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CHAPTER 27
SECTION 4**JUDICIAL REVIEW**
– AFTER-ENTRY CASES (SCOTLAND)**1. GENERAL**

Scottish Judicial Review procedures differ in various ways from those in England and Wales. The recommendations made in the Bowman Report, and the consequential changes to the Civil Procedure Rules, do not apply in Scotland. This instruction therefore gives guidance to staff on procedures to be followed when dealing with such cases.

2. THE MAIN DIFFERENCES

- ***There is no Permission to Apply stage in Scotland.*** Cases go straight to a first hearing from the first orders stage, whereas in England and Wales an applicant for judicial review has first to seek permission to apply for judicial review. When considering whether to grant leave, the judge will be looking to see whether the case is arguable on its merits; whether there has been an unreasonable delay in bringing the case before the court and whether the person bringing the petition has locus standi, i.e. whether he has a sufficient interest in the proceedings.
- ***There is no time limit for lodging an application.*** In England and Wales an application for judicial review must be lodged promptly and in any event not later than 3 months after the grounds to make the claim first arose. Although there is no official time limit for applications for judicial review, the Office of the Solicitor to the Advocate General for Scotland will take account of undue delay in presenting a petition, particularly where an application is not lodged until just before the petitioner is about to be removed. In practice, Scottish cases tend to take longer to be disposed of than those brought in England and Wales.
- ***A Petition is lodged, with supporting documents.*** These supporting documents consist mainly of a decision letter, a determination or whatever is being challenged in the Petition. In England and Wales, applications post-Bowman are made on a claim form supported by all documentation which will be relied on and an outline argument.
- ***There is no paper hearing.*** In England and Wales, most applications for permission to apply for judicial review are dealt with on the papers, ie. on the basis of the documentary evidence, by a judge working privately in chambers: oral hearings are unusual in the first instance. In Scotland, an oral application has to be made by a petitioner whether interim orders are sought or not. If interim orders are sought, the respondent is given a chance to appear (the term “intimation” refers to the notice

given to a respondent to appear). The usual interim orders are for suspension of removal directions and interim liberation (see para 3.3 below).

- ***There is no equivalent of the “assertive letter” in Scotland.*** As the petitioner does not have to seek leave to apply, there is no prospect of intervention at this phase unless interim orders are sought (see paragraph 3.3, below, “interim liberation”). However, caseworkers should take the opportunity, if it arises, of setting out as fully as possible the background to the case and the reasons for the S of S’s refusal to reverse this decision so that this can be set before the court as part of the other side’s supporting documents.
- ***A Petitioner can amend his case whilst it is running.*** In Scotland, petitioners are frequently allowed to do this. In England and Wales, the claimant sets out in the claim form the grounds of challenge and must serve this on the respondent within 7 days of making the claim. There is no scope for amending the grounds before the hearing. However, the court’s permission is required if a claimant seeks to rely on grounds other than those for which he has been given permission to proceed.
- ***Skeleton Arguments are not produced.*** In Scotland, unlike in England and Wales, the petitioner does not have to make full disclosure of all the material facts to the court. Skeleton arguments are not produced and arguments can be sprung on the opposition in the middle of a hearing.
- ***There is no requirement for “answers” to be lodged.*** In Scotland, “answers”, i.e. the respondent’s version of events, can be lodged at any time before the first hearing, and in fact there is no requirement for answers to be lodged at all (although they usually are). In England and Wales, the respondent’s grounds for defence must be lodged within 21 days after service of the claim form and then, if permission to proceed is granted, within a further 35 days.
- ***There is no “active case” letter procedure.*** In England and Wales, “active case” letters are sent out by the court to request confirmation of whether a case is still live. The applicant’s solicitor has two weeks from the date of that letter to confirm whether they wish to proceed. If no response is received, the case is struck off the rolls for want of prosecution. No such system is in place in Scotland.

3. SCOTTISH JUDICIAL REVIEW PROCEDURE

3.1. The Application

In Scotland, the judicial review applicant raises a Petition and is known as the Petitioner: the Secretary of State is known as the Respondent.

It is not necessary for a Petitioner’s representatives to notify the Office of the Solicitor to the Advocate General for Scotland in advance of a petition being presented to the Court.

If the Petitioner is not in detention and removal is **not** imminent, then a first order only will be sought. In these circumstances, the Respondent has no right to be present.

If the Petitioner is in detention and removal directions have been set, the representatives will usually apply for interim liberation (similar to bail) and suspension of removal.

These types of cases are intended to be dealt with quickly and, since the case may come before the court very speedily, time is of the essence.

3.2. **The Home Office**

This section applies where there is a threat of imminent removal.

If the Immigration Service has set removal directions, the Petitioner's representatives will advise the Immigration Service that the decision leading to removal is to be challenged by way of judicial review. The Immigration Service should then notify the representatives that they have **5 working days** in which to present a petition for judicial review for signetting by the Signet Office. **If no action is taken on behalf of the petitioner at that stage, action will continue and removal will take place as scheduled.**

If it is obvious that the case is high profile or that judicial action is imminent, the Immigration Service should send relevant papers to the Office of the Solicitor to the Advocate General for Scotland and copies of all to the JRMU. Relevant papers for these purposes should include any notices served on the petitioner, any immigration officer's reports, interview reports and any determinations by the Appellate authorities. Additional documents may be requested by the Office of the Solicitor to the Advocate General for Scotland where necessary.

If no prior warning is given of a new case, the Office of the Solicitor to the Advocate General for Scotland will be notified by the Keeper's Officer if interim orders are sought by the Petitioner. The Keeper is obliged to do this since the Secretary of State has a caveat (a warning mechanism) with the Court. A copy of the Petition is then forwarded to the Office of the Solicitor to the Advocate General for Scotland by the petitioner's agents with notice of when it will come before the court. It should be noted that in most cases the Office of the Solicitor to the Advocate General for Scotland have less than 24 hours to prepare a case for an interim liberation hearing.

3.3. **First Orders and Interim Liberation**

First Orders

When a petition is first lodged with the court a motion is enrolled seeking:

1. authority to serve the petition on all interested parties;

2. a date for the first hearing; and
3. any interim orders.

In practice the court will allow a hearing but the date will be fixed between the parties at a later stage.

Unless interim orders are sought, first orders will be fixed without the need to intimate the petition, i.e. to tell the respondent that the petition has been lodged, so we will have no opportunity to appear and oppose first orders. These can and sometimes are opposed when we have notice.

The usual **interim orders** sought are for suspension of removal directions and interim liberation. The practice is that removal will not take place until the petition has been disposed of. To avoid the Court having to consider making an order of suspension, an undertaking is usually given to the petitioner's solicitors that no removal directions will be fixed until the petition is disposed of.

The Petitioner's representatives must appear and ask the court for First Orders for intimation and service. Such an order will only exceptionally be opposed. This will be done where the basis of the Petition is clearly ill founded in law. The court will not consider disputes of fact at a motion for First Orders.

Interim Liberation

This is an order requiring the petitioner to be released from detention until the petition has been disposed of. The interim liberation is usually subject to certain conditions as to residence, reporting to local police and consignment with the court of an amount of caution (security). The approach of the courts in deciding whether or not to liberate is to consider if there is a materially greater risk of the petitioner absconding than in the normal case

The Court will deal with motions where interim liberation is sought as a matter of urgency. The following steps are usually carried out with speed.

- Papers are sent to the Office of the Solicitor to the Advocate General for Scotland by the appropriate caseworking directorate (usually by fax). Relevant papers should include those previously indicated but the Office of the Solicitor to the Advocate General for Scotland will request supplementary documents if required. The Office of the Solicitor to the Advocate General for Scotland will then contact the Keeper to ascertain when the case is likely to be heard.
- The Office of the Solicitor to the Advocate General for Scotland will obtain Counsel's Clerk. Although the Home Office has 2 standing juniors in Scotland, they are frequently unavailable because of the short notice given for interim liberation hearings.

- Papers received from the caseworking directorate are studied and any further instructions obtained by telephone where necessary.
- A bundle of papers (made up of those sent by the Home Office) is then forwarded to Counsel together with a letter of instruction. Occasionally photocopies of recent decisions are also sent to Counsel if they are considered helpful.
- Motions for interim liberation do not have any scheduled hearing time. The Officer of the Solicitor to the Advocate General for Scotland will try to arrange for a case to be heard in the morning or afternoon. When the case is called the Petitioner will seek a first order and any interim order.

Grounds for opposition to Interim Liberation

- The petitioner has a history of absconding.
- The petitioner has given false representation.
- Conditions of temporary admission or bail have been breached.
- All statutory remedies have been exhausted and the petitioner has no reason to comply.
- The petitioner's history shows a determined effort to remain in the United Kingdom.
- Liberty is sought pending the determination of an application made by the petitioner e.g. Asylum, but a decision is likely to be reached within a short space of time.
- The address offered is unacceptable.
- The amount of caution when offered is not acceptable.

Caution, pronounced **Kation**, is a form of surety whereby one person promises on behalf of another that he will pay a certain sum of money or perform a certain act. In this context caution is offered as a security that a person will comply with bail conditions; it is paid on behalf of the petitioner by a named individual. The caution is forfeited if the petitioner fails to comply with bail conditions.

- If there is a point of law to be answered and a prima facie case is presented, it will be argued at a first hearing. If it is not possible to hear the case for some time, i.e. several months, the Secretary of State may not wish to oppose interim liberation.
- Interim liberation may be agreed if the petitioner has previously received bail and complied and/or previously received temporary admission and complied.

3.4. **Recall of Interim Liberation**

A motion for recall of interim liberation may be made where the petitioner has failed to comply with conditions attached to the award of interim liberation. In such cases, forfeiture of caution is sought. In most cases such a motion is made when it has come to light that a petitioner has absconded. However, a failure of the petitioner to report to the police would also merit such a motion.

4. **FIRST HEARINGS**

4.1. **Fixing a First Hearing**

These are usually fixed by the Parliament House Clerk and the Keeper will usually require both the Petitioner and Respondent to attend to fix a hearing, although this can also be done by one of the parties with written consent of the other.

4.2. **Answers**

There is no time limit or requirement for lodging answers in advance of a hearing. In practice the first hearing is treated as the main hearing for immigration cases and has taken the form of what the rule seems to envisage as a second hearing (The rule referred to is Rule 58 of the Rules of the Court of Session, which regulate all proceedings in the Court of Session, the highest civil court of first instance in Scotland). Second hearings are rare. Evidence can be led (ie. the court would hear oral evidence from witnesses). It would be at this point that affidavits would be presented to the court.

Counsel will advise if affidavits (Witness statements are not used in Scotland) will be necessary.

4.3. **First Hearings**

In terms of the Rules of Court (58.9.1) the purpose of the First Hearing is to enable the judge to ascertain the respective position of the parties and to determine any outstanding issues which may be disposed of at the first hearing. In practice the merits of the petition are dealt with then. If evidence is required then this will be done at a second hearing. If a second hearing is necessary, the judge will have specified what is to be dealt with.

Counsel will advise if it is appropriate to proceed to a first Hearing. Answers will have been prepared and advice given on necessary preparation. This is likely to include the lodging of productions, which commonly take the form of parts of the Home Office file and decisions letters. The Keeper's Office will be advised at least 48 hours in advance of the hearing that the Secretary of State intends to be represented at the first hearing.

Some cases never reach the stage of a first hearing. This is because it may not be necessary to proceed to a hearing particularly in instances where a petitioner is merely challenging a decision to detain which may not merit a hearing as the petition will superseded by a forthcoming event.

Often new representations or an application on a fresh ground will have been submitted by agents direct before the First Hearing and the Office of the Solicitor to the Advocate General for Scotland will be unaware of this. This most commonly happens where the petition is in respect of an asylum decision and the petitioner marries a British citizen and applies for cleave to remain as a spouse. Where it is clear from a file that a judicial review is ongoing, the Office of the Solicitor to the Advocate General for Scotland should be advised of any further representations submitted by a petitioner's representative.

4.4. **Appeals**

There is a right of appeal to the Inner House of the Court of Session and from there to the House of Lords against the Judge's decision disposing of the petition. The appeal is known as reclaiming motion and has to be marked within 21 days of the date of the decision. If a petition is successfully opposed removal directions should not be fixed for a period of 21 days to see if a reclaiming motion is marked. Petitions for Judicial Review are at first instance heard by a single judge sitting in what is known as the Outer House of the Court of Session and from there, there is a right of appeal to the Inner House which is a bench usually of three judges but it can be five or more, where necessary.

4.5. **Addendum**

The court rules are designed to put petitioners in the driving seat as far as progressing cases is concerned. Normally the petitioner has an interest in having the case determined as quickly as possible. This, however, is not always the position in immigration cases where there is often little incentive to dispose a case if an unfavourable outcome would lead to removal. The petitioner's agents may therefore not be in a hurry to progress matters.

In addition, the volume of business before the courts has the effect that it can be between 9-12 months before a First Hearing takes place. The Court of Session has three terms during which it sits to hear business such as First Hearings. These are roughly the end of September/beginning of October to the end of December; January to the end of March and the end of April to the beginning of July. The number of vacation days adds to the delay in securing a hearing date, as does the fact there are only a small number of practitioners who practise immigration law and they obviously have limited availability. In addition, there are often delays in the processing of the petitioner's legal aid application.

5. SOME USEFUL TERMS

Avizandum – the term to describe that the judge is going to make up his mind.

Caveat – a warning. This is like a written form of alarm, which will be triggered off in the Keeper's office if any interim orders are sought by the petitioner. The caveat will not operate where no interim orders are sought.

Court of Session – the highest Civil Court in Scotland. All judicial reviews and immigration cases take place here. Equivalent to the High Court in England.

Outer House – not a separate building from the Court of Session but a grouping of judges under category of case suitable for hearing by these judges (see Inner House).

Inner House – a group of judges and category of case suitable for hearing by those judges. Appeal cases are usually heard in Inner House cases. If either the Home Office or a petitioner makes an appeal against a decision by an Outer House judge, then the case will be heard on appeal by the Inner House, normally in front of 3 judges sitting as a team.

Keeper of the Rolls – the court official whose responsibility it is to allocate cases to judges on a daily, weekly, monthly and yearly basis. This is an almost impossible task given the volume of court business. The Court of Session does not just deal with judicial reviews. It also deals with criminal business on appeal, reparation actions, complicated divorce cases and civil jury trials.

Reclaim, Reclaiming Motion – to reclaim is to appeal against the decision of the court. Done by way of a reclaiming motion