme'](#), which required proof of vaccination for entry to bars and nightclubs. [The Court of Session did not accept that the scheme was disproportionate, irrational or unreasonable](#) but was "an attempt to address the legitimate issues identified in a balanced way." Consequently, it was within the margins of a reasonable government response to the pandemic.

R (on the application of Good Law Project and EveryDoctor) v Secretary of State For Health and Social Care (January 2022)

[This case, on contracts relating to the supply of Personal Protective Equipment \(PPE\),](#)

was one of several cases relating to the UK Government's awarding of contracts for various goods and services during the COVID-19 pandemic.

The High Court of Justice for England and Wales found that the Government's operation of a 'VIP lane', which conferred preferential treatment for bids was unlawful. This approach failed to comply with the obligations of equal treatment and transparency contained in the relevant legislation relating to public contracts.^{xi} However, even if two such suppliers had not been allocated to the high priority lane, it was highly likely that they still would have been awarded contracts because of the substantial volumes of PPE they could supply to meet an urgent need. In February 2022, the Good Law Project [reported it had sought permission from the court to appeal parts of the High Court's judgement.](#)

^{xi} The Public Contract Regulations 2015 (SI 2015/102).

Key constitutional developments affecting judicial review

This section of the briefing considers **three key constitutional developments** relevant to judicial review over the last fifty years:

- [the incorporation of human rights into domestic UK law](#)
- [the impact of the UK's changing relationship with the EU](#)
- [the creation of the devolved Scottish Parliament and Scottish Government.](#)

Human rights and judicial review

This first section considers how **the development of human rights law** has affected judicial review.

The Human Rights Act 1998

The [Human Rights Act 1998](#) ('the Human Rights Act') came fully into force in 2000. [As explained earlier in the briefing](#), the Act provides for certain rights protected by the [European Convention on Human Rights](#) ('the Convention') to be part of UK domestic law. These rights are known as **Convention rights**.

A new ground of review - breach of Convention rights

One effect of the [Human Rights Act](#) is that it is now possible to bring an action for judicial review in the [Court of Session](#) based on an alleged breach of one of the Convention rights. Previously, an individual alleging a breach had to take their case to the [European Court of Human Rights](#) in Strasbourg.

More information on **the content of specific Convention rights** are provided under [Grounds of judicial review](#) at [Breach of Convention rights](#).

Public bodies and subordinate legislation

Section 6 of the [Human Rights Act](#) provides that it is unlawful for a **public authority** to act in a way which is incompatible with a Convention right, unless the wording of an Act of the UK Parliament means they have no choice.

Section 6 allows people whose rights have been infringed to challenge the validity of both:

- administrative decisions
- [subordinate legislation](#) under which decisions are made.

Administrative decisions and [subordinate legislation](#) can be **struck down** by the courts, i.e. found to be invalid and unenforceable, by virtue of section 6.

Acts of the UK Parliament

This section of the briefing considers how the [Human Rights Act](#) affects **Acts of the UK Parliament**.

Note that, separately, **Acts of the Scottish Parliament** are classified as **subordinate legislation** under the [Human Rights Act](#).^{xii}

The [Scotland Act 1998](#) also contains specific provisions on **Convention rights** and **Acts of the Scottish Parliament**, [discussed later in the briefing](#). It is these provisions which are commonly used in practice in relation to human rights challenges of Acts of the Scottish Parliament.

Obligation to interpret

Under the [Human Rights Act](#), courts are **obliged to interpret** Acts of the UK Parliament consistently with Convention rights so far as it is possible to do so.^{xiii} Therefore, some cases of potential inconsistency between provisions of such Acts of Parliament and Convention rights can be resolved by the court's interpretation of those provisions.

Declaration of incompatibility

Where it is not possible to interpret an Act of the UK Parliament so as to make it compatible with Convention rights, a **higher court** can issue a **declaration of incompatibility** in relation to that act.^{xiv}

In the context of a Scottish judicial review, such a declaration can be made by the [Court of Session](#) and, should the case be appealed to [UK Supreme Court](#), that court.

xii Human Rights Act 1998, section 21.

xiii [Human Rights Act 1998](#), section 3.

xiv [Human Rights Act 1998](#), section 4.

A declaration of incompatibility:

- does not make an Act of Parliament invalid
- is not binding on the parties against which it is issued
- does not have any effect on the rights of the parties to the case in which it is made.

Instead UK Government ministers are empowered to make **an order repealing or amending the legislation** in question, as they think appropriate, to remove the incompatibility.^{xv}

A declaration of incompatibility can still have a big impact in practice. UK Government ministers will be aware that there is the possibility that the [European Court of Human Rights](#) in Strasbourg could find the United Kingdom in breach of the [European Convention on Human Rights](#) (ECHR).

Providing all domestic judicial remedies have been exhausted, it is still an option for an individual to take a case against the United Kingdom to Strasbourg because they feel they been denied a remedy under the ECHR.

The impact of the UK's changing relationship with the EU on judicial review

On 1 January 1973, the UK **joined** the [European Economic Community](#), which has since evolved to become today's [European Union](#) ('the EU').

The UK **left** the EU on 31 January 2020 ('Brexit'). There then followed a transition period, before EU law ceased to have effect in the UK at 11 pm on the later date of **31 December 2020**.

This section considers the impact of the UK's (changing) relationship with the EU on the law of judicial review.

The impact of the UK's membership of the EU

Prior to joining the EU, the UK Parliament was recognised by the UK courts as **sovereign**. This meant that Acts of Parliament were treated as the supreme law of the land and were **immune from judicial review**.

When the UK joined the EU, two key principles became fundamental:

- The **principle of the supremacy of EU law** says that a country's domestic law must be consistent with EU law (whatever the source of that EU law). Furthermore, to the

xv [Human Rights Act 1998](#), section 10.

extent that it is not consistent, EU law must take priority over domestic law.

- The **principle of direct effect** says that, where certain conditions are satisfied, rules of EU Law can be relied upon directly by litigants in national courts. Crucially, this position applies even if the law in question has not been specifically incorporated into a member state's domestic legal system.

A very important consequence of these two principles is that, in the UK, **Acts of Parliament, subordinate legislation and decisions of public bodies** could be the subject of a judicial review action in the national courts on the basis that they were incompatible with EU law.

The UK's departure from the EU and EU retained law

Since EU law ceased to apply in the UK (at 11 pm on 31 December 2020), as a general rule, it has **not** been possible to raise an action for judicial review based on an alleged breach of EU law.

The one exception to this general rule is where the [UK-EU Withdrawal Agreement, discussed later in the briefing](#), requires the UK to adhere to EU law, principally in the context of Northern Ireland.

In the post-Brexit era, the key concept which affects judicial review is **retained EU law**.^{xvi}

Retained EU law is a new type of UK domestic law. Broadly speaking, it is a snapshot of the EU law which was in place in the UK at the point EU law ceased to apply in the UK.

Not all EU law became retained EU law, [a topic discussed in more detail later in the briefing](#).

Retained EU law was created so that there was no gap in UK law immediately after EU law stopped applying. The underlying policy aim was to provide **legal certainty** in the period immediately following EU exit.

The UK Government has [recently announced it is planning to introduce a 'Brexit Freedoms Bill'](#), with one policy aim to make it easier to amend or remove retained EU law than it is at present.

^{xvi} European Union Withdrawal Act 2018, sections 2, 3 and 4.

Retained EU law and judicial review

There are **three key ways** in which **retained EU law** might be relevant in the context of judicial review after Brexit:

- In certain circumstances, [it will be possible to bring a petition for judicial review based on an alleged breach of retained EU law](#).
- [Retained EU law itself can sometimes be challenged by way of judicial review](#). However, **depending on the type of retained EU law**, it cannot be challenged on all the grounds of judicial review which are available in other circumstances.
- Domestic legislation (made on or after 11 pm on 31 December 2020) which **amends** retained EU law can itself be judicially reviewed.

The first two scenarios involve complex areas of law and are considered in more detail in the next sub-sections of this briefing.

A possible breach of retained EU law

To explain why a judicial review action might be possible for an alleged breach of retained EU law, two key terms are used in this part of the briefing:

- First, **IP completion day**, which is defined in legislation as 11 pm on 31 December 2020 (when EU law ceased to apply in the UK).^{xvii}
- Second, as a convenient shorthand, UK domestic law made **before** the IP completion day is referred to here as **pre-IPCD domestic law**.

Section 5 of the **European Union Withdrawal Act 2018** ('the 2018 Act') says:

- The [principle of the supremacy of EU law](#) does **not** apply to any legislation or other legal rule passed or made **on or after** IP completion day.
- However, with some exceptions and qualifications, [the principle of the supremacy of EU law](#) continues to apply **on or after** IP completion day to **pre-IPCD domestic law**.

Crucially, this means that there could be a challenge by way of judicial review to **pre-IPCD domestic law** on the ground that the domestic law is incompatible with retained EU law.

For those interested in the detail of the 2018 Act:

- The rules contained in section 5 of the 2018 Act are themselves subject to the **overriding supremacy** of the [UK-EU Withdrawal Agreement](#), a topic explored later in [this briefing](#).

^{xvii} European Union (Withdrawal Agreement) Act 2020, section 39.

- The principle of supremacy of EU law applies almost exclusively to **pre-IPCD domestic law**. However, as a limited exception, it can also apply to certain **modifications of pre-IPCD domestic law** which are made **on or after** IP completion day.^{xviii}

A [UK Government policy paper from January 2022](#) suggests that the **Brexit Freedoms Bill**, [recently announced in the Queen's Speech](#), may revisit the issue of whether the principle of the supremacy of EU law should apply in respect of pre-IPCD domestic law.

Challenging retained EU law by way of judicial review

After Brexit, an individual or organisation might also be able to bring a judicial review action **to challenge a piece of retained EU law**.

However, there are several types of EU retained law, and what is possible here depends on **the type of retained EU law** at issue. Two of the main types of retained EU law in this context are:

- [EU-derived domestic legislation](#)
- [direct EU legislation](#).

These are considered in turn in the next two sub-sections of this briefing.

EU-derived domestic legislation

Section 2 of the European Union (Withdrawal) Act 2018 ('the 2018 Act') preserves **EU-derived domestic legislation**.

EU-derived domestic legislation is typically [domestic subordinate legislation](#), or sometimes [primary legislation](#). This legislation has been passed in order to implement one or more **EU directives** (though sometimes other sources of EU law).

EU directives set out a legal framework which member states have to follow. However, subject to some constraints, they leave **discretion to the member state** as to **how** to make it part of their law and administrative arrangements.

Whatever the status a particular piece of EU-derived legislation had prior to [IP completion day](#), that is to say as primary or subordinate legislation, the 2018 Act **preserves this status on or after IP completion day**.^{xix} Consequently, the scope for a possible challenge by way of judicial review to EU-derived domestic legislation can be summarised as described in **Figure 3** below.

xviii European Union Withdrawal Act 2018, section 5(3).

xix European Union (Withdrawal) Act 201, section 7(1A).

Figure 3: Judicial review and EU-derived domestic legislation

Ground of judicial review	UK Statutory Instrument (SI)	Scottish Statutory Instrument (SSI)	Act of the UK Parliament	Act of the Scottish Parliament
Breach of Convention rights under the Human Rights Act 1998	✓	✓	✓ but the courts can only make a declarator of incompatibility	✓ (they are treated as subordinate legislation in this context) Much more common to use the Scotland Act 1998
Outwith 'legislative competence' under the Scotland Act 1998 (includes a breach of Convention rights)	✗	✓	✗	✓
The 'so-called' traditional grounds of review (illegality, procedural unfairness, unreasonableness)	✓	✓	✗	✗ (except illegality and unreasonableness in exceptional circumstances)

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In relation to Figure 3, note that both:

- the concept of 'legislative competence' under the Scotland Act 1998
- the use of the 'traditional' grounds of review for Acts of the Scottish Parliament

are explored in more detail later in the briefing.

Direct EU legislation

Another key form of EU retained law is **direct EU legislation**. This, in turn, includes:

- EU regulations (not to be confused with domestic subordinate legislation)
- decisions
- tertiary legislation.

EU regulations contain detailed legal rules. Regulations have the force of law in an EU member state and throughout the EU. A member state does not have to create their own legal rules in order to ensure the regulation has the desired legal effect.

A **decision** is binding on those to whom it is addressed, for example, an EU member state, an individual or a company.

Tertiary legislation are measures in order to supplement and amend, or to implement, the rules set out in EU directives, regulations or decisions.

Section 3 of the **European Union Withdrawal Act 2018** ('the 2018 Act') converts direct EU legislation into UK domestic law. Where legislation is converted under this section, it is the text of the EU legislation itself which forms part of domestic legislation.

Schedule 1, para 1 of the 2018 Act says that there is no right in domestic law on or after **IP completion day** to challenge any **retained EU law** on the basis that, immediately before IP completion day, **an EU instrument** was invalid.

Although this rule is subject to some exceptions and qualifications, it greatly limits the scope to challenge direct EU legislation by way of judicial review.

However, separately, **schedule 8 of the 2018 Act** makes special provision on how the **Human Rights Act 1998** ('the Human Rights Act') applies to direct EU legislation. This leaves scope for judicial review in this context.

Schedule 8 splits direct EU legislation into **two categories**. These are retained direct **principal** EU legislation and retained direct **minor** EU legislation. For the purposes of the Human Rights Act:

- any **principal retained EU law** is to be treated as domestic **primary legislation**.
- any **minor retained EU law** is to be treated as domestic **primary legislation so far as it amends any primary legislation**. Otherwise it is to be treated as **subordinate legislation**.^{xx}

The significance of this is that **subordinate legislation can be struck down under the Human Rights Act**. However, Acts of the UK Parliament **can only be the subject of a declaration of incompatibility before the courts** (which does not affect the validity of an Act.)

The overall scope for a possible challenge to direct EU legislation by way of judicial review is summarised in Figure 4 below.

xx European Union (Withdrawal) Act 2018, schedule 8.

Figure 4: Judicial review and direct EU legislation

Ground of judicial review	Retained direct principal legislation	Retained direct minor legislation
Breach of Convention rights under the Human Rights Act 1998	✓ but the courts can only issue a declarator of incompatibility	✓ (but the courts can only issue a declarator of incompatibility if it is to be treated as primary legislation)
Outwith 'legislative competence' under the Scotland Act 1998 (includes a breach of Convention rights)	✗ not legislation made by the Scottish Parliament	✗ not legislation made by the Scottish Parliament
The 'so-called' traditional grounds of review (illegality, procedural unfairness, unreasonableness)	✗	✗

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Other relevant parts of the UK-EU Brexit arrangements

Although not falling within [the definition of retained EU law](#), some aspects of UK-EU Brexit agreements are **directly enforceable in the UK legal system** in the same way that EU law was previously:

- First, the **European Union (Withdrawal) Act 2018** says the [UK-EU Withdrawal Agreement](#), including [the Northern Ireland Protocol](#), has direct effect in the UK legal system where the agreement requires this.^{xxi} The [UK-EU Withdrawal Agreement](#) sets out the terms of the UK's exit from the European Union. [The Northern Ireland Protocol](#) helps prevent checks along the land border between Northern Ireland (in the UK) and the Republic of Ireland (in the EU).
- Second, the **European Union (Future Relationship) Act 2020** makes a general modification to all existing domestic law, so far as necessary to comply with the [UK-EU Trade and Cooperation Agreement](#).^{xxii} This agreement, which is separate from the [UK-EU Withdrawal Agreement](#), sets out the UK-EU future relationship.

It seems possible that a potential judicial review action could be based on domestic laws or action by a public body that allegedly breaches either of those agreements.

^{xxi} European Union (Withdrawal) Act 2018, section 7A.

^{xxii} European Union (Future Relationship) Act 2020, section 29.

Note that the [Northern Ireland Protocol Bill](#) was introduced by the UK Government on 13 June 2022. If enacted, the Bill would empower UK Ministers to disapply elements of the Northern Ireland Protocol unilaterally. The Institute for Government has provided [a helpful summary of the Bill](#).

Subordinate legislation after Brexit

There is one final point relating to judicial review and the post-Brexit world.

The powers of UK and Scottish Government Ministers to make subordinate legislation in certain areas are much more significant than they were prior to the UK's EU exit. This is as a result of powers granted to Ministers in various different pieces of Brexit-related primary legislation.

Noteworthy policy changes can now be made by subordinate legislation. These include the kind of changes which would previously have required the Scottish or UK Parliaments to consider primary legislation (i.e. a bill).

The change of approach is significant in the context of judicial review. This is because a review of subordinate legislation is possible on **the full range of grounds associated with judicial review**, compared to the more restrictive approach taken to Acts of Parliament.

Judicial review and the Scottish Parliament and the Scottish Government

This section of the briefing specifically considers judicial review in the context of the **Scottish Parliament** and the **Scottish Government**.

Two key topics are covered in this section of the briefing:

- [an introduction to the Scotland Act 1998 and its relationship with judicial review](#). This includes a discussion of how a key concept in the Act, **legislative competence**, [changed after Brexit](#)
- whether **Acts of the Scottish Parliament** [can be subject to a petition for judicial review on the so-called 'traditional' grounds of review](#). As a reminder, these are [illegality](#), [procedural impropriety or unfairness](#) and [irrationality or unreasonableness](#).

The Scotland Act 1998: legislative competence

The [Scotland Act 1998](#) ('the Scotland Act') created the [Scottish Parliament](#) and the

[Scottish Government](#) (or the Scottish Executive as it then was).

The Scotland Act transferred significant statutory powers (**devolved powers**) from a UK level to the **Scottish Government** and the newly created **Scottish Parliament**. The remaining powers (**reserved powers**) are still exercisable by the UK Parliament and Government.

The [Scotland Act](#) has significant implications for the nature of judicial review. [As outlined earlier in the briefing](#), the [Scotland Act](#) says that **an Act of the Scottish Parliament** is not law in so far as any of its provisions are outwith the **legislative competence** of the [Scottish Parliament](#).

Statutory provisions falling **outwith legislative competence** include:

- those addressing matters [reserved to the UK Parliament](#)
- those which are [incompatible with Convention rights](#), making human rights an integral part of the devolution settlement as well.

The [Scotland Act](#) also imposes similar limitations on Scottish [subordinate legislation](#) and acts of, or failures to act by, members of the [Scottish Government](#).^{xxiii}

Alleged non-compliance with these provisions of the [Scotland Act](#) by the Scottish Parliament or the Scottish Government fall into a specific category of legal questions known as **devolution issues**. As well as arising in other types of court proceedings, devolution issues can be the subject of a petition for judicial review before the [Court of Session](#).

Where there is an alleged **breach of Convention rights** by the **Scottish Government**, including in relation to [subordinate legislation](#) it has made, the case of [Somerville v Scottish Ministers](#) (2007) is significant. The case determined that there is **a choice** of raising an action for judicial review under either the [Scotland Act](#) or the [Human Rights Act](#).²⁴ However, the legal consequences are the same in both situations: An unlawful decision or provision of subordinate legislation may be **struck down** (i.e. found invalid and unenforceable).

The legislative approach to **Acts of the Scottish Parliament** (under the [Scotland Act](#)) differs from the approach to **the Acts of the UK Parliament** (under the [Human Rights Act](#)).

If an **Act of the Scottish Parliament** is found to be outwith legislative competence, including where it is incompatible with a Convention right, it is **invalid** and can be **struck down** by the courts.^{xxiv}

On the other hand, [as explained earlier in the briefing](#), an **Act of the UK Parliament** which is incompatible with a Convention right (under the [Human Rights Act](#)) **remains valid**. However, it can be the subject of a **declaration of incompatibility**.^{xxv}

xxiii [Scotland Act 1998](#), section 57.

xxiv [Scotland Act 1998](#), section 29.

The approach to Acts of the Scottish Parliament and legislative competence

To date, most challenges to the legislative competence of **Acts of the Scottish Parliament** under judicial review have failed. Two examples of successful challenges to Acts of the Scottish Parliament are set out in the box below:

Salvesen v Riddell (2013) ²⁵

A legislative provision relating to agricultural tenancies^{xxvi} was found by the [UK Supreme Court](#) to violate Article 1 of Protocol 1 of the ECHR (which protects property rights). The provision was accordingly [outwith legislative competence](#).

The Christian Institute and others v The Lord Advocate (2016) ²⁶

Part 4 of the [Children and Young People \(Scotland\) Act 2014](#) has the key policy idea that every child in Scotland should have a 'named person' to safeguard the welfare of every child in the country. The [UK Supreme Court](#) found Part 4 to be [a disproportionate interference](#) with the rights of children, young people and their parents under Article 8 of the ECHR (which protects private and family life). The provisions were therefore [outwith legislative competence](#) and, consequently, were not brought into force. In 2019, the Scottish Government [announced its intention to scrap the statutory scheme](#).

Legislative competence: EU law and EU retained law

Breaches of EU law were part of the original scope of what was outwith legislative competence under the Scotland Act.^{xxvii} However, since 11 pm on **31 December 2020**, when EU law ceased to apply in the UK after Brexit, this has not been the case.^{xxviii}

The UK's departure from the EU did have an additional (temporary) effect on the concept of legislative competence. This relates to [EU retained law](#), i.e. the new type of UK domestic law created when EU law ceased to apply in the UK.

Specifically, the **European Union Withdrawal Act 2018** ('the 2018 Act') inserted **section 30A** into the Scotland Act 1998.^{xxix} This provision (now repealed) said that it was not within the legislative competence of the Scottish Parliament to modify any **retained EU law** that is set out in so-called **freezing regulations**.

These regulations could be made by UK Ministers. They could specify the parts of retained

xxv [Human Rights Act 1998](#), section 4.

xxvi [Agricultural Holdings \(Scotland\) Act 2003](#), section 72(10).

xxvii [Scotland Act 1998](#), section 29(1) and (2)(d) (version in force until 31 December 2020).

xxviii [Scotland Act 1998](#), section 29(2)(d), as amended by the European Union (Withdrawal) Act 2018, section 12(1).

xxix The European Union (Withdrawal) Act 2018, section 12(2) inserting section 30A of the [Scotland Act 1998](#).

EU law which the UK Government wanted to protect from modification by the devolved legislatures. Such regulations would expire **five years** after they came into force.

UK Government Ministers only had the key power to make these freezing regulations **until 31 January 2022**. Ultimately, no relevant regulations were made and section 30A itself was **repealed by regulations** which came into force on **31 March 2022**.^{xxx}

Acts of the Scottish Parliament and the 'traditional' grounds of review

As mentioned earlier in the briefing, the so-called 'traditional' grounds of judicial review fall under the broad headings of:

- [illegality](#)
- [procedural impropriety or unfairness](#)
- [unreasonableness or irrationality](#).

These grounds of review do **not** apply to **Acts of the UK Parliament**.

The position with **Acts of the Scottish Parliament** is as follows:

- By virtue of specific provision in the [Scotland Act](#), **procedural impropriety** does not apply to Acts of the Scottish Parliament.^{xxxi}
- A specific (statutory) example of illegality is contained in the [Scotland Act](#), that is to say being [beyond the legislative competence of the Scottish Parliament](#).
- Aside from this specific statutory form of illegality, the 2011 UK Supreme Court decision in [the AXA case](#) clarified that the traditional grounds of **illegality** and **unreasonableness** did **not** apply to **Acts of the Scottish Parliament**, save in **exceptional circumstances**.²⁷

The **exceptional circumstances** referred to by the [UK Supreme Court](#) in the last bullet point were:

- **a breach of fundamental rights**. There is no definitive list of what constitutes a fundamental right, [but it is a concept the Supreme Court in particular has been active in developing in recent years](#).
- **a breach of the rule of law**. In its most basic form, the rule of law is the constitutional principle that no one is above the law.

xxx European Union (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation, etc.) Regulations 2022/357, Part 2, reg 2(3).

xxxi [Scotland Act 1998](#), section 28(6).

The mechanics of judicial review in more detail

This section of the briefing revisits some aspects of the law associated with judicial review actions which merit a more detailed treatment than was possible in [the overview at the start of this briefing](#).

Specifically, this section covers in more detail:

- [who can bring a judicial review action](#) (covered by the rules on **standing**)
- [the different ways of funding a judicial review action](#)
- [the circumstances in which a third party can intervene in a judicial review action](#)
- [the scope of judicial review in Scotland](#) which, [as noted earlier](#), differs from that in England and Wales
- [the grounds for judicial review](#), both established grounds, as well as emerging ones and ones where their scope is uncertain
- [the remedies available where a judicial review action is successful](#).

Who can raise judicial review proceedings - in more detail

[As explained earlier](#), the rules on **standing** determine who may bring an action for judicial review. This section of the briefing covers:

- [the general position on standing in judicial review cases](#)
- [standing in cases relating to Convention rights](#).

Standing in judicial review cases: the general position

In Scotland, until ten years ago, for a petitioner to have **standing** to bring a judicial review action, the outcome of the case would have to **materially affect their private legal rights**.

This caused particular difficulties for petitioners in the context of **public interest standing**. This is where an individual, group or organisation seeks to represent the general public or some part of it.

The previous law on standing in Scotland was widely criticised and was changed by the UK Supreme Court in 2011 in what is known as [the AXA case](#).²⁷

The Supreme Court decided in the AXA case that the more liberal test of **sufficient interest** used in England and Wales should be used in Scotland.

The new test in the AXA case - in more detail

Lord Hope and Lord Reed were the two judges who gave the leading judgements in the AXA case. Both adopted a test of standing based on the petitioners' **interests**, rather than on their **legal rights** (Lord Hope at para 62, Lord Reed at para 170 of [the judgment](#)).

Lord Hope (at para 63) expressed the view that the new test meant that a petitioner seeking review of a particular measure required to be **directly affected** by it. His formulation of the new test excluded 'the mere busybody' and required the person to have:

“ a reasonable concern in the matter to which the application related (para 63)”

He also said:

“ A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent (para 63).”

Lord Reed explained **the rationale for the new test** in terms of the important **constitutional principle of the rule of law**. [As noted earlier](#), in its most basic form, this is the principle that no one is above the law.

Lord Reed said a public authority **can violate the rule of law without infringing the private legal rights of any individual**. Hence, why a rights-based approach to standing was, in his view, insufficient (para 169 of [the judgment](#)).

However, Lord Reed also said that what is required by the new test of standing can still depend on **the context of the case**:

“ In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of ... In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought to court, and that in turn might disable the court from performing its function to protect the rule of law. (para 170)”

Shortly after the AXA case, the Supreme Court again had to consider the Scottish test of standing in [Walton v Scottish Ministers \(2012\)](#),²⁸ as part of a statutory appeals process.

When this case was first appealed, the Court of Session said that, had it been an action for judicial review, Mr Walton would not have had 'sufficient interest'. When the matter ultimately came before the Supreme Court, it strongly disagreed. It took the opportunity to reaffirm the new liberal approach to standing for judicial review.

After AXA - uncertainties and the continued importance of case law

The sufficient interest test has now been placed on a statutory footing by **section 89** of the [Courts Reform \(Scotland\) Act 2014](#) ('the 2014 Act'), which inserted a new provision in the [Court of Session Act 1988](#).^{xxxii} However, no further explanation of sufficient interest was provided by the 2014 Act.

xxxii [Court of Session Act 1988](#), section 27B.

Consequently, in future, the law as set out in the decided cases of the [Supreme Court](#) and the [Court of Session](#) will remain significant on the topic of what is required to satisfy the test.

A leading Scottish academic, Professor Tom Mullen, writing in 2015 on the new test of standing and how it might develop, commented:

“ The judgments of Lord Reed and Hope in *AXA* and *Walton* provide only a general statement of the new approach to standing and the rationale for it. They do not resolve all of the issues that might arise when litigants assert that they have standing to sue in the public interest, in particular the factors which the court should take into account in deciding whether to recognise the standing of a public interest litigant.”

Mullen, 2015²⁹

Sufficient interest under statute

Given the issues [environmental bodies have traditionally had in relation to standing](#), one interesting **recent statutory development** is found in the [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#) ('the 2021 Act'). The 2021 Act gave Environmental Standards Scotland, a new independent body set up to ensure the effectiveness of environmental law, a **power to apply for judicial review** where there is an alleged breach of environmental law.^{xxxiii}

The 2021 Act says the new body is to be **treated as having sufficient interest** in the subject matter of any application which it may make ([or of any legal proceedings in which it may intervene](#)).

However, this is not the first time a public body has been given **automatic standing** under statute when it wants to bring certain types of judicial review case. Another example relates to the [Equalities and Human Rights Commission](#), which has this status for judicial review cases (including Scottish cases) connected to the Commission's functions.^{xxxiv} [It appears the Commission has had to target its resources carefully when using its legal powers](#) and similar considerations are likely to apply for other bodies with equivalent powers.

Cases relating to Convention rights

For judicial review cases relating to Convention rights, the test for standing is different from the general test.

[While some petitioners have a special status](#), the [Human Rights Act 1998](#) usually requires

xxxiii [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#), section 38(1), (6) and (7).

xxxiv [Equality Act 2006](#), section 30.

the person raising the action to be **a victim**.^{xxxv} The meaning of victim in this context is the subject of extensive case law.

In 2015, Professor Mullen argued that, if the victim test is the usual gateway to standing, the result may be that the UK's obligations under the Convention are not adequately supervised by the court. Those who do have standing as victims (based on personal interests) may be unaware they could sue, or may choose not to take their case to court.
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Also in 2015, the Inner House of the Court of Session had to consider this issue in [Christian Institute v Lord Advocate](#).³¹ The Inner House expressed the view that the practical effect of the restriction in the victim test was limited in cases in which a public interest body was willing to a) support an individual's legal challenge; or b) [apply to intervene](#) in any case raised by a potential victim.

However, the debate has continued more recently on whether the victim test is satisfactory in policy terms. [As discussed later in this briefing, the Scottish Government is proposing that there will be a Human Rights Bill](#) in this parliamentary session, with the aim of strengthening human rights protection in Scotland. The [independent report of the National Taskforce for Human Rights Leadership](#) ('the National Taskforce Report') published in March last year, is a key piece of work related to this goal.³²

The [National Taskforce Report](#) recommends replacing the victim test with [the sufficient interest test](#) in cases relating to Convention rights (**recommendation 23**).

Funding a judicial review action

A key issue for any would-be petitioner in a possible judicial review action is how to fund it.

A person initiating a petition for judicial review has the following potential costs:³³

- **their own legal costs**, which can be particularly expensive as judicial review requires the involvement of lawyers with rights to appear in [the Court of Session](#), mainly [advocates](#). In addition to advocates, solicitors, another type of lawyer, also typically work on the case.
- **court fees**, payable to the court. These can be a considerable figure to be factored into the overall costs, usually over a thousand pounds for a day's hearing in the Outer House.^{xxxvi} 34
- **the expenses of their opponent if they lose**. This includes the opponent's legal costs and court fees. There may also be liability for the expenses of [any intervening](#)

xxxv European Convention on Human Rights, Article 34; Human Rights Act 1998, section 7; Scotland Act 1998, section 100.

xxxvi The Court of Session etc. Fees Order 2018 (SSI 2018/83), schedule 3.

[third parties](#) in the case.

Note that certain **exemptions from court fees** apply, including for those litigants [who qualify for Civil Legal Aid](#) or who are receiving certain state benefits.^{xxxvii}

A key advantage of qualifying for [Civil Legal Aid](#) is that it [also offers a level of protection against liability for the other side's legal expenses](#).^{xxxviii}

Legal aid and judicial review

The legal aid system can be an important method of funding in the context of judicial review. The legal aid system provides support to **people on low and moderate incomes** to access **legal advice on an issue** and **legal representation** in court. Lawyers who carry out legal aid work are paid a fee, set in legislation, for their work.

An important feature of the Scottish system, compared to England and Wales, is that a significant proportion of the Scottish population ([thought to be around 70%](#)) qualifies for some assistance out of the legal aid budget.³⁵

However, in some circumstances, people need to **contribute from their own income** towards the costs of the legal services they receive. This contribution increases as income increases. People who, on the face of it, qualify for legal aid can be put off by this requirement.³⁵

More about **how the legal aid system works** [can be found in the SPICe Briefing on the topic from 2021](#).³⁵

It is possible for someone in a judicial review action to qualify for either (or both) [Advice and Assistance](#) and [Civil Legal Aid](#) in relation to an action for judicial review.

Advice and Assistance

[Advice and Assistance](#) funds **legal advice from a solicitor** but does not cover representation by a lawyer in court. The term **legal advice** is broad enough to include investigation, negotiation and any work involved [in a subsequent application for Civil Legal Aid](#).³⁶

Advice and Assistance is available where:^{xxxix}

- [the client is financially eligible](#), based on their capital and income
- the issue on which advice is being sought relates to Scots law, which includes UK law

xxxvii The Court of Session etc. Fees Order 2018 (SSI 2018/83), arts 4 and 5.

xxxviii [Legal Aid \(Scotland\) Act 1986](#), section 18(2).

xxxix [Legal Aid \(Scotland\) Act 1986](#), sections 6 and 8; Advice and Assistance (Scotland) Regulations 1996 (SI 1996/2447), schedule 2.

as it applies in Scotland.

Civil Legal Aid

Note that Civil legal aid is available only to **persons**.^{xl} This rule makes NGOs and incorporated or unincorporated community groups ineligible.³⁷

Civil Legal Aid, which covers legal representation in court, is also only granted by the [Scottish Legal Aid Board](#) (SLAB) where a number of tests are met. [One test relates to the applicant's financial eligibility](#), based on the applicant's capital and income.^{xli}

Another of the tests relating to **eligibility for Civil Legal Aid** is that it is **reasonable in the particular circumstances of the case** that the applicant should receive it.^{xlii} It is this test which, in practice, can create a barrier to funding for judicial review cases.

In relation to the reasonableness test, where **a number of people have the same interest in the case**, Civil Legal Aid will not be provided to one individual unless it can be shown that:

- an individual will suffer serious prejudice, or
- it would not be reasonable for the other people concerned to pay the expenses being sought.^{xliii}

In this context, the [Environmental Rights Centre for Scotland](#) has recently argued that a person wishing to undertake environmental litigation is prone to a 'joint interest' with others, as there may well be a number of individuals with similar concerns about the issue in dispute.

In **assessing reasonableness**, another issue is that SLAB [will also examine the likely costs of any case. It will balance these against the benefit an applicant will get from the proceedings](#).

Judicial review actions are particularly expensive from the outset because they must be raised in the [Court of Session](#). However, the matters they relate to may not be significant in financial terms. On the other hand, a particularly important matter of law or status could justify the expense in the analysis by SLAB.

Protective expenses orders

[As mentioned earlier in the briefing](#), the normal rule of litigation is that **expenses follow success**. In other words, the losing party will usually pay the legal expenses of the

xl [Legal Aid \(Scotland\) Act 1986](#), section 41.

xli [Legal Aid \(Scotland\) Act 1986](#), section 15.

xlii [Legal Aid \(Scotland\) Act 1986](#), section 14(1)(b).

xliii Civil Legal Aid (Scotland) Regulations (SSI 2002/494), regulation 15.

winning party in a case.

However, the usual rule can be modified for cases in which the litigant seeks to advance the public interest. The aim is to make it less likely that exposure to liability for expenses will deter litigation which is in the public interest.

In a Scottish judicial review action (and indeed in some other types of litigation) it is possible for the court to make a **protective expenses order** ('PEO'). This limits the financial liability of the person raising the action.

The equivalent term in England and Wales is a **cost capping order**, previously a **protective costs order**.³⁸

There are currently two separate legal approaches to PEOs in Scotland:

- a specific regime which applies in environmental cases
- another regime which applies in other public interest cases.

PEOs in environmental cases

Chapter 58A of the court rules applicable to the Court of Session set out how PEOs should operate in environmental cases. There have been various iterations of these rules, with the current set applicable since December 2018.

If the judge decides that the proceedings would be **prohibitively expensive** for the person applying for the PEO, having regard to various factors set out in the court rules,^{xliv} they must award a PEO.

PEOs contain two **caps on financial liability**:

- One cap limits the applicant's liability for the other side's legal expenses to **£5,000**.
- The other cap limits the respondent's liability in expenses to the applicant to the sum of **£30,000**.^{xlv}

These are the default PEO caps, they may be **raised or lowered** 'on cause shown', i.e. when the court is satisfied there is a reasonable basis for doing this.

The first cap aims to protect the petitioner. On the other hand, the second cap is intended to address the potential for a PEO to operate as a 'blank cheque', enabling a petitioner to litigate in an unreasonable or disproportionate fashion.

The current PEO regime for environmental cases has been recently criticised by the [Environmental Rights Centre for Scotland](#) as being insufficient to improve the affordability of environmental litigation.³³ The cost of such litigation is [considered more generally in a](#)

xliv [Court of Session rules](#), rule 58A.1(3).

xlv [Court of Session rules](#), rule 58A.7.

later section of this briefing, in the context of government compliance with the Aarhus Convention.

Other public interest cases

For other public interest cases not falling under [the regime in Chapter 58A](#) of the court rules, the decision to award a PEO in a particular case, and at what level, is still a matter for the discretion of the courts.

In 2009, the [report of the Scottish Civil Courts Review](#) recommended that there should be a new regime for all PEOs in public interest litigation, with the court being required to have regard to specified criteria in their decision-making process.³⁹ However, the [report of the Review of Expenses and Funding of Civil Litigation](#) (the Taylor Review) later made recommendations on this topic in 2013. Its report largely favoured the retention of the court's existing level of discretion.⁴⁰

The Aarhus Convention and environmental cases

The UK is a signatory to the [Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters](#) (the Aarhus Convention).

There have been a number of findings that the Scottish legal system is non-compliant with the Aarhus Convention with respect to its requirements on access to environmental justice. [The first of those findings was made in 2014](#), and [the most recent in October 2021](#).⁴¹

The main source of non-compliance is the failure to meet the requirement that access to environmental justice must be **not prohibitively expensive** (Article 9(4)).

The Scottish Government **has not responded publicly to the October findings**, but it did consider the issue of court fees for environmental cases in its [recent consultation on court fees](#).

Relating to the Aarhus findings last year, the [Environmental Rights Centre for Scotland](#) made [various recommendations for improving the situation in relation to the costs of environmental litigation](#), including judicial review actions.⁴¹

For example, the Centre recommended [the existing regime of Protective Expenses Orders for environmental cases](#) be replaced with what is known as **Qualified One Way Cost Shifting**. The general rule would be that a petitioner would **not** be liable for the expenses of any other parties if the judicial review were unsuccessful. However, conversely, a petitioner would still be able to claim their expenses from the respondent if the judicial review were successful.

See also the later section of this briefing on [other policy developments relating to access to environmental justice](#) associated with [2021 Brexit-related legislation](#).

Third party interventions

As explained earlier in the briefing, **interventions** are written or verbal arguments on key legal issues relating to the case by third parties in judicial review proceedings with an interest in the case.

Sometimes **specific legislation** enables individual public bodies **to intervene** in certain types of judicial review case. For example:

- the new body, Environmental Standards Scotland, has a statutory power to intervene, either with the court's permission or invitation, in judicial review cases relating to environmental law^{xlvi}
- under statute, the [Equality and Human Rights Commission](#) has capacity to intervene in any judicial review case which it appears to the Commission is connected to its functions.^{xlvi} See the box below for a recent example of the Commission's power in action.

S v Scottish Ministers (2021) ⁴²

S is a prisoner serving a life sentence. In this case he challenged, by way of judicial review, decisions of the prison authorities. They had refused him exceptional escorted day absence ('EEDA') to enable contact with his elderly grandmother outside of the prison.

The Outer House of the Court of Session [refused permission](#) to allow S to proceed by way of judicial review. S appealed this decision. At the appeal stage in the Inner House, [the Equality and Human Rights Commission intervened in writing](#). In its intervention, the Commission considered the role of the public sector equality duty in policy formulation. It also advanced arguments about the approach for prisoners to Article 8 of the ECHR (which protects the right to a private and family life). The appeal was ultimately successful.

Otherwise, interventions are permitted in **two ways** under **the current court rules**:

- [where the person is 'directly affected'](#)
- [as a public interest intervention](#).

^{xlvi} [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#), section 38(3)-(7).

^{xlvi} Equality Act 2006, section 30(1).

Where the person is 'directly affected'

In the first place, a party who considers that they are **directly affected** by the issues raised in the case, may apply to enter the process and become a party to the case.^{xlviii} This is what individuals affected by an asbestos-related condition sought to do in [the AXA case](#), [discussed earlier in the briefing](#).

Public interest intervention

There is also a separate procedure contained in the court rules for **a public interest intervention**.^{xlix}

A public interest intervention allows a person to make an application to the court for leave to intervene in a judicial review petition where he or she believes that any issue in the case raises **a matter of public interest**. The court may grant permission if it considers that certain requirements are satisfied.

In the [Court of Session](#), public interest intervention is generally **in written form** and is subject to rules as to length. An oral intervention is only permitted in exceptional circumstances.^I The [UK Supreme Court](#) has demonstrated a greater willingness to hear oral interventions.

Until relatively recently, public interest interventions were rare in practice in Scotland but they are becoming more common. A noteworthy example of the courts' approach is given in the box below:

The Christian Institute and others v Scottish Ministers (2016)^{43 26}

This case, [referred to earlier in the briefing](#), [related to the Scottish Government's legislation to create a 'named persons' scheme](#). Before the Inner House, [CLAN Childlaw](#), a charitable Scottish law centre for children and young people, was [granted permission](#) to intervene in writing in the public interest. However, the Inner House did not agree with CLAN's Convention rights-based arguments against the scheme.

Before the UK Supreme Court, the charity again intervened - [in writing](#) and orally. [The intervention was high-profile](#), and ultimately the Supreme Court found that certain Convention rights had been breached by the Scottish Government.

xlviii [Court of Session Rules](#), rule 58.14.

xlix [Court of Session Rules](#), rule 58.17-20.

I [Court of Session Rules](#), rule 58.20(4)(b).

The scope of judicial review

As explained earlier in the briefing, the **scope of judicial review** is different in Scotland compared to England and Wales.

The general position

In England and Wales, a distinction has developed between cases involving **public law** and those involving **private law rights**, with judicial review only being competent in relation to public law rights.

The effect of this distinction in judicial review cases south of the border is that the decisions of private bodies are **not** usually open to judicial review.

In the important case of **West v Secretary of State for Scotland (1992)** ⁴⁴ the English approach was rejected for Scotland. It was confirmed that **the actions and decisions of private bodies could be subject to judicial review**.

The judges in West stated that what was required for a competent judicial review action was **a tripartite relationship** between:

- the source of the decision making power
- the person or people to whom that decision making power has been delegated
- the person or people affected by that decision making power.

The practical effect of this test is that the decision of a private body, for example, the decision of a sporting association or golf club might be able to be judicially reviewed, where a committee applies the association or club rules to a member.

Later case law has suggested that the tripartite relationship is not an exhaustive statement of all the circumstances where judicial review is possible, nor should it be interpreted too literally. ⁴⁵

The scope of judicial review in this context is also less important in practice than once it was. For the current court rules now allow the transfer of cases brought under the incorrect court procedure to the right court procedure. Accordingly, a case beginning under the judicial review procedure can be transferred to what is known as the **ordinary procedure**.^{li}

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^{li} [Court of Session Rules](#), rule 58.16.

Cases relating to Convention rights

In terms of the scope of judicial review, there is a **special rule** applicable to judicial review cases concerning Convention rights.

The [Human Rights Act 1998](#) provides a right of challenge in respect of **public authorities** acting in contravention of Convention rights. This means that the public or private nature of the body remains important in this context.^{lii}

Grounds of judicial review

This section of the briefing explores the **grounds for judicial review** in detail.

The grounds (emerging and established) covered in this part of the briefing are as follows:

- [illegality](#) (in the traditional judicial review sense)
- [breach of Convention rights](#) (a specific statutory form of illegality)
- [breach of retained EU law](#) (another specific statutory form of illegality)
- [procedural impropriety or unfairness](#)
- [unjustified departure from someone's legitimate expectations](#)
- [unreasonableness or irrationality](#)
- [breach of the principle of proportionality](#)
- [breach of constitutional rights, principles or values](#).

Although the grounds have been divided into categories for this purpose, any type of categorisation is somewhat artificial. The grounds for judicial review are (perhaps increasingly) fluid and overlapping.

Illegality

In one sense it can be said that the sole ground of judicial review is that of unlawfulness. All the ways in which decisions or actions can be challenged by way of judicial review may be seen as aspects of this basic ground.

However, when the specific ground of review of **illegality** is referred to, **a narrower meaning is being attributed to the term**.

^{lii} Human Rights Act 1998, sections 6-7.

The basic principle is that public bodies may not make any decision or take any action that is not authorised by law.

Any decision or action going beyond that body's legal powers is unlawful and may be challenged as such. This type of unlawfulness is sometimes referred to using the Latin phrase **ultra vires**.

Some of the specific principles underpinning this ground of review are considered in more detail in the next sections of this briefing.

The situations covered are as follows:

- [there has been a breach of a statutory duty](#)
- [there has been an error of law](#) or [an error of fact](#)
- [the decision maker has failed to take account of relevant considerations, or taken into account irrelevant considerations](#)
- [the decision maker's powers have been used for an improper purpose](#)
- [the decision maker has fettered \(i.e. closed off\) their discretion](#)
- [the wrong person has exercised the power.](#)

Separately, specific statutory forms of illegality, namely, [breach of Convention rights](#), and [breach of EU retained law](#) are discussed in later sections of the briefing.

Breach of a statutory duty

A court may find an action, or failure to act, is unlawful where this is in **breach of a particular duty imposed by statute**.

Not all alleged breaches of statutory duties will be treated the same way by the court. The court will look at the **wording used in the statute**, as well as **the whole scope and purpose of the Act** to work out what is required and what the effect of the particular breach at issue should be. ⁴⁷

The courts are much more willing to enforce **duties to carry out particular tasks**, for example, a duty to **produce a strategy** or to **follow a particular procedure**. On these types of duties, see also [the later section of the briefing on procedural impropriety or unfairness](#).

Where there is a broad discretion

Some statutory duties are actually framed broadly enough that, in practice, they represent **an aspiration** rather than an enforceable obligation.

Some duties also give the bodies **significant discretion** as to what is actually required in practice. Sometimes the language used in the duty contains significant qualifications, such

as the obligation to do something **so far as reasonably practicable** or **to take reasonable steps**.

The courts allow much greater flexibility in relation to these types of duty. Since such duties normally require the decision maker to allocate scarce resources among competing needs, the courts will not interfere readily.⁴⁸

Discretionary decision making is considered in more detail in the section of this briefing called [Review where there is discretion](#).

Outcome duties

Several academics have identified a new type of duty in UK and Scottish legislation. These are so-called **outcome duties**. They impose an obligation to achieve a broad, but measurable and very specific, strategic outcome in relation to complex problems.^{49 50}

For example, the [Climate Change \(Scotland\) Act 2009](#) (as amended) set targets to **reduce Scotland's emissions of all greenhouse gases to net-zero by 2045** at the latest. There are also interim targets for specific reductions by 2020, 2030 and 2040.^{liii}

There has been academic discussion as to how existing outcome duties will be treated by judges,^{49 50} but the matter has not yet been tested in court. [Future developments may be important here](#).

Errors of law and errors of fact

In some circumstances, the court will recognise that an error by a decision maker relating to the law which applies (an **error of law**) amounts to a ground for judicial review. Likewise, an error relating to the facts of a dispute (an **error of fact**) can constitute a ground for judicial review.

The rules in this area are underpinned by the fundamental principle that the courts in judicial review actions are primarily concerned with the legal validity of decisions taken, not the merits of those decisions.

Errors of law

Scottish courts would traditionally only intervene in relation to errors of law which caused the decision maker to **exceed its powers** and **take a decision it was not authorised to take (jurisdictional errors)**.

However, the courts would not otherwise pronounce on the proper interpretation and application of the law in relation to decisions which were **within** the scope of the decision

liii [Climate Change \(Scotland\) Act 2009](#), section A1 (added by the [Climate Change \(Emissions Reduction Targets\) \(Scotland\) Act 2019](#), section 1) and section 2.

maker's powers.

Professor Chris Himsworth has commented on this distinction as follows:

“ For some, this was a wholly justifiable restriction on the boundaries of judicial review. Parliament has deliberately permitted a situation where statutorily created bodies were free (and should be free), within the bounds of the autonomy granted to them, to make some types of legal mistake without sanction in judicial review. But was it not, on the other hand, a failure of the rule of law? How could it be tolerated that courts should be seen to close their eyes to demonstrably ‘illegal’ decision making?”

Himsworth, n.d.⁵¹

The highly legal technical distinction has been **significantly eroded by case law**, in particular, by the landmark UK Supreme Court case of [Eba v Advocate General for Scotland](#) (2011).⁵²

Accordingly, the basic position is now that any error of law on which the decision depends is subject to judicial review. However, in practice, this approach still shows deference to the traditionally recognised scope of judicial review actions.

Errors of fact

The court does **not** have a general power to correct errors of fact. However, in some circumstances, errors of fact are reviewable.

For example:

- The court in a judicial review action will intervene when material findings of fact are reached on the basis of no evidence.
- The court may also intervene when findings of fact are manifestly contrary to the weight of the evidence.

However, otherwise it will consider that dealing with errors of fact is the function of an appeal court or tribunal rather than a court in a judicial review action.

Review where there is discretion

It is easy to understand that a decision that is inconsistent with the terms of a statute is subject to judicial review. However, many statutory powers and duties confer discretion. The decision maker may have **a range of choices available** as to what to do in the light of the facts.

The next few sub-headings of this briefing relate to the review of the discretionary element in decision making.

Relevant considerations and irrelevant considerations

The decision of a body or individual which **fails to take into account all relevant considerations** can be subject to review on the ground of illegality. A decision maker also should not take into account **irrelevant considerations**.

Improper purpose

Sometimes an authority exercises its lawful powers for **a purpose other than that for which they were specifically intended or conferred**. Then the resulting decision may be struck down by the courts as being in breach of the principle of legality.

Fettering of discretion

Except in particular circumstances, a public body cannot prevent itself from properly considering the exercise of its discretion in individual cases. This is the requirement on the decision maker not to 'close off' or **fetter their discretion**.

Decision makers may formulate **general policies** to guide the exercise of their discretion. However, these policies must not be applied as if they were rigid rules. The decision maker must still have regard to **the special circumstances** of the case under consideration.

Exercise of power by the wrong person

A power may have been validly exercised. However, the exercise of it may be struck down on the ground that it was **exercised by someone other than the person entitled to exercise it**.

On the other hand, there is a **special rule** applicable to the exercise of power by a **government minister**. It is well accepted that the power in question may validly be exercised by an official in the minister's department. This is known as the **Carltona principle**, named after the case in which the principle was developed.⁵³

Breach of Convention rights

As discussed earlier in the briefing, [a breach of Convention rights](#) can form a ground for judicial review [under the Human Rights Act 1998](#) (the Human Rights Act) and also [under the Scotland Act 1998](#).

The Convention rights enshrined in UK domestic law are as follows:

- Right to life (Article 2)
- Freedom from torture and inhuman or degrading treatment (Article 3)
- Freedom from slavery and forced labour (Article 4)

- Right to liberty and security (Article 5)
- Right to a fair trial (Article 6)
- No punishment without law (Article 7)
- Respect for your private life, home and correspondence (Article 8)
- Freedom of thought, belief and religion (Article 9)
- Freedom of expression (Article 10)
- Freedom of assembly and association (Article 11)
- Right to marry and start a family (Article 12)
- Protection from discrimination in respect of these rights and freedoms (article 14)
- Protection of property (Protocol 1, Article 1)
- Right to education (Protocol 1, Article 2)
- Right to elections (Protocol 1, Article 3)
- Prohibition of the death penalty in peacetime (Protocol 6).

Absolute, limited and qualified rights

Not all rights in the Convention and its Protocols have the same weight. There are three broad types:

- In the first place, there are **absolute rights**. As the name suggests, these rights, such as the protection against torture (Article 3), are absolute and cannot be removed or limited by member states.
- There are also **limited rights**, that is to say those which can be limited under specific and finite circumstances. For example, Article 5 (right to liberty) allows for people to be imprisoned, provided there is a “lawful detention of a person after conviction by a competent court”.
- Lastly there are **qualified rights**. These are rights which require **a balance between the rights of the individual and other interests**. These include the rights to: respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); peaceful enjoyment of property (Protocol 1, Article 1); and, to a degree, the right to education (Protocol 1, Article 2). See the later discussion of [the principle of proportionality](#) in the context of qualified rights.

Depending on the right in question and the specific circumstances, a policy or decision which restricts a Convention right may or may not be incompatible with the Convention.

Breach of retained EU Law

As set out earlier in the briefing, a possible (statutory) ground of judicial review is that there has been a **breach of retained EU law**.

A key point is not all EU law became retained EU law.

Sources of EU law which were retained

Sources of EU law which the UK **has** retained include those discussed earlier in the briefing, namely:

- [domestic legislation passed to implement EU directives and other EU law](#), a category known as **EU-derived domestic legislation**^{liv}
- [EU regulations, decisions and tertiary legislation](#), forming part of a grouping known as **direct EU legislation**.^{lv}

Other sources of EU law which have been retained include:

- some **directly effective rights** under the [Treaty on European Union](#) and the [Treaty on the Functioning of the European Union](#)^{lvi} 54
- most **general principles of EU law** as they existed at [IP completion day](#)^{lvii}
- **relevant case law** of the [Court of Justice of the European Union](#) issued before [IP completion day](#).^{lviii}

Directly effective rights under the [Treaty on European Union](#) and the [Treaty on the Functioning of the European Union](#) are rights which the UK Government considers are "sufficiently clear, precise and unconditional" as to confer rights directly on individuals. They can be relied on in national law without the need for implementing measures.⁵⁵

Para 94 of the [Explanatory Notes to the European Union \(Withdrawal\) Act 2018](#) has a helpful (non-exhaustive) list of directly effective treaty rights.

The **general principles of EU law** include **equal treatment** and **non-discrimination**; **legal certainty**; **proportionality**; and **the protection of legitimate expectations**.

liv European Union (Withdrawal) Act 2018, section 2.

lv European Union (Withdrawal) Act 2018, section 3.

lvi European Union (Withdrawal) Act 2018, section 4.

lvii European Union (Withdrawal) Act 2018, sections 4 and 6(7), schedule 1, para 2.

lviii European Union (Withdrawal) Act 2018, section 6(7).

Unlike other forms of retained EU law, the general principles **cannot** be relied upon in a court action as a **direct** ground of challenge to set aside (pre-IP completion day) domestic law.^{lix}

The principles can only be used as **an aid to interpretation** of other forms of retained EU law (which can form the basis of such a direct legal challenge).^{lx}

In addition, the [UK Supreme Court](#), the Inner House of the [Court of Session](#), and the [High Court of Justiciary](#) (the highest criminal court in Scotland) are **not** bound by retained EU case law. These higher courts can choose to depart from it where they consider it right to do so.^{lxi}

Sources of EU law which were not retained

The UK is **not** retaining:

- the [Charter of Fundamental Rights of the European Union](#), except insofar as its rights are replicated in other parts of EU retained law^{lixii}
- the legislative instruments known as **EU directives** themselves. (This is not to be confused with [the domestic legislation implementing directives](#), which **are** retained)
- [as already discussed](#), the principle of supremacy of EU law for any domestic law passed or made **on or after IP completion day**^{lixiii}
- the rule in the [Francovich case](#). This says that, where certain conditions are satisfied, a member state can be liable to pay **financial damages** where there has been a breach of EU law.^{lixiv}

It is easy to get confused between the [Charter of Fundamental Rights of the European Union](#) ('the Charter') and the [well-known European Convention on Human Rights](#) ('the Convention'). For one thing, there is an overlap in their content. However, the Charter draws on a broader range of sources than the Convention. It aims to be a very modern codification, including 'third generation' fundamental rights. These include those related to data protection and bioethics.

lix European Union (Withdrawal) Act 2018, schedule 1, para 3.

lx European Union (Withdrawal) Act 2018, section 6(3).

lxi European Union (Withdrawal) Act 2018, section 6(3), (4), (5), (5A)-(5D) and (7). The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020.

lixii European Union (Withdrawal) Act 2018, section 5(4).

lixiii European Union (Withdrawal) Act 2018, section 5(1).

lixiv European Union (Withdrawal) Act 2018, schedule 1, para 4.

As discussed earlier, the Convention is incorporated into UK domestic law by virtue of the Human Rights Act 1998. Its status as part of UK domestic law is unaffected by Brexit, unlike the position with the Charter.

Procedural impropriety or unfairness

Decision makers must act fairly in reaching their decisions. This principle applies solely to the procedure used, as opposed to the substance of the decision reached.

Sources of procedural requirements

There are various sources of procedural requirements:

- The **common law**, that is to say the law developed through **the individual decisions of the courts**, requires a fair procedure to be followed. In this context, this is sometimes referred to as the requirement to observe the **principles of natural justice**.
- **Legislation** may impose a duty to follow specific procedures. However, failure by a decision maker to comply does **not** automatically mean that the decision which follows is invalid. The courts will take **a range of factors** into account in this regard.
- **Convention rights** are significant sources of procedural requirements.

Article 2 of the ECHR imposes a specific procedural requirement. An effective official investigation is required where an individual is killed as a result of the official use of lethal force or where public authorities have failed to protect life.

Article 6 of the ECHR creates a right to a fair trial in civil and criminal matters. This Convention right has been very influential in practice.

A requirement to follow a specific procedural requirement can sometimes result from [the protection of 'legitimate expectations'](#), a topic explored in more detail later in the briefing.

The specific principles underpinning procedural fairness

The content of procedural fairness has been described by a leading textbook as a "constantly evolving" and "infinitely flexible", with its precise content depending on the subject matter of the case.⁵⁶ However, this section of the briefing considers some of **the specific principles** associated with the general concept of procedural fairness:

- [the rule against bias, or the appearance of bias](#)
- [the right to a fair hearing](#)
- [the duty to give reasons](#)
- [the courts' approach to consultations by the decision maker.](#)

Rule against bias

A key principle is that no one may be the judge of his or her own cause. This strikes at decision making where the decision maker is connected with the party to the dispute or the subject matter of it.

In this context, justice should not only be done, but should be seen to be done. Consequently, **the appearance of bias** may be as relevant as **actual bias** (as well as being more common).

Right to a fair hearing

No person against whom an adverse decision might be taken should be denied **a fair hearing** to allow them to put their side of the case.

What constitutes a fair hearing depends on the particular circumstances of the case. These include:

- the character of the decision-making body
- the kind of decision it has to make
- the statutory or other framework in which it has to work.

It is **not** the case that procedural fairness will require in every case that the parties interested in a decision must be allowed **an oral hearing**. However, oral hearings will certainly be required in some contexts.

The case law associated with **Article 6 of the ECHR** (which guarantees **a right to a fair trial** in civil matters) has influenced judicial understanding of what constitutes a right to a fair hearing, even in cases which are not being brought on the ground of [a breach of a Convention right](#).

Duty to give reasons

Statutes often require that decisions made under them should be supported by reasons.

It is often said that, statutory requirements apart, there is no general duty to provide reasoned decisions. However, developments in this area have been such that the sum of exceptions to the general principle probably outweighs the principle itself.

Generally speaking, **the more important or fundamental the nature of the individual's right or interest in question**, the more likely the principle of procedural fairness will require reasons to be given.

Where reasons are given they must be adequate. In particular, they must be sufficiently detailed to show that an appropriate thought process has taken place.⁵⁷

Consultations by the decision maker

To avoid successful challenge, a decision maker must, **where required by statute**, carry out public consultation prior to any change to policy or law.

A consultation exercise may also be required according to the **developing law of legitimate expectations**, [considered later in the briefing](#). For example, where there has been a **promise to consult**.

Furthermore, **in the field of environmental policy**, even in the absence of a statutory requirement or a legitimate expectation, the Government is under a duty to consult.⁵⁸ **Article 7** of the [Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters](#) (the Aarhus Convention) requires those countries who have signed up to it to provide opportunities for public participation in the preparation of policies relating to the environment.

Where a consultation exercise is undertaken by a decision maker, **it must be carried out properly**. In particular, the following requirements must be met:⁵⁹

- the consultation must be at a point when the proposals are still at an early stage
- it must include sufficient reasons for particular proposals to allow those consulted intelligent consideration and response
- it must also include explanation of alternative proposals which the decision maker has discarded
- adequate time must be given for consideration and response
- the product of the consultation must be consciously taken into account in finalising any proposals.

Unjustified departure from legitimate expectations

In some circumstances, the courts have recognised that if a decision maker unjustifiably departs from someone's **legitimate expectations** as to how a decision maker will act, then this can be a separate ground for judicial review.

Earlier, [this concept was mentioned as a general principle of EU law](#). This section of the briefing considers its possible role as **an independent ground of review in domestic law**.

A 'legitimate expectation' may be recognised by the court as a result of an **express promise, assurance or representation** by the decision maker. It also may be inferred by the court from the **past practice** or the **conduct** of the decision maker.

There can be a tension between the concept of a person's legitimate expectations and the idea, [discussed earlier](#), that **a decision maker must not fetter (i.e. close off) their discretion** in an individual case.

The key to resolving these tensions is to strike a balance between **the public interest**, for example in changing the policy, and **the private interest** in maintaining it. ⁶⁰ Accordingly, a decision maker's departure from a legitimate expectation can be **justified if there is overriding public interest**.

Overall, the scope of the possible ground of review relating to legitimate expectations is still very unclear. ⁶¹

Procedural protection or protecting the substance of the expectation?

The law of legitimate expectations is most developed where the courts are making a connection between a **legitimate expectation** and [the procedure followed](#). A legitimate expectation may entitle people to a level of procedural protection (such as an oral hearing) which, in the absence of the expectation, they would not have received. ^{62 63 64}

On the other hand, cases about whether the litigant should receive **the substantive benefit** behind the legitimate expectation have proved more challenging for the courts. Where they have been willing to protect the expectation of a particular substantive outcome, key factors that the courts appear to find influential include:

- a clear and unequivocal promise, made to a single person, or a small group of people ⁶⁵
- detriment suffered by that person or group in reliance on that promise. ⁶⁶

A recent example of a case where a court was willing to protect a substantive benefit is found in the box below.

R (on the application of Patel) v General Medical Council (2013)

This case concerned the recognition of medical qualifications in the UK obtained by overseas applicants. The Court of Appeal in England and Wales found that the General Medical Council was required to honour a clear, unequivocal and unqualified assurance given to Patel that, if he completed his distance learning course of study in a reasonable time, his qualification would be recognised by the Council. The doctor's expenditure had been \$40,000 over six years of his study.

Unreasonableness, proportionality and another emerging ground of review

This section of the briefing considers **two established grounds for review**:

- [unreasonableness or irrationality](#)
- [the principle of proportionality](#).

These are both grounds for review where the court reviews the substance of a decision or the justification for that decision.

This section also considers **an emerging ground of review**, that is to say that [a decision maker has contravened a constitutional right, principle or value](#).

Unreasonableness or irrationality

The courts have recognised that when different reasonable people are given the same set of facts, it is perfectly possible for them to come to different conclusions. This means that a range of lawful decisions may be within the discretion of the decision maker. However, decision makers must not exercise their powers in a **wholly unreasonable or irrational way**.

In particular, when it comes to making the decision, a decision maker must not make a decision that is so unreasonable that no reasonable person acting properly could have taken it. This is often called **Wednesbury unreasonableness**, after the name of the court case which first established the concept.⁶⁷

Variable intensity of review

The traditional view of unreasonableness is that it does not give judges much opportunity to review the merits of administrative decisions. It has often been said that the ground has a high threshold for judicial intervention which is very rarely satisfied.

However, it seems that, in recent years, the intensity of the review which the courts are willing to carry out does vary, depending on a number of factors.

For example, where **fundamental rights** are at stake the courts will engage in a deeper scrutiny of the decision, sometimes referred to as **anxious scrutiny**.^{68 69}

Another key factor the court takes into account in deciding the appropriate intensity of review is the **nature of the relationship between the original decision maker and the court**. In particular, it will look at the respective expertise of the court compared to that of the decision maker. For example, where **the decision maker is an expert in a highly technical field**, the court will be extremely reluctant to intervene.⁷⁰

Courts will also be reluctant to intervene where the governmental decision involves **the allocation of scarce resources**.⁷¹

The principle of proportionality

This part of the briefing considers the **principle of proportionality** and its role in judicial review cases. The role of this proportionality as [a general principle of EU law](#) has been mentioned earlier in the briefing. This section of the briefing considers proportionality in the context of:

- [breaches of Convention rights](#)
- [an independent ground of review under domestic law](#).

Broadly speaking, the idea behind this principle is that any restrictions have to be a proportionate means of achieving a legitimate aim, in other words not "using a sledgehammer to crack a nut." ⁷²

Breaches of Convention rights

In human rights cases, [where an interference with a Convention right may be justified](#), **a structured test of proportionality**, involving various steps, takes the place of [the reasonableness test discussed earlier in the briefing](#).

Specifically, when the courts in a Convention rights case are considering **whether or not a decision was proportionate**, they will consider whether:

- the measures are 'prescribed by law'
- they pursue a legitimate end or an end specified in the relevant article (e.g. public safety or national security)
- they are rationally connected to that end; that no less restrictive alternative could have been adopted
- they are necessary (and not merely desirable). ⁷³

Proportionality in other cases

In an important case in 2015, the [UK Supreme Court](#) was invited to replace [Wednesbury unreasonableness](#) with **a general proportionality standard** potentially applicable in all judicial review cases. The (five-judge) court was not willing to do this, saying that it would be a decision for the Supreme Court when sitting as a nine-judge court. ⁷⁴

Consequently, the applicability of the proportionality principle is limited to [cases relating to Convention rights](#) and, in some circumstances, [those on the interpretation of retained EU law](#).

In the policy sphere, the UK Government [said recently](#) that any legislative replacement of the reasonableness test with a general proportionality test was not desirable.

On the other hand, in the Scottish context, [a recent report of the Scottish Environmental Rights Centre](#) argued that *Wednesbury* unreasonableness does not adequately protect the environment. The recent [report of the National Taskforce for Human Rights Leadership](#) argued that, for the better protection of economic, social and cultural rights, there should be a more exacting approach to reasonableness than the [Wednesbury standard](#) provides (recommendation 24).

Constitutional rights, principles or values

In recent years, [as explored later in the briefing](#), there has been political uncertainty concerning the future of the Human Rights Act 1998. Accordingly, the courts have begun to place a renewed emphasis on the common law as an independent source of **fundamental rights** and **constitutional principles**.

In a trio of cases from the last five years, the UK Supreme Court has founded its decision on what appears to be **an emerging ground of judicial review**. This involves unjustifiably or disproportionately breaching **constitutional rights, principles or values**. One of the key cases, [R \(Miller\) v The Prime Minister \(2019\)](#),²¹ [has been described earlier in the briefing](#), the details of the other two are set out in the box below.

There is current uncertainty around the question of what amounts to a constitutional right, value or principle.⁷⁵ The rights and principles referred to by the courts in recent years include **certainty, consistency, access to justice, free expression and equality of treatment**.

R (Evans) v Attorney General (2015)⁷⁶

This case concerned the [Freedom of Information Act 2000](#) and a request for disclosure of communications passing between HRH the Prince of Wales and various government departments.

The Supreme Court concluded (by a majority of 5:2) that the 2000 Act did not permit the Attorney General to override a decision of a judicial tribunal or court merely because he, a member of the executive, considering the same facts and arguments, took a different view from that taken by the tribunal or court.

The Supreme Court said this would cut across two constitutional principles which are fundamental components of the rule of law, namely that a decision of a court is binding between the parties and cannot be set aside, and that decisions and actions of the executive are reviewable by the courts, and not vice versa. The Supreme Court said clear words must be used if the statute is to have that effect, and that the relevant statutory provision is "a very long way" from being clear enough for this purpose.

R (UNISON) v Lord Chancellor (2017)⁷⁷

This case involved a challenge to the level at which court fees were set for a hearing before an employment tribunal and an employment appeal tribunal. The UK Government's policy aim for the new levels of fees were to transfer part of the cost burden of the tribunals from taxpayers to users of their services, to deter unmeritorious claims, and to encourage earlier settlement.

The Supreme Court found the level of fees to be unlawful because they had the effect of preventing access to justice. Under domestic law, the court said the constitutional right of access to the courts is inherent in the rule of law and the fees risked being a barrier to that access.

Legal remedies available in judicial review actions

Where an action for judicial review is successful, the Court of Session may award various legal remedies against the decision maker. These are outlined in the box below.

Reduction

Reduction is the most common of the remedies sought. This involves the court quashing the original decision (i.e. rejecting it as invalid) and giving the issue back to the decision maker to look at again. However, in keeping with the nature of judicial review, the court will not say what it thinks the ultimate decision should be.

Declarator

A declarator is another popular remedy. It is an authoritative statement that an individual or body has a specific right or duty. It is useful where the petitioner wants to establish that a particular right exists, or that a particular status applies, which has been doubted or denied.

Suspension and interdict

An order for suspension stops something currently being done. An interdict is used to prevent a threatened wrong occurring or the continuance of current wrongdoing.

These remedies can be applied for separately but it is more common for them to be applied for together and in conjunction with other remedies.

Specific performance or specific implement

Specific performance (also referred to as specific implement) is where the court orders the respondent to do something which they are under a legal duty to do.

Liberation

As the name suggests, this order gives the petitioner their liberty and is used where there has been wrongful or illegal imprisonment. At present, liberation most frequently arises in immigration and asylum cases.

Interim orders

Interim orders are provisionally or temporary orders which can be applied for at the start of a case, pending a final decision. Interim interdicts are the most common type of interim order.

Interim orders will be awarded where the court thinks that the petitioner has a convincing case and the **balance of convenience** supports it. The court will weigh the likely inconvenience or damage which would be suffered by the applicant if the interim interdict is not granted against the likely inconvenience or cost for the respondent if it is.

Damages

Damages are financial compensation for a loss suffered. Damages can only be awarded in judicial review actions if there can be shown to be a ground entitling the petitioner to such an award by virtue of another specific part of the law. For example, where certain conditions are satisfied, damages can be awarded for [a breach of Convention rights](#). [As explained earlier](#), it is no longer possible to claim damages for breach of EU law against the UK Government under [the Francovich case](#).

Judicial review as part of the wider system for addressing grievances

This section of the briefing considers judicial review as part of the wider system for addressing grievances. It covers two specific topics:

- [alternatives to judicial review](#)
- [tribunals and judicial review](#).

Alternatives to judicial review

There are various **alternatives to judicial review**.

Internal complaints or review procedures

In the first place, an aggrieved individual or organisation may be able to make a complaint using a body's internal complaints or review procedures (where these exist).

Any public body can set up an internal complaints procedure and in recent years all public bodies have been encouraged to do so. In some cases (e.g. under homelessness legislation) there is a statutory requirement to carry out an internal review on request.

Whereas judicial review focuses on the legality of the decision made, internal complaints procedures can encompass a broader range of issues.

Alternative dispute resolution

An aggrieved individual or organisation can try to use **alternative dispute resolution** (ADR) to help with the issue they are facing. ADR is the traditional term for [a collection of methods, such as mediation, designed to enable people to resolve disputes outside the civil court system](#).

It is often the case that a public body is under no obligation to provide, or to participate in, ADR. However, sometimes there is a statutory right to access ADR. [For example, this is the case for families in dispute with a local authority in relation to additional support needs](#).

Ombudsmen and other external complaints handlers

Another option for an individual facing an issue is to complain to **an ombudsman** or other **external complaints handling body**.

The main ombudsman in Scotland, with authority to consider complaints relating to **most devolved Scottish public bodies**, is the [Scottish Public Services Ombudsman \(SPSO\)](#).

The most notable exception to the SPSO's remit is **complaints relating to the police**. These fall under the remit of the [Police Investigations and Review Commissioner](#).

The other key ombudsman is the [Parliamentary and Health Service Ombudsman](#) who is responsible for considering complaints relating to **UK Government departments and agencies**. The health service aspect of this ombudsman's powers applies to England only.

Statutory right of appeal

In some instances, it will be possible for an individual or organisation to exercise **a right of appeal** before a court or tribunal which has been provided for by statute. The individual or body considering the appeal will often be empowered to look at **the merits of the original decision** and **substitute their own decision**.

Judicial review and the Scottish Public Services Ombudsman

[As noted earlier in the briefing](#), if **an effective alternative statutory remedy exists**, a person is required to use it before seeking judicial review,^{lxv} unless special or exceptional circumstances apply.⁸

On the other hand, the [Scottish Public Services Ombudsman Act 2002](#) ('the 2002 Act') says that the [Scottish Public Services Ombudsman](#) ('the SPSO') must **not** investigate any matter in respect of which there was a right of appeal, review or 'remedy by way of proceedings in any court of law'. There is an exception where the SPSO is satisfied that it is not reasonable to expect a person to use, or have used, the alternative remedy.^{lxvi}

There are **two key questions** in this context:

- Should the SPSO consider a complaint where there is also an action for judicial review, or the possibility of such an action?
- Conversely, should a court in a judicial review action consider a complaint to the SPSO as an alternative effective remedy which must be exhausted before judicial review proceedings are competent?

lxv [Court of Session Rules](#), rule 58.3(1).

lxvi [Scottish Public Services Ombudsman Act 2002](#), section 7(8).

The Inner House of the Court of Session had the opportunity to consider these issues in an important recent case, [McCue's Guardian v Glasgow City Council \(2020\)](#) ('the McCue case'), the details of which are set out in the box below. The key point is that the court in McCue left **an element of discretion** for the SPSO and the court in some circumstances.

McCue's Guardian v Glasgow City Council (2020) ⁷⁸

The petitioner sought judicial review of a council's decision in relation to her son's community care services and one issue was whether she had exhausted all alternative statutory remedies.

In interpreting the SPSO's powers under the 2002 Act, the Inner House said that the authority of the SPSO to consider a case will be 'ousted' when judicial review proceedings have been raised and there is a possibility of a successful remedy. However, where the complainer does **not** pursue judicial review proceedings, the SPSO will have **discretion** as to whether it investigates the complaint.

Likewise, the court said that it may be appropriate in some cases for the court to dismiss a petition for judicial review where the SPSO would be better placed to deal with the issues raised in the complaint.

Several legal commentators have highlighted that this case leaves **some potential difficulties** associated with the time limit for raising judicial review proceedings (usually **three months**)^{lxvii} compared to the time limit for making a complaint to the SPSO (usually **twelve months**).^{lxviii 79 80} [One legal commentator explained the resulting dilemma \(and possible solution\) in this way:](#)

“ ... there is a clear risk that if someone decides to pursue a complaint to the SPSO, and it later transpires that the complaint raises issues more suited to be dealt with by ... the court, that the person will be out with the time limit for raising such proceedings... it will be best practice to consider at the earliest possible stage whether judicial review proceedings may be appropriate. By adopting this approach, even if the petition is dismissed by the court at the permission stage, the complainer will still be able to pursue a complaint to the SPSO.”

Brodies, 2020⁷⁹

lxvii [Court of Session Act 1988](#), section 27A.

lxviii [Scottish Public Services Ombudsman Act 2002](#), section 10.

Tribunals and judicial review

A tribunal is a specialist forum for resolving disputes which is intended to be faster, as well as more accessible and user-friendly, than the courts.

This section of the briefing begins with [a short background note on the tribunal system](#). It then considers **two discrete issues associated with the tribunal system and judicial review**, namely:

- [the system by which a judicial review action commenced in the Court of Session can be transferred into the tribunal system](#)
- [the limited opportunity for the judicial review of an 'unappealable' tribunal decision](#).

An overview of the tribunal system

There are many different tribunals operating in Scotland. They loosely fall into **two categories**:

- **UK tribunals**, which deal with issues **reserved to the UK Parliament and Government**, where a UK-wide approach is taken, such as child support, most tax, employment law and immigration and asylum (**reserved matters**).^{lxix}
- **Scottish tribunals**, which deal with policy areas **devolved to the Scottish Parliament and Government** such as housing, land and mental health (**devolved matters**).

Both the UK and Scottish tribunals systems initially **developed in a piecemeal way**, in response to an identified need for dispute resolution in a particular policy area.

In **2008**, the [Tribunals, Courts and Enforcement Act 2007](#) came into force and created the **new centralised tribunal system** for **UK tribunals**. The new structure is split into a **First-tier Tribunal** (where a case is first heard and decided) and the **Upper Tribunal** (which usually only hears appeals). Both the First-tier Tribunal and the Upper Tribunal are, in turn, split into specialist chambers.

The [Tribunals \(Scotland\) Act 2014](#) made similar provision for [a new unified tribunal structure](#) for **Scottish tribunals**, with a target date for full integration of all tribunals into the centralised structure of **August 2023**.

The [Scotland Act 2016](#) also enabled the functions of a UK tribunal dealing with reserved matters to be transferred to the Scottish tribunal system on a case by case basis.^{lxx} This transfer, to take place in tranches, will be “an extended process” ([Explanatory Notes to the Scotland Bill](#), para 236).

^{lxix} [Scotland Act 1998](#), schedule 5.

^{lxx} [Scotland Act 2016](#), section 39 inserting para 2A into the [Scotland Act 1998](#), schedule 5, Pt III.

Transfer of judicial review cases from the Court of Session to the Upper Tribunals

In recognition of tribunals' expertise in their various specialist areas of law, legislation provides that certain judicial review cases **commenced** in the [Court of Session](#) can be **transferred** to the tribunal system.

At present, such transfers are **not** thought to be particularly common in practice.⁸¹

Under statute, there are **two separate mechanisms for transfer**, depending on whether the proposed transfer is to the UK tribunal system or to the Scottish tribunal system:

- The [Tribunals, Courts and Enforcement Act 2007](#) says, where certain conditions are satisfied, judicial review cases **commenced** in the [Court of Session](#) can be **transferred** to the **UK Upper Tribunal**.^{lxxi} One important condition of transfer is that the case in question does **not** relate to [a devolved matter](#).^{lxxii}
- The [Tribunals \(Scotland\) Act 2014](#) ('the 2014 Act') makes broadly equivalent provision for transfer from the [Court of Session](#) to the [the Upper Tribunal for Scotland](#).^{lxxiii} However, the relevant statutory provision requires subordinate legislation to become operational. **At the time of writing, the subordinate legislation has not been made.**

The two systems are similar but not identical:

- assuming the relevant provision becomes operational, the 2014 Act says that the transfer to [the Upper Tribunal for Scotland](#) will always be **at the discretion of the Court of Session**.^{lxxiv}
- for the **UK Upper Tribunal**, in relation to one narrow class of tribunal decision, transfers to the tribunal **are mandatory**, while other categories are **discretionary**.^{lxxv}

^{lxxi} [Tribunals, Courts and Enforcement Act 2007](#), section 20.

^{lxxii} [Tribunals, Courts and Enforcement Act 2007](#), section 20(1)(4).

^{lxxiii} [Tribunals \(Scotland\) Act 2014](#), section 57.

^{lxxiv} [Tribunals \(Scotland\) Act 2014](#), section 57.

^{lxxv} [Tribunals, Courts and Enforcement Act 2007](#), section 20; Act of Sederunt (Transfer of Judicial Review Applications from the Court of Session) 2008 (SSI 2008/357).

Decisions of the Upper Tribunals which cannot be appealed

Some decisions of the **UK Upper Tribunal** (under the UK tribunal system) can be appealed to the higher courts. However, others cannot be.

For example, where the UK Upper Tribunal refuses permission for its decision to be further appealed to the courts, this decision to refuse permission itself cannot be appealed.^{lxxvi}

Some of these 'unappealable' UK Upper Tribunal cases **have a Scottish element**, for example, the person raising the action lives in Scotland. It was thought that they (in theory) might be able to be the subject of a judicial review action before the [Court of Session](#).

Likewise, for other 'unappealable' UK Upper Tribunal cases, i.e. **those connected to other parts of the UK**, it was thought they might also be able to be judicially reviewed by the Court of Appeal.

However, in 2011, the twin UK Supreme Court judgements of [Eba v Advocate General for Scotland](#)⁸² (relating to the Court of Session) and [R \(on the application of Cart\) v The Upper Tribunal](#)⁸³ (relating to the Court of Appeal) **clarified that the availability of judicial review was restricted in this context**. There could only be a challenge by way of judicial review where:

- the UK Upper Tribunal decision in question raises an important point of principle or practice; or
- there is some other compelling reason.

Section 2 of the [Judicial Review and Courts Act 2022](#), also discussed later in the [briefing](#), will **override** the decisions in Cart and Eba. It will virtually eliminate the prospect of judicial review in the sphere previously covered by those Supreme Court decisions. Section 2 has to be brought into force via subordinate legislation and the date for this to happen is yet to be decided.

It is important to remember that, so far, we have been discussing the position with the **UK Upper Tribunal** under **the UK tribunal system**. The [Courts Reform \(Scotland\) Act 2014](#) introduced the equivalent rule to that contained in Cart and Eba in relation to 'unappealable' decisions of the [Upper Tribunal for Scotland](#) in the Scottish tribunal system.^{lxxvii}

This separate provision on the [Upper Tribunal for Scotland](#) does **not** fall within the scope of the [Judicial Review and Courts Act 2022](#).

^{lxxvi} [Tribunals, Courts and Enforcement Act 2007](#), sections 11(4) and 13 (1) and (8).

^{lxxvii} Courts Reform (Scotland) Act 2014, section 89 inserting section 27B(3)(c) into the Court of Session Act 1988.

Policy initiatives relating to judicial review

This final section of the briefing discusses **a range of recent and ongoing policy initiatives** by the UK and Scottish governments relating to judicial review.

Policy initiatives of the UK Government

First, this section of the briefing discusses policy developments associated with **the UK Government**. These can be divided into:

- [reforms contained in the Judicial Review and Courts Act 2022](#)
- [A Bill to repeal and replace the Human Rights Act](#).

Judicial review

In July 2020, an expert Panel was established by the UK Government to conduct the [Independent Review of Administrative Law](#) (IRAL). This included a detailed consideration of the law of judicial review. [The Panel's report](#) was published on **18 March 2021**. This report did not recommend wide-ranging, fundamental reforms, but it did propose some key changes to law and procedure.

Also on that day, the UK Government published [its response to the report in the form of a consultation document](#). This was supportive of the Panel's recommendations, but sought views on some more radical proposals, which the Panel had not advocated or endorsed.

The [Judicial Review and Courts Bill](#) ('the Bill'), based on the review report and government consultation, was introduced in the UK Parliament in **July 2021**. The Bill recently completed its parliamentary passage and received Royal Assent on **28 April 2022**, becoming the [Judicial Review and Courts Act 2022](#) ('the 2022 Act').

One key measure in the 2022 Act is provision to **restrict the availability of judicial review** in relation to decisions of [the UK Upper Tribunal](#). [As discussed earlier](#), this change, when it comes into force (via future subordinate legislation), will override the effect of the UK Supreme Court judgements known as [Cart](#) and [Eba](#).^{lxxviii}

^{lxxviii} Judicial Review and Courts Act 2022, section 2.

Human rights legislation

On **22 June 2022**, the UK Government introduced [the Bill of Rights Bill in the UK Parliament](#) ('the Bill') which aims to reform human rights law, by repealing and replacing the [Human Rights Act](#). The Bill in its entirety extends to Scotland, as well as other parts of the UK.^{lxxix}

A [summary of the bill](#) and a [short policy paper](#) can be found on the UK Government's website.

Prior to this development, the UK Government had commissioned [an independent review of the Human Rights Act](#) and [the report from this](#) was published in **December 2021**. The review was focused on:

1. the relationship between domestic courts and the [European Court of Human Rights](#)
2. the impact of the [Human Rights Act 1998](#) ('the Human Rights Act') on the relationship between the judiciary, the executive and the legislature.

In **December 2021**, the UK Government [published its consultation on the proposed Bill](#). The [Executive Summary to the consultation](#) (at para 3) comments on the plans as follows:

“ We will overhaul the Human Rights Act passed by the then Labour government in 1998 and restore common sense to the application of human rights in the UK. We will remain faithful to the basic principles of human rights, which we signed up to in the original European Convention on Human Rights ... The Bill of Rights will protect essential rights, like the right to a fair trial and the right to life, which are a fundamental part of a modern democratic society. But we will reverse the mission creep that has meant human rights law being used for more and more purposes, and often with little regard for the rights of wider society.”

The policy and constitutional impact of this Bill on Scotland (as well as the rest of the UK) is likely to be discussed extensively in the forthcoming weeks and months.

Policy initiatives of the Scottish Government

Recent policy initiatives of **the Scottish Government** affecting the law of judicial review can be divided into:

- possible future changes to the law itself, specifically [in the area of human rights law](#)
- possible structural reforms, specifically [the creation of an environmental court](#).

Human rights legislation

The Scottish Government supports the current human rights regime in the UK. In its recent response to the [UK independent review of the Human Rights Act](#), the Scottish

^{lxxix} Bill of Rights Bill, clause 38(2). See also the Annex to the [Explanatory Notes](#) on p 38.

Government argued that the regime is a key part of the devolution settlement.⁸⁴

In **March 2021**, at the very end of the last parliamentary session, the Scottish Parliament passed [the United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#) ('the UNCRC Bill'). This aimed to incorporate [the United Nations Convention on the Rights of the Child](#) (the UNCRC) into domestic Scots law.

In **October 2021**, in a setback to the Scottish Government's policy in this area, the [UK Supreme Court found certain provisions of the Bill to be outwith the legislative competence of the Scottish Parliament](#).⁸⁵ On **24 May 2022**, the Deputy First Minister, John Swinney MSP, made [a statement to Parliament on the Bill](#). He confirmed that he had not managed to reach agreement with the UK Government on alternative approaches. Consequently, the Bill would proceed to **Reconsideration Stage**, to allow the provisions of the Bill which were subject to legal challenge to be amended.

For this session of the Scottish Parliament, [the Scottish Government is proposing that there will be a Human Rights Bill](#). It will include a **right to a healthy environment**; a **right for older people to ensure equal access to their human rights** and provision to **ensure equal access to everyone** to the rights contained in the Bill.

The Bill would also incorporate into domestic Scots law the UN's [International Covenant on Economic, Social and Cultural Rights](#), as well as three UN treaties on [race](#), [women](#), and [disability](#).

In March 2022, SPICe published a briefing entitled [Economic, Social and Cultural Rights and the Proposed Human Rights Bill](#).⁸⁶

If, at a future date, international human rights treaties (other than the ECHR) are incorporated into domestic Scots law then this has consequences for the law of judicial review.

Access to environmental justice and an environmental court

The Scottish Government is required [under 2021 legislation associated with Brexit](#) to consult, within a specified timeframe, on issues including:

- whether the law in Scotland on [access to justice on environmental matters](#) is effective and sufficient
- the possible need for **a specialist environmental court**.^{lxxx}

This consultation is likely to take place **in late 2022 or early 2023**.³⁷

In **2018**, the lawyer, Sir Crispin Agnew, argued that such any specialist environmental forum **should be able to hear and decide judicial review cases**.⁸⁷

In **October 2021**, [Environmental Rights Centre for Scotland](#) (ERCS) was the latest in this

^{lxxx} UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, sections 22 and 41 (1)-(4).

policy field to [set out its thoughts on the subject of a specialist environmental court in a report](#).³⁷ However, the report did not set out a definitive view on whether judicial review actions should transfer to any specialist environmental court.

Future Scottish Government policy developments will be important here.

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