OUTER HOUSE, COURT OF SESSION

[2019] CSOH 23

P514/18, P511/18, P1136/17

OPINION OF LADY CARMICHAEL

In the petitions

AP

GORDON BURNS

JOSEPH MILLBANK

Petitioners

against

THE LORD ADVOCATE

Respondent

Petitioners: Leighton; Drummond Miller LLP
Respondent: O'Neill (Sol Adv); SGLD

7 March 2019

[1] One of the developments that followed the Scottish Civil Courts Review ("SCCR") was the introduction of a permission stage in Scottish judicial review procedure. Legislative provision was made in section 89 of the Courts Reform (Scotland) Act 2014, which amended the Court of Session Act 1988, by adding sections 27B-D. These are in the following terms:

> "27B (1)No proceedings may be taken in respect of an application to the supervisory jurisdiction of the Court unless the Court has granted permission for the application to proceed.
>
> (2) Subject to subsection (3), the Court may grant permission under subsection (1) for an application to proceed only if it is satisfied that—

(a) the applicant can demonstrate a sufficient interest in the subject matter of the application, and

(b) the application has a real prospect of success.

(3) Where the application relates to a relevant Upper Tribunal decision, the Court may grant permission under subsection (1) for the application to proceed only if it is satisfied that—

(a) the applicant can demonstrate a sufficient interest in the subject matter of the application,

(b) the application has a real prospect of success, and

(c) either—

(i) the application would raise an important point of principle or practice, or

(ii) there is some other compelling reason for allowing the application to proceed.

(4) The Court may grant permission under subsection (1) for an application to proceed—

(a) subject to such conditions as the Court thinks fit,

(b) only on such of the grounds specified in the application as the Court thinks fit.

(5) The Court may decide whether or not to grant permission without an oral hearing having been held.

(6) In this section, "a relevant Upper Tribunal decision" means—

(a) a decision of the Upper Tribunal for Scotland in an appeal from the First-tier Tribunal for Scotland under section 46 of the Tribunals (Scotland) Act 2014,

(b) a decision of the Upper Tribunal in an appeal from the First-tier Tribunal under section 11 of the Tribunals, Courts and Enforcement Act 2007.

27C (1) Subsection (2) applies where, in relation to an application to the supervisory jurisdiction of the Court—

(a) the Court—

(i) refuses permission under subsection 27B(1) for the application to proceed, or

(ii) grants permission for the application to proceed subject to conditions or only on particular grounds, and

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

(2) The person making the application may, within the period of 7 days beginning with the day on which that decision is made, request a review of the decision at an oral hearing.

(3) A request under subsection (2) must be considered by a different Lord Ordinary from the one who refused permission or granted permission as mentioned in subsection (1)(a)(ii).

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

(5) At a review following a request under subsection (2), the Court must consider whether to grant permission for the application to proceed; and subsections (2), (3) and (4) of section 27B apply for that purpose.

(6) Section 28 does not apply—

(a) where subsection (2) applies, or

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

27D(1) Subsection (2) applies where, after an oral hearing to determine whether or not to grant permission for an application to the supervisory jurisdiction of the Court to proceed, the Court—

(a) refuses permission for the application to proceed, or

(b) grants permission for the application to proceed subject to conditions or only on particular grounds.

(2) The person making the application may, within the period of 7 days beginning with the day on which the Court makes its decision, appeal under this section to the Inner House (but may not appeal under any other provision of this Act).

(3) In an appeal under subsection (2), the Inner House must consider whether to grant permission for the application to proceed; and subsections (2), (3) and (4) of section 27B apply for that purpose.

(4) In subsection (1), the reference to an oral hearing is to an oral hearing whether following a request under section 27C(2) or otherwise.

[2] The Rules of the Court of Session were amended to make provision for the permission procedure, in particular in paragraphs 58.7-58.10:

58.7 (1) Within 14 days from the end of the period for lodging answers the Lord Ordinary must—

(a) decide whether to—

(i) grant permission (including permission subject to conditions or only on particular grounds);

(ii) grant an extension to the time limit under section 27A of the 1988 Act; or

(b) order an oral hearing (for the purpose of making those decisions) to take place within 14 days.

(1A) The petitioner, respondent and any other person who has lodged answers to the petition must be given at least 2 days' notice of the oral hearing.

(2) Where permission is refused (or permission is granted subject to conditions or only on particular grounds) without an oral hearing, the Lord Ordinary must give reasons for the decision.

(3) Where an extension to the time limit under section 27A of the Act of 1988 is refused without an oral hearing, the Lord Ordinary must give reasons for the decision.

58.8(1) A request to review a decision made without an oral hearing, under section 27C(2) of the Act of 1988, is made in Form 58.8.

(2) Where a request is granted, the oral hearing must take place within 7 days.

(3) The petitioner, respondent and any other person who has lodged answers to the petition must be given at least 2 days' notice of the oral hearing.

58.9(1) Except on cause shown, an oral hearing must not exceed 30 minutes.

(2) Where permission is refused (or permission is granted subject to conditions or only on particular grounds) at an oral hearing, the Lord Ordinary must give reasons for the decision.

59.10 An appeal under section 27D(2) of the Act of 1988 (appeals following oral hearings) is made by reclaiming motion (see rule 38.8(d)).

[3] The Lord Ordinary may either grant or refuse permission on the papers at the first stage of the procedure. At that first stage, an oral hearing on permission may be appointed. A party may request a review at an oral hearing of a decision taken on the papers at the first stage. When such a request is made, it is considered by a different Lord Ordinary. That Lord Ordinary decides whether or not to appoint an oral hearing. Where the Lord Ordinary decides not to grant a request for review at an oral hearing, that is the end of the life of the petition. Where there has been no oral hearing at either the first stage or following a request for review, there is no right to reclaim. A petition can, therefore, be determined adversely to the petitioner by refusal of permission which can take place without any oral hearing on the question of permission, and without a right of appeal. The present petitioners complain that these aspects of the procedure are not compatible with certain of their Convention rights. All of the petitioners have previously lodged petitions

for judicial review in which permission was refused on the papers, and a request for review at an oral hearing was then also refused.

The petitions

[4] The first is brought by AP, in her own name and as guardian of her son ("the adult"). Her initials only are used in this opinion to protect the privacy of the adult. Before amendment to the Mental Health (Care and Treatment) (Scotland) Act 2003, she was by operation of law his named person. As a named person she was afforded access to papers relative to proceedings relating to him in the Mental Health Tribunal for Scotland ("MHTS"). Following amendment of that Act, she no longer has the status of a named person. In relation to individual sets of proceedings she has been afforded "party" status by the MHTS so that she can have access to papers. By a decision of 29 January 2018 she was refused party status. On 26 February 2018 the Lord Ordinary granted permission in relation to two orders dealing with the refusal of party status. He refused permission in relation to a further six orders some of which challenged the legislation relating to named persons. Because of the subject matter the case was dealt with expeditiously and a substantive hearing took place on 27 February 2018. The decision of the MHTS refusing party status was reduced. Thereafter the petitioner sought review of refusal of permission in relation to the remaining six orders. The Lord Ordinary refused the request for an oral review hearing. The emphasis in the earlier petition was upon the consequences of lack of named person status in the context of tribunal proceedings. The note submitted by the petitioner in support of her request for a review, however, refers to difficulties with involvement in decision-making about the adult's care and treatment outwith MHTS proceedings, arising from her not being his named person.

[5] Gordon Burns is a life prisoner. The complaint in the earlier petition was that the Scottish Ministers refused to "fast-track" his progression on the waiting list for psychological treatment to address his offending behaviour. It was alleged that the Scottish Ministers had unlawfully fettered their discretion to depart from a policy regarding the priority given to prisoners awaiting such treatment. The complaint was made only on common law grounds. He submitted with his request for a review a note containing submissions in support of that request.

[6] Joseph Millbank is a recalled extended sentence prisoner. His present petition omits a challenge to the decision of the Lord Ordinary, but he seeks to add such a challenge by amendment if permission is granted. The respondents have raised a plea of time-bar in respect that they aver that the petition was lodged one day after the last day of the three-month period for which provision is made in section 27A of the Court of Session Act 1988. His earlier petition sought reduction of a decision to move him from the open prison estate to closed conditions. It includes in the statement of facts a reference to his being placed in the segregation unit and strip-searched, but did not aver any unlawfulness regarding those procedures. The challenge to the decision to move the petitioner to closed conditions was made on common law grounds. Before the decision on permission he sought to amend to include a challenge to the lawfulness of the strip-search and segregation on Article 8 grounds. The court, on an opposed motion, refused to allow the minute of amendment to be received.

[7] Each of the present three petitions was originally brought on a variety of grounds. Following an oral hearing, I granted permission in AP for challenges based on the petitioner's Convention rights under Articles 5, 6 and 8, and those Articles taken together

with Article 14. In Burns and Millbank I granted permission only in relation to the challenges based on Article 6 and Article 6 with Article 14.

[8] At the hearing on permission, there was some discussion of the circumstance that there had been no service of the petitions on the Court, although the provisions of an Act of Sederunt were being challenged. Ms O'Neill told me that the Lord Advocate was willing in this case, in the public interest, to defend the rules in question. If the Court became concerned that the rules were not being defended at some later stage, appropriate steps could be taken, as by the appointment of an amicus. No difficulty of that sort arose. In granting permission, I expressed the view that judicial review proceedings should be served on any person or body whose decision is impugned in them, at least for such interest as that person or body may have. Where rules of court are challenged, there ought to be service on the Court, however exceptionally it might be expected to result in a response. The Lord Advocate also made submissions in the public interest in relation to challenges to the interlocutors of the Lord Ordinary.

[9] In Millbank, there had been a dispute at permission stage as to whether the petition was lodged timeously. That issue appeared to have been resolved by the substantive hearing, and the respondent did not move his first plea in law.

[10] The orders sought in the petitions so far as the statute and the Rules of Court were concerned were for reduction of sections 27B, C and D of the Court of Session Act 1998 and of rules 58.7 – 58.10 of the Rules of the Court of Session, on the grounds that they were unlawful insofar as they did not permit an oral hearing or right of appeal in some cases, or alternatively for declarator that they were unlawful on those grounds. In the course of the substantive hearing, Mr Leighton indicated that he recognised that the provisions complained of could not properly be characterised as unlawful in their entirety. He

accordingly sought only declarators. The petitioners also sought reduction of the interlocutor in each case refusing the request for an oral review hearing.

[11] I indicated at the substantive hearing that if I were of the view that any of the provisions of the statute were outwith the competence of the Scottish Parliament, I would provide an Opinion to that effect, and seek further submissions as to what might follow from that by way of remedy, and whether it would be appropriate to make an order under section 102(2) of the Scotland Act 1998.

Matters not in dispute

[12] Parties both submitted that a decision on permission was not a determination of the civil rights and obligations of the petitioners, and that the full range of protections afforded by Article 6 were not available to the petitioners. The permission procedure was, however, a limitation placed on access to the court. The following are the passages referred to by parties in *H* v *United Kingdom* (1985) 45 DR 281, at pages 283 to 285, which they said set out the correct approach to determining the lawfulness of a limitation on access to a court. *H* relates to the procedure to provide for leave to vexatious litigants to institute proceedings under the Vexatious Actions (Scotland) Act 1898. It is a Commission decision on admissibility.

> "1(b) The specific refusal of consent to the applicant's action to proceed ... cannot be said to have determined his civil rights and obligations as it constituted a mere procedural step before the applicant was able to bring an action in the civil courts … It follows that the procedure by which such consent was to be obtained did not attract the procedural guarantees of Article 6 of the Convention, and this aspect of the application must be dismissed as being manifestly ill-founded …
>
> (c) The refusal of leave by a single judge of the Court of Session to bring an action against a policeman did, however, restrict the applicant's access to court.

The European Court of Human Rights in its judgment in the Golder case … did not make specific reference to the question of vexatious litigants, but it did hold as follows:

"36. … Article 6 para 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para 1 as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing."

…

The question of access to court has been further discussed by the Court in the *Ashingdane* judgment … in which the Court held as follows:

"Certainly the right of access to the courts is not absolute but may be subject to limitations; these are permitted since the right of access 'by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals' (see the above-mentioned *Golder* judgment, quoting the *Belgian Linguistic* judgment …)

…

Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see the above mentioned *Golder* and *Belgian Linguistic* judgments … and also the Winterwerp judgment …). Furthermore, a limitation will not be compatible with Article 6 para 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

In the present case the Commission is only called upon to determine whether following the *Golder* and *Ashingdane* judgments, the applicants access to court was restricted to such an extent that the very essence of the right was impaired, whether the aim pursued was legitimate, and whether the means employed to achieve that aim were proportionate to the aim itself.

…

The vexatious litigant order of 16 December 1982 did not limit the applicant's access to court completely, but provided for a review by a senior judge of the Scottish judiciary of any case the applicant wished to bring. The Commission considers that such a review is not such as to deny the essence of the right of access to court; indeed, some form of regulation of access to court is necessary in the interests of the proper administration of justice and must therefore be regarded as a legitimate aim (cf No 727/60, Dec 5.8.60, Yearbook 3 pp 302, 309).

> Further, the Commission finds that in the present case the means employed in regulating access to court by the applicant were not disproportionate to the aim of ensuring the proper administration of justice (cf the reference to the Commission's report in the Golder case, supra) and it does not appear from the applicant's submissions that the judge's refusal of consent to commence proceedings was in any way arbitrary or unreasonable."

[13] In accordance with the approach set out in those passages, parties were at one in submitting that I required to consider whether the procedure for permission restricted the petitioners' right of access to the Court to such an extent as to impair the very essence of that right; and the proportionality of the measure. In relation to proportionality there was no dispute that the regulation of access to courts in the interests of the proper administration of justice was a legitimate aim. The petitioners did not assert that the introduction of a procedure requiring permission to proceed in judicial review was of itself unlawful. Their objection was to the particular provisions enacted to that end.

Petitioner's submissions

[14] Against that background, Mr Leighton submitted that a combination of factors in the scheme, being the potential for termination of the proceedings without an oral hearing, and the further consequence of the absence of an appeal, both impaired the essence of the right of access to the court, and were disproportionate interferences with it. In relation to the importance of an oral hearing, he referred to *Goc* v *Turkey* [2002] ECHR 589 at paragraph 47:

> "47. According to the Court's established case-law, in proceedings before a court of first and only instance the right to a "public hearing" in the sense of Article 6 § 1 entails an entitlement to an "oral hearing" unless there are exceptional circumstances that justify dispensing with such a hearing (see, for instance, *Håkansson and Sturesson* v *Sweden*, judgment of 21 February 1990, Series A no. 171-A, p. 20, § 64; *Fredin* v *Sweden (no. 2)*, judgment of 23 February 1994, Series A no. 283-A, pp. 10-11, §§ 21-22; and *Allan Jacobsson* v *Sweden (no. 2)* judgment of 19 February 1998, Reports 1998-I, p. 168, § 46)."

[15] In AP, in which permission had been given for challenges under Articles 5 and 8, the petitioner submitted that the guarantee of a public hearing was implicit in relation to Article 5. In relation to Article 8, the guarantee, so far as procedure was concerned, was of sufficient involvement in the decision making process relating to the adult. There was nothing in the petitioner's submissions to indicate to me that either Article 5 or Article 8 imported any more stringent requirement as to procedure than did Article 6, and I have therefore not considered the challenges made under those articles separately. Mr Leighton accepted that the regulation of access to courts in the interests of the proper administration of justice was a legitimate aim so far as each of these Articles was concerned.

[16] The test to be applied, so far as proportionality was concerned, was that set out in *Christian Institute* v *Lord Advocate* 2016 SLT 805 at paragraph 90. The relevant questions were (i) whether the objective was sufficiently important to justify the limitation of a protected right; (ii) whether the measure was rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applied against the importance of the objective, to the extent that the measure would contribute to its achievement, the former outweighed the latter. He accepted that the objective was sufficiently important to justify the limitation of a protected right, and that the measure in question was rationally connected to the objective. He did not, however, accept that the measure was proportionate having regard to questions (iii) and (iv) above. Mr Leighton placed emphasis on what was at stake for each petitioner, and the relatively limited court time involved in an oral hearing.

[17] The system in England and Wales did permit judicial review applications to be disposed of at permission stage, but only where a case was found to be totally without merit.

It also provided some access to the Court of Appeal in such circumstances: *R (Wasif)* v *Secretary of State for the Home Department* [2016] 1 WLR 2793. There was no scope for a margin of appreciation where the subject matter of the provisions was court procedure, and a domestic court was dealing with its own justice system. The petitioner in AP had wished to have a 30 minute oral hearing in a matter which was of importance to herself and the adult, which concerned the lawfulness of rules and legislation, and which affected others.

[18] So far as Article 14 was concerned, the essential elements were (i) that the matter in question fell within the ambit of another article of the Convention; (ii) a difference of treatment; (iii) that the difference of treatment was on a ground within the scope of Article 14; (iv) that others treated differently were in an analogous situation and (v) the absence of justification: *R (Steinfeld and Keidan)* v *Secretary of State for International Development* [2018] 3 WLR 415, paragraph 19. There was no dispute that the matters at issue fell within the ambit of Article 6. There was a difference of treatment between litigants seeking judicial review and other litigants. This fell within the scope of "other status" for the purposes of Article 14. The protection conferred by Article 14 was not limited to different treatment based on characteristics which were personal in the sense of being innate or inherent: *Clift* v *United Kingdom* [2010] ECHR 1106, paragraphs 55-63. It was not necessary that the treatment complained of must exist independently of the "other status" on which it was based: Clift, paragraph 60.

[19] The aim of Article 14 was to ensure that where a state provided for rights falling within the ambit of the Convention, but going beyond the minimum guarantees set out in the Convention, those rights were applied fairly and consistently within the jurisdiction, unless a difference of treatment was objectively justified. Counsel referred also to *AL (Serbia)* v *Secretary of State for the Home Department* [2008] 1 WLR 1445, paragraphs 24-28 in

relation to the correct approach to determining whether discrimination had occurred which was incompatible with Article 14. Counsel submitted that the importance of the right protected by the substantive article in informing the need for careful scrutiny. He referred to the French language text of Article 14, which uses the expression "toutes autres situations", reflecting a more expansive intention than "other status" as to the range of circumstances in which Article 14 should afford protection. The rights in issue in relation to Articles 5, 6 and 8 were important ones. In AP I understood his submission to be that even more careful scrutiny was required where the rights of a young man lacking capacity were at issue than in a case like Clift involving someone convicted of serious crimes.

[20] The petitioners were in an analogous position to other litigants seeking to vindicate their rights. There was no legitimate aim articulated for the difference of treatment. Insofar as the respondents sought to rely on the SCCR as providing justification, while it might do so in relation to the introduction of permission, it could not as regards the absence of oral hearing or appeal. He reiterated that it was the whole procedure that created the difficulty, although there was a variety of different ways, in his submission, in which the scheme might be rendered compliant with the petitioners' Convention rights. While he accepted that it might be difficult for a litigant to suggest that she had no real right of access to a court if an oral hearing was afforded, he maintained his position that his objection was to the scheme as a whole, that being one which permitted termination of the proceedings without an oral hearing, and without a right of onward appeal.

Respondents' submissions

[21] Ms O'Neill submitted that limitations on the right of access to the court might involve decision-making wholly on the papers, citing *Wasif*, and *Bhamjee* v *Fosdick and others*

[2004] 1 WLR 88, paragraphs 32 and 33. She submitted that the provisions complained of did not impair the very essence of the petitioners' right of access to the court. The procedure involved an application to the court, and consideration of it by the court, against the tests set out in the statute, as to whether or not permission should be granted. The tests, and in particular the "real prospect of success" test in section 27B, as further explained and articulated in *Wightman* v *Advocate General* 2018 SLT 356 at paragraph 9, were themselves of relevance. The intention was to sift out unmeritorious cases, but not to create an unsurmountable barrier which would prevent what might appear to be a weak case being fully argued in due course.

[22] Where the Lord Ordinary refused permission or granted permission on certain grounds only, or subject to conditions, the petitioner was entitled to request a review at an oral hearing. That application had to be considered by a different Lord Ordinary. The statutory scheme explicitly envisaged that the second Lord Ordinary must address whether or not an oral hearing should be held.

[23] The requirement for permission served a legitimate aim. She referred to the aims described in the report of the SCCR and the policy memorandum accompanying the Courts Reform (Scotland) Bill, namely preventing unmeritorious claims from proceeding, and thereby enabling resources to be focused on the expeditious disposal of cases which were allowed to proceed. The report of the SCCR at Chapter 12, paragraph 51, included the following:

> "We recommend the introduction of a requirement to obtain leave to proceed with an application to proceed with judicial review in Scotland, following the model of part 54 of the Civil Procedure Rules in England and Wales. We consider that such a procedure will assist, at an early stage, in encouraging early concessions by respondents in cases which are well founded in preventing unmeritorious claims from proceeding. This will create additional capacity in the court programme, enabling those cases in which leave is granted to be dealt with expeditiously."

The policy memorandum referred to the report of the SCCR, and to a preceding consultation which had posed the question: "Do you agree that the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases?"

[24] The means employed were proportionate to the aim sought to be achieved. The procedure contained a check on the decision-making of the first Lord Ordinary, namely the procedure to request review. To require an oral hearing in every case would reduce the effectiveness of permission in minimising the impact of unmeritorious applications on the resources of the court and of parties. Such a requirement would, she submitted, be pointless and waste the resources of the court and unjustifiably prolong an apparent uncertainty about the lawfulness of the challenged decision, referring to the language used by the Court of Appeal in *Wasif* at paragraph 16.

[25] A decision on permission did not attract the full range of protections provided by Article 6. Article 6 did not in any event guarantee a right of appeal: *Delcourt* v *Belgium* (1970) 1 EHRR 355, paragraph 25. The exclusion of a right of appeal in the circumstances envisaged by the statute was a proportionate response. No separate arguments had been advanced under Articles 5 and 8.

[26] In relation to Article 14, differences in the procedural requirements of forms of action did not constitute differences of treatment based on "other status". They were not grounded in a characteristic by which persons or groups of persons were distinguishable from each other. Ms O'Neill referred to *Whaley* v *Lord Advocate* 2008 SC (HL) 107, at paragraphs 27 to 30, and the authorities cited there. In particular, at paragraph 30, Lord Hope of Craighead said, referring to *Adams* v *Scottish Ministers* 2004 SC 665:

> " … it is the activity of hunting with hounds for sport that has been singled out for differential treatment, not participation in it by a particular sort of people or by

> people having a particular characteristic. … The real reason for it lies in the nature of the activity, not any personal characteristic of [the appellant] or any of the many other people of all kinds and social backgrounds who participate in hunting."

There was an analogy with the present case, in that it was the activity of seeking to access the supervisory jurisdiction of the court that was being treated in a particular way.

[27] The requirement for permission in relation to applications to the supervisory jurisdiction was legitimate and proportionate. There was a particular interest in the early disposal of applications directed against the decisions of public authorities on legal grounds.

[28] Ms O'Neill conceded that she was unable to point to any example of a first instance sift procedure whereby civil proceedings could be brought to an end without an oral hearing, and without a right of appeal. The closest analogy was with the procedure where persons who have been determined to be vexatious litigants attempt to bring proceedings and cannot do so without the permission of the court.

[29] The respondents were unable to identify any discussion in the Scottish Parliament regarding the nature of the process for permission. There is nothing to indicate that Parliament particularly considered the circumstance that the procedure set out in the bill could result in the determination of the petition by refusal of permission without any oral hearing, and without a right of appeal where that has occurred, or weighed the merits of that particular procedure against benefits which it might provide.

Discussion

[30] Perhaps surprisingly, there was little discussion in the course of the substantive hearing as to what value an oral hearing in open court, as opposed to a decision on the papers in chambers, brings to proceedings. The European Court of Human Rights has on many occasions identified the protection afforded by a public, oral hearing against the

administration of justice in secret without public scrutiny, and the importance of such hearings in maintaining public confidence in the courts. In rendering the administration of justice visible, it contributes to the achievement of a fair trial. It contributes also to the achievement of open justice. Open justice is a principle of the common law.

[31] It was difficult to identify precisely what factor was said to render the provisions complained of incompatible with Article 6 rights. Mr Leighton referred both to the absence of an oral hearing, and the absence of appeal where there has been no oral hearing. His submission was that it was the combination of factors that gave rise to the incompatibility. Following discussion I understood him to accept that if there were an oral hearing at any point before a Lord Ordinary, that would render the provisions compatible. That would within the current statutory scheme give rise to a right of appeal.

[32] As I have already said, no example of a procedure precisely similar, which had been found to comply with the requirements of Article 6, so far as those apply to a sifting procedure, was cited to me. The respondents referred to *H* and to *Bhamjee*. I did not find these of particular assistance in the present context. They relate to vexatious litigants who have, by reason of an established pattern of behaviour of abusing the processes of the court, come to find that access which they would normally have had as of right, has been limited. In Scottish cases, like *H*, the limitation occurs when there has already been an order of the court made in response to a history of vexatious proceedings. It is that which underlies and justifies the summary procedure for consideration of further requests to litigate.

[33] The respondents referred in this connection to *Wasif* as an example of a procedure in which proceedings could be brought to an end without any oral hearing. Two appellants challenged decisions of the Upper Tribunal to refuse permission to bring judicial reviews. In each case the Upper Tribunal had determined that the claim was totally without merit.

Rule 54.12 of Civil Procedure Rules (CPR r 54.12) provided that a claimant whose application to the High Court to apply for judicial review was refused in whole or in part on the papers was entitled to request that his decision be reconsidered at a hearing (commonly known as a renewal hearing). That was, however, subject to further provision, with effect from 1 July 2013, in the following terms:

> "Where the court refuses permission to proceed and records the fact that the application is totally without merit in accordance with rule 23.12, the claimant may not request that decision to be reconsidered at a hearing."

[34] The Upper Tribunal rules regarding permission were in material respects identical. The appeal concerned the correct approach to the application of the "totally without merit" ("TWM") certification. It did not involve a challenge to the lawfulness of the relevant parts of the procedural rules.

[35] As well as precluding a renewal hearing, certification had consequences in relation to onward appeal. Applications for permission to appeal would be determined on the papers, without a hearing. The Court of Appeal had already considered the relevant provisions in *R (Grace)* v *Secretary of State for the Home Department* [2014] 1 WLR 3432. Although *Wasif* does not involve any challenge to the rule in question, it does contain some potentially useful observations about the importance of an oral hearing, and the sorts of cases, in which they will serve some purpose, and those in which they will serve no purpose at all, in paragraphs 15-17. These require to be viewed in the context of the procedure in question, and do not all translate without modification to Scottish procedure. I return to discuss these further below.

> "15. … There are indeed cases in which the judge considering an application for permission to apply for judicial review can see no rational basis on which the claim could succeed: these are in our view the cases referred to in the *Grace* case as "bound to fail" (or "hopeless"). In such cases permission is of course refused. But there are also cases in which the claimant or applicant (we will henceforth say "claimant" for

short) has identified a rational argument in support of his claim but where the judge is confident that, even taking the case at its highest, it is wrong. In such a case also it is in our view right to refuse permission; and in our experience this is the approach that most judges take. […]

16. Once that is recognised, there is a sensible basis for distinguishing between the two kinds of case as regards the right to an oral renewal hearing. The provision for such a right, in the Rules as currently structured, recognises that oral argument may on occasion persuade a court that a claim for which the judge has refused permission on the papers does in fact have a realistic chance of success. To allow for that possibility is reasonable where the judge has recognised a rational case but has felt able to reject it on the papers; and it reflects the value which the common law tradition attaches to oral argument. But where the judge has found that the claim is bound to fail, in the sense identified above, it necessarily follows that there is no such chance; and to allow a hearing would be pointless and would merely – contrary to the policy behind the 2013 rule-changes – waste the resources of the court and unjustifiably prolong an apparent uncertainty about the lawfulness of the challenged decision.

17. It is inescapable that the distinction between those cases which are "bound to fail" (and thus fall for certification as TWM) and those where permission is refused on the less definitive basis identified above is a matter for the assessment of the judge in each case. … we would make the following observations

(1) At the risk of spelling out the obvious, judges should certainly not certify applications as TWM as the automatic consequence of refusing permission. The criteria are different.

(2) We repeat what Maurice Kay LJ said in para. 15 of his judgment in *Grace*, as quoted above:

'[N]o judge will certify an application as TWM unless he is confident after careful consideration that the case truly is bound to fail. He or she will no doubt have in mind the seriousness of the issue and the consequences of his decision in the particular case.'

(3) The potential value of an oral renewal hearing does not lie only in the power of oral advocacy. It is also an opportunity for the claimant to address the perceived weaknesses in the claim which have led the judge to refuse permission on the papers (and which should have been identified in the reasons). The points in question may not always have been anticipated or addressed in the grounds and skeleton argument (particularly if the judge has drawn them from the respondent's summary grounds: see (6) below). The judge should only certify the application as TWM if satisfied that in the circumstances of the particular case a hearing could not serve such a purpose; the claimant should get the benefit of any real doubt.

(4) Mr Fordham submitted that the essential question for a judge in deciding whether to certify was "whether another Judge, with the benefit of oral submissions at an oral hearing, would be bound to refuse [permission]". That is broadly in line with what we have said above, but the reference to "another Judge" is not quite right. Although it will generally be the case that any renewal hearing will be before a different judge than the one who refused permission on the papers, the rules do not require that that be the case; and in any event in an ideal world one judge's standard of what is arguable should be the same as another's. The point of a renewal hearing is not that the claimant is entitled to another dip into the bran-tub of Administrative Court or Upper Tribunal judges in the hope of finding someone more sympathetic. Having said that, we do not deny that some judges may find it a useful thought-experiment to ask whether they can conceive of a judicial colleague taking a different view about whether permission should be granted.

(5) Judges considering permission applications will quite commonly encounter cases – particularly where the claimant is unrepresented – in which the claim form/grounds and/or the supporting materials are too confused or inadequate to disclose a claim which justifies the grant of permission but where the judge nevertheless suspects that proper presentation might disclose an arguable basis of claim. In such cases he or she should not certify the application as TWM. The right course will usually be to refuse permission, with reasons which identify the nature of the problem, giving the claimant the opportunity to address it at an oral renewal hearing if they can; but there may sometimes be cases where the better course is to adjourn the permission application to an oral hearing, perhaps on an inter partes basis.

(6) Mr Fordham pointed out that at the time that a judge decides the permission application on the papers the respondent will have had the opportunity to file an Acknowledgment of Service, incorporating summary grounds of defence, to which the claimant has under the Rules no right of reply (though some claimants do provide responses which are in practice put before the Judge). Judges should not certify a claim as TWM on the basis of points raised in the summary grounds to which the claimant might have had an answer if given the opportunity."

[36] In the course of my own researches I came across a number of cases which did not relate to a sifting mechanism limiting access to the court, but where decisions relating to criminal charges or which determined civil rights and obligations had been taken without an

oral hearing, and the Strasbourg court rejected challenges based on Article 6. It seemed to me that in considering the merits of the submission that the lack of an oral hearing was one of the factors which impaired the very essence of the right of access to the court, it might be relevant to examine some of the circumstances in which proceedings have involved either the determination of a criminal charge or of civil rights/obligations and in which the Strasbourg court has found that the want of a public, oral hearing did not give rise to a breach of Article 6(1). I invited further submissions about these cases. They were: *Schuler-Zraggen* v S*witzerland* (App No 14518/89), 24 June 1993; *Scarth* v *United Kingdom* (App No 33745/96) (1999) 28 EHRR CD 47; *Pursiheimo* v *Finland* (App No 57797/00) (2004) 38 EHRR CD 138; *Jussila* v *Finland* (App No 73053/01) (2007) 45 EHRR 39; *Saccoccia* v *Austria* (App No 69917/01) (2010) 50 EHRR 11.

[37] The petitioners submitted that the cases were useful so far as they dealt with the right to an oral hearing, but cautioned against looking at the absence of an oral hearing in isolation; it was the combination of that aspect with the absence of a right of appeal that was the subject of the complaint. They submitted that the cases related to procedures in which a right of appeal was available. Article 6 generally required an oral hearing. That there were exceptions to that requirement did not detract from the importance of it. The respondents submitted that the cases supported the view that there was no absolute right to an oral hearing, even in substantive proceedings involving the determination of civil rights and obligations. A fortiori, such a right was not absolute in the context of a filtering mechanism. In *Schuler-Zraggen* it was the decision of the Federal Insurance Court - from which there was no further appeal – that was impugned. The existence or otherwise of a right of appeal was not material to the reasoning of the Strasbourg court in any of the cases.

[38] Various authorities are conveniently reviewed in *Saccoccia*, at paragraphs 70-76:

"70. The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, for example, *Diennet* v *France*, 26 September 1995, § 33, Series A no. 325-A, and *Werner* v *Austria*, 24 November 1997, § 45, Reports 1997-VII).

71. According to the Court's case-law, the right to a "public hearing" under Article 6 § 1 entails the right to an "oral hearing" unless there are circumstances which justify dispensing with such a hearing (see Allan *Jacobsson* v *Sweden* (no. 2), 19 February 1998, § 46, Reports 1998-I, with reference to *Fredin* v *Sweden* (no. 2), 23 February 1994, §§ 21-22, Series A no. 283-A, and *Stallinger and Kuso* v *Austria*, 23 April 1997, § 51, Reports 1997-II).

72. In the present case neither the Vienna Regional Court nor the Vienna Court of Appeal held a hearing before taking over the execution of the Rhode Island District Court's forfeiture order (see paragraphs 33 and 42 above). The Court notes that section 67 of the ELAA does not envisage the holding of a hearing in proceedings concerning the execution of a foreign decision. The fact that the applicant did not request a hearing before the Vienna Regional Criminal Court cannot therefore be interpreted as a waiver of his right to a hearing (see Werner, cited above, § 48). Moreover, in his appeal against the Regional Court's decision he complained about the lack of a hearing and requested the appellate court to hold one (see paragraph 40 above).

73. The Court must therefore examine whether there where circumstances of such a nature as to dispense the courts from holding a hearing. The Court has accepted that a hearing may not be required where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials (see, as a recent authority, mutatis mutandis, *Jussila* v *Finland* [GC], no. 73053/01, § 41, ECHR 2006-XIV, with further references).

74. It follows from the Court's case-law that the character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations. It does not mean that refusing to hold an oral hearing may be justified only in rare cases (ibid., §42). The overarching principle of fairness embodied in Article 6 is, as always, the key consideration.

> 75. In particular the Court has had regard to the technical nature of disputes over social-security benefits, which are better dealt with in writing than by means of oral argument. It has repeatedly held that in this sphere the national authorities, having regard to the demands of efficiency and economy, could abstain from holding a hearing since systematically holding hearings could be an obstacle to the particular diligence required in social-security proceedings (see, for instance, *Schuler-Zgraggen* v *Switzerland*, 24 June 1993, § 58, Series A no. 263; *Döry* v *Sweden*, no. 28394/95, § 41, 12 November 2002; and *Pitkänen* v *Sweden* (dec.), no. 52793/99, 26 August 2003). In addition the Court has sometimes noted that the dispute at hand did not raise issues of public importance such as to make a hearing necessary (see *Schuler-Zgraggen*, ibid.).
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> 76. Furthermore, the Court has accepted that forgoing a hearing may be justified in cases raising merely legal issues of a limited nature (see Allan Jacobsson (no.2), cited above, §§ 48-49, and *Valová and Others* v *Slovakia*, no. 44925/99, § 68, 1 June 2004) or of no particular complexity (*Varela Assalino* v *Portugal* (dec.), no. 64336/01, 25 April 2002, and *Speil* v *Austria* (dec.), no. 42057/98, 5 September 2002)."

[39] Where there is a determination of civil rights and obligations or of any criminal charge, there is a requirement for a public hearing, which entails an oral hearing unless there are circumstances which justify dispensing with one. The requirements of open justice are at least as rigorous. In this jurisdiction substantive hearings are also subject to the "open door" requirements of the Court of Session Act 1693 (c 42):

> "That in all tyme comeing all Bills Reports Debates Probations and others relating to processes shall be considered reasoned advised and voted by the Lords of Session with open doors where parties procurators and all others are hereby allowed to be present as they used to be formerly in time of Debates but with this restriction that in some speciall cases the saids Lords shall be allowed to cause remove all persons except the parties and their procurators."

What I draw from the discussion in *Saccoccia* is that even where Article 6 applies in all its aspects, there are some limited circumstances in which an oral hearing will not be required. When it may be dispensed with depends on the nature of the matter at hand, and whether it can be disposed of fairly without an oral hearing. In sifting procedures where what is at issue is the lawfulness of a provision limiting access to the court, it seems to me that that must also be the case, and be the case a fortiori.

[40] It is necessary to take into account also the elements that do form part of the procedure. They regulate access to the court on the basis of a test that is still a relatively modest one as articulated by the Lord President in *Wightman* at paragraph 9:

> "The words "real prospect of success" mean what they say. However, they were introduced against the background of *EY* v *Secretary of State for Scotland (supra)* and were intended to replace the former "manifestly without substance" test for first orders. They were designed to set a higher hurdle than that which was described in *EY* as "low". The new test is certainly intended to sift out unmeritorious cases, but it is not to be interpreted as creating an unsurmountable barrier which would prevent what might appear to be a weak case being fully argued in due course. Of course the test must eliminate the fanciful, but it is dropping the bar too low to say that every ground of review which is not fanciful passes the test. It is not enough that the petition is not "manifestly devoid of merit", since that, in essence, reflects the "manifestly without substance" test adopted in *EY*. The applicant has to demonstrate a real prospect, which is undoubtedly less than probable success, but the prospect must be real; it must have substance. Arguability or statability, which might be seen as interchangeable terms, is not enough (SCCR c 12, para 53). The substance, or the lack of it, is something which the court has to determine as a preliminary issue; not after a full consideration of elaborate pleadings."

The "real prospect of success" criterion is not, therefore, intended to exclude cases that appear merely weak.

[41] Nothing that a Lord Ordinary can do at the first stage of the procedure can exclude an oral hearing. The Lord Ordinary considering matters at the first stage will be bearing in mind the content of Practice Note No 3 of 2017. At paragraph 12, which relates to the first stage of the permission process, it includes this:

> "The Lord Ordinary must make a decision on whether to grant or refuse permission or order an oral hearing (RCS 58.7). The Lord Ordinary will ordinarily order an oral hearing if considering refusing permission. In that event, the Lord Ordinary will normally produce a brief note that sets out the concerns which are to be addressed at the hearing. This will assist parties and the court in ensuring that hearings do not exceed 30 minutes (RCS 58.9)."

This plainly expresses an expectation as to what a Lord Ordinary will do "ordinarily", and that is to appoint an oral hearing when considering refusing permission. It is implicit that the cases in which permission will be refused without an oral hearing are cases in which it is

very clear indeed to the Lord Ordinary that the petition fails one or more of the relevant tests, and that there is therefore nothing to be gained by having an oral hearing.

[42] A decision taken at the first stage refusing permission on the papers must be accompanied by reasons. The party has an opportunity to address those reasons when requesting a review at an oral hearing. Although nothing in Form 58.8 prescribes that the reasons given by the first Lord Ordinary are to be addressed in the request, as a matter of practice, requests for a review are generally accompanied by a note stating the respects in which the petitioner takes issue with the reasons given. Sometimes additional information is provided. A party may take the opportunity to respond to something said against him in the Answers lodged. It has been known, for example, for affidavits not originally presented to be presented with the request for review. The process for seeking review affords opportunities to answer apparent deficiencies which have been identified in the reasons for refusal of permission given by the first Lord Ordinary. It affords opportunities of the sort described in *Wasif* at paragraph 17(3), even without an oral review hearing. The petitioners AP and Burns both took that opportunity. It is only following consideration of the case by a second, different, Lord Ordinary, where that is requested, that the case can come to an end without an oral hearing.

[43] The matter of whether to appoint an oral hearing is at both stages left for the decision of the Lord Ordinary. The Lord Ordinary, whether considering permission under rule 58.7 or a request under rule 58.8, and in considering whether to make a decision with or without an oral hearing, will have the opportunity to consider all the relevant circumstances. The procedure has the following features.

(a) The Lord Ordinary has the opportunity to consider whether the case is one which, to borrow the English terminology, is totally without merit.

(b) The Lord Ordinary considering permission at the first stage will be guided by the Practice Note already referred to, and will not refuse permission without an oral hearing unless satisfied that such a hearing would serve no purpose.

(c) Where answers have been lodged by the respondent at permission stage the Lord Ordinary will be in a position to consider whether these raise points to which the petitioner ought to be afforded an opportunity to respond before a decision is made on permission. Where the first Lord Ordinary identifies a matter of this sort, that may lead to the conclusion that an oral hearing is required at the first stage of the proceedings. At an oral hearing of this sort, the petitioner will have seen the Answers, and also a note from the Lord Ordinary setting out the matters of concern.

(d) In giving reasons for refusal on the papers at the first stage, the Lord Ordinary will have in mind the importance of providing reasons as an aspect of fair procedure, and of the opportunity those reasons will afford for the petitioner to consider whether to seek review, and, if so, on what grounds.

(e) The Lord Ordinary will be bearing in mind the importance of the rule of law in public law cases, and the need to ensure that the Court is not readily disabled from enforcing the rule of law: see for example *Taylor v Scottish Ministers* [2019] CSIH 2, Lord Drummond Young at paragraphs 15 and 18. This may require particular consideration where preliminary matters such as standing are raised, (as in *Taylor*, a statutory appeal).

(f) A Lord Ordinary considering whether to grant a request for review at an oral hearing will consider independently whether an oral hearing is required. She will also have the reasons provided by the first Lord Ordinary, and the

terms of the request for review, which should assist in assessing whether benefit will be derived from an oral hearing.

(g) The Lord Ordinary will be applying the statutory tests relevant to permission, along with the jurisprudence construing them. She will be alert to the need to avoid undertaking a substantive evaluation of the competing submissions of parties or a stringent examination of the merits: *Wightman*, paragraphs 6, 8.

(h) The Lord Ordinary will be aware of the approach as set out in *Wightman* not only as to the test to be applied, but in relation to the subject matter at stake, and the approach that it may be appropriate for the court to take in cases of particular public importance: *Wightman*, paragraph 12.

[44] Mr Leighton adverted to the differences between the procedure in Scotland and that in England and Wales. Refusal on the papers without the possibility of an oral hearing related only to a particular category of cases, delimited by a stringent test. Even where that test was met there was still access to appellate procedure. While all of that is true, it is also necessary to note that the scope for oral hearing can be removed by a single judge at the first stage of the procedure in England and Wales – something that cannot happen at the first stage of the permission procedure in Scotland. While there is no access to reclaiming where there has been no oral hearing in Scotland, there is access to review by a second, different judge. Unlike the judge dealing with permission to appeal in the procedure described in *Wasif*, the second Lord Ordinary can order that an oral hearing is to take place. That a different series of measures has been chosen in the different neighbour jurisdictions does not mean that one or the other is necessarily unlawful by reason of being a disproportionate limitation. What the two systems have in common is that the determination as to whether or not an oral hearing is to take place is placed in the hands of a judge. In neither system

does legislation or a rule of procedure mandate that an oral hearing must be available at some stage in every case.

[45] I consider that the provisions do not impair the very essence of the petitioners' right of access to the court. Even where Article 6 applies in all its aspects, there are some circumstances in which no oral hearing is required. Article 6 does not require that an appeal be available. Whether an oral hearing is required depends on the subject matter and whether it is necessary for the fair determination of the matter. In the context of this particular procedure, the decision as to whether an oral hearing is required is left to the Lord Ordinary. As I have already observed, the Lord Ordinary will be able to take into account all of the circumstances relevant to the particular case in determining what is required, and will require to take into account the guidance given by appellate courts as to the correct approach to determining permission. While there is no possibility of reclaiming where there has been no oral hearing, there is a two stage procedure, with provision for review by a second judge, and the possibility of an oral hearing at either stage of the procedure.

[46] I am satisfied also that the provisions represent a proportionate limitation on the right of access to the court. I do not reach this conclusion unimpeded by a sense of unease about a scheme which could theoretically permit a challenge, even on a matter of very great public importance, to be brought to an end without a hearing in open court. It is, however, proportionate because it recognises that there are some cases in which an oral hearing will be required for the fair and proper determination of whether permission should be granted, and others in which it will not. There will be cases in which there will be nothing to be gained from an oral hearing. Such cases will include cases which are, on examination of the papers, totally without merit. In such cases there is no point in prolonging the proceedings or incurring expense by having an oral hearing. The legislation places the decisions as to

whether an oral hearing is required in the hands of the Lords Ordinary who consider the papers. Those Lords Ordinary will have the opportunity to consider all of the matters that I have already referred to above. If an oral hearing were required in every case that would diminish the effectiveness of the measure insofar as it is directed at avoiding the expenditure of resources, which include the costs to parties and the court associated with the holding of a hearing, on unmeritorious claims. It would compromise unacceptably the achievement of the objective. There was no evidence before me as to the resources that would be required to deal with additional oral hearings or reclaiming motions. Judicial resources are, of course, expended in dealing with cases on the papers. Depending on the nature of a petition and the volume of supporting papers, consideration of permission on the papers may take some time. That additional hearings in court (which would be the result of requiring an oral hearing in every case where permission was not granted on the papers) would give rise to additional calls on the resources of the court and the parties is, however, self-evident. I am enjoined to weigh the severity of the effect of the measure against the importance of the objective. In trying to assess the severity of the effect of the measure, I have done so taking account of all of the features I have set out above. These include the guidance provided by the Practice Note as to the norm regarding oral hearings where a Lord Ordinary is considering refusing permission. The effect of the measure should not be, having regard to those features, to deprive a litigant of an oral hearing in any case in which it is required for the proper determination of whether or not to grant permission. On that basis I do not consider that the impact of the measure is disproportionate to its likely benefit.

[47] So far as Article 14 is concerned, if there is any difference of treatment for the purposes of that article, I am satisfied that it is justified. I accept that there is a particular interest in the early and expeditious disposal of public law cases, which form the vast

majority of judicial review applications. That includes an interest in avoiding protracting proceedings about the validity of public law decisions unnecessarily. A means of achieving that is by not imposing a requirement that an oral hearing be afforded in circumstances where a judge has determined that no such hearing is required in order to ascertain whether the tests for permission have been satisfied.

[48] I accept that justification for any difference of treatment must be scrutinised with care where rights such as those protected by Article 6 are concerned. I do not accept that the position of the adult in AP requires justification to be scrutinised with more care than it would be in a case where the petitioner was a prisoner. If Article 14 affords protection on the basis of different treatment as between litigants in different types of procedure, that protection must be available to all the litigants in the relevant category on an equal footing. If the difference between classes of litigants seeking remedies in different ways is an "other status", it is not one which requires that a difference in treatment must be justified by "very weighty reasons", as where the status follows from an immutable personal characteristic such as race, colour, ethnic origin, sex, sexual orientation, nationality, or birth or adopted status: see eg authorities cited in *AL* at paragraph 29.

[49] It seems to me that there is in any event a difficulty in characterising accurately the difference of treatment complained of in the context of the challenges advanced in the petitions. There is a difference of treatment simply in the requirement for a grant of permission between petitioners for judicial review and pursuers and petitioners in other forms of civil proceedings in Scotland. The petitioners do not complain of that, and, as I understood Mr Leighton's submission, accept that the introduction of a permission requirement is justified. The complaint is actually about being subject to a regime where access to a procedure for redress is governed by the particular provisions already discussed.

[50] Once it is accepted, as it is in this case, that there is justification for treating those applying to the supervisory jurisdiction of the Court of Session differently from those applying for redress through other forms of procedure, there does not appear to me really to be a question as to the justification for the particular procedure employed separate from the one I have already determined in favour of the respondents. Having approached matters in that way, I do not require to reach a concluded view as to whether being a person seeking to bring a petition for judicial review is an "other status" for the purposes of Article 14.

Other matters

[51] Although I do not require to reach a concluded view on the other matters that were discussed in the course of the hearing, I record briefly what those other matters were for completeness, and my conclusions.

[52] Had I been of the view that the potential absence of an oral hearing and/or appeal were inconsistent with the petitioners' rights under Article 6, I would have required to consider whether the statutory provisions could be read down in the light of the obligations in section 101 of the Scotland Act 1998 and section 3 of the Human Rights Act 1998. Ms O'Neill did not submit that any particular provision ought to be read down. There was a variety of ways in which the result the petitioners contended for could be achieved by reading down. Mr Leighton submitted that there was no possible reading of the provisions that would be compatible with the petitioners' Convention rights. Any such reading would be entirely inconsistent with the legislative intention. Ms O'Neill on the other hand referred to *DS* v *HM Advocate* 2007 JC (PC) 1 and the Privy Council's approach to section 275A(7) of the Criminal Procedure (Scotland) Act 1995. There was in that provision a requirement that

the court proceed on the basis of a particular presumption. A Convention compatible reading, however, required that the court disregard that presumption.

[53] In my view a reading down which would result in Convention rights compatibility on the hypothesis that the petitioner's challenges were well-founded would be achieved in the following way. There would be no need to interfere with the provisions relating to the first stage of the procedure. If there had been an oral hearing at that stage, there could, on the petitioners' analysis, be no incompatibility. If there had not, there would still be scope for recourse to section 27C. Section 27C would come into play at the point at which there had been a decision adverse to a petitioner on the papers, and the petitioner was dissatisfied with that. The word "considered" in section 27C(3) would have to be read as "granted". In the context of the scheme, that would afford an oral hearing whenever one was requested, and also, within the statutory scheme, a right of appeal.

[54] Where Convention rights are in issue, the starting point is section 3 of the Human Rights Act, rather than section 101 of the Scotland Act, and the obligation to construe a provision in an Act of the Scottish Parliament so far as it is possible to do so in a way that is compatible with the Convention rights is a strong one: *DS*, Lord Hope, paragraphs 23 and 24. It does not appear to me that the reading I propose is any less "possible", for the purposes of section 3 of the Human Rights Act 1998, than that adopted by the Privy Council in *DS*. I would have adopted that reading, and found the provisions to be within the competence of the Scottish Parliament.

[55] In relation to the Rules of Court, Ms O'Neill submitted that I required to read the Court of Session Act 1988 in a way compatible with the petitioners' Convention rights. Lords Ordinary in making decisions about permission must not act incompatibly with Convention rights, by virtue of section 6 of the Human Rights Act 1998. The rules conferred

a discretion on a Lord Ordinary which could be exercised compatibly with a petitioner's Convention rights. I understood her to be referring to the discretion as to procedure provided in relation to the first stage of the procedure. If I were of the view that the discretion was not sufficient to render the rules compatible, I should report the matter to the Inner House. Where the lawfulness of an Act of Sederunt has been raised in proceedings, it has been the practice of the Court to have the matter determined in the Inner House, either because the matter arose in the context of an appeal, as in *KP (Pakistan)* v *Secretary of State for the Home Department* [2012] CSIH 38 or on a report to the Inner House by the Lord Ordinary as in *Carron Co* v *Hislop* 1930 SC 1050 and *Taylor* v *Marshalls Food Group* 1998 SC 841. In *Carron* Lord Moncrieff had, at page 1053, expressed the view that it would be improper for a single judge to entertain or decide a question as to the vires of an Act of Sederunt.

[56] Had I concluded that the statutory provisions required to be read as requiring the Lord Ordinary to grant a request for an oral hearing under section 27C, I would have found that nothing in the rules prevents the Lord Ordinary from adopting that course. The rules are silent as to what the Lord Ordinary is to do when considering such a request. Rule 58.6, which provides the discretion to which I understood Ms O'Neill to be referring, appears to relate only to procedure under section 27B.

[57] Finally, Mr Leighton contended that it would be competent for me to reduce the interlocutor of another Lord Ordinary, if I were to find that the legislation was outwith the legislative competency of the Scottish Parliament. In doing so I would be making an ancillary order, necessary to achieve justice for the petitioners. In cases not involving the supervisory jurisdiction, and brought by way of summons, an interlocutor of the Court of Session could be reduced where an interlocutor had been pronounced without any legal basis. Ms O'Neill submitted that reduction of an interlocutor of a Lord Ordinary was

incompetent in proceedings for judicial review. The supervisory jurisdiction did not extend to the review of supreme courts, but existed to ensure that inferior tribunals and other decision makers did not exceed their powers: Clyde and Edwards, Judicial Review, paragraph 9.03; *Moss' Empires* v *Assessor for Glasgow* 1917 SC (HL) 1; *West* v *Secretary of State for Scotland* 1992 SC 385. In order to challenge an interlocutor of a Lord Ordinary which could not be reclaimed, it was necessary to petition the *nobile officium* of the court: *Helow* v *Advocate General* 2007 SC 303. In any event, even if the legislation were found not to be law, the decisions of the Lords Ordinary would remain valid and effective. It would not be a nullity, but would stand until altered by some competent process. She sought to draw an analogy with the reasoning in *Council of the Law Society of Scotland* v *Scottish Legal Complaints Commission* 2017 SC 718 at paragraph 75.

[58] I was not satisfied that it would be competent in these proceedings to reduce the interlocutor of another Lord Ordinary. In *West* the Lord President examined the history of the supervisory jurisdiction of the Court. He was examining the source of the jurisdiction as it might be exercised in the first instance by a Lord Ordinary in a petition for judicial review through the procedural mechanisms then prescribed by RCS 260B. He cited Sheriff McNeill's article, *The Passing of the Scottish Privy Council* 1965 JR 263, which explains that before the union, the Privy Council had exercised an equitable jurisdiction, and the Court of Session had exercised the functions of a court of law. No measure was enacted in 1708 to distribute the jurisdiction formerly exercised by the Scots Privy Council. The Court of Session therefore developed its own jurisdiction to provide an extraordinary equitable remedy where none was available within the strict limits of the law. The Lord President then went on to examine the limits of the supereminent jurisdiction of the Court as it developed in the eighteenth, nineteenth and early twentieth centuries, observing, at page

394, that Erskine's prediction that "it will soon be considered as part of the province of the court of session to redress all wrongs for which a peculiar remedy is not otherwise provided" were an imperfect guide to what had followed. Although the emphasis of the Lord President's analysis was upon the nature of the supervisory jurisdiction, which is to ensure that the inferior tribunal or other decision-maker keep within the limits of its jurisdiction, rather than being one to review the merits, each case he considered involved decision-making by a body which was inferior to the Court of Session. There is no suggestion in *West* that the sort of exercise of the supervisory jurisdiction with which that case was concerned might be exercised by one Lord Ordinary in respect of the interlocutor of another. In articulating the jurisdiction the limits of which might be examined in the exercise of the supervisory jurisdiction, he said, at page 413:

> "The word "jurisdiction" best describes the nature of the power, duty or authority committed to the person or body which is amenable to the supervisory jurisdiction of the court. It is used here as meaning simply "power to decide", and it can be applied to the acts or decision of any administrative bodies and persons with similar functions as well as to those of inferior tribunals." (Emphasis added)

[59] The Court of Session does have power to provide a remedy in respect of an irregularity in its own proceedings where there is no provision for reclaiming. It resides in the *nobile officium*, which is a jurisdiction that may only be exercised by the Inner House. It is reserved for cases in which other procedures provide no remedy. The *nobile officium* itself is an example of the exercise by the Court of its supervisory jurisdiction, as Lord Nimmo Smith, delivering the Opinion of the Court, explained in *Helow* at paragraph 1. No question was raised by the court or any party in *Helow* as to the correctness or competency of the procedure adopted by the petitioner in that case, which was to petition the *nobile officium* of the Court of Session. The procedural background to that case is of some interest in the

present context. The decision complained of was one taken by a Lord Ordinary on the papers under section 101 of the Nationality, Immigration and Asylum Act 2004. Before that statutory provision was made, decisions of the Immigration Appeal Tribunal refusing leave to appeal to itself against the decision of an adjudicator were frequently the subject of petitions for judicial review. Parliament then provided for a procedure for statutory review on the papers by a Lord Ordinary. The provision of that alternative remedy resulted in the necessity to pursue it rather than judicial review. What was alleged was apparent bias and want of objective impartiality on the part of the judge. Lord Nimmo Smith, delivering the Opinion of the Court, said this about the nature of the jurisdiction at paragraph 2:

> "The *nobile officium* is a jurisdiction which, in a civil case, may only be exercised by the Inner House of the Court of Session. It is
>
> > "the power of the Court of Session to create and exercise a remedy or grant relief in circumstances in which there is no statutory or common law provision which provides such a remedy or relief, but where the remedy or relief is obviously necessary and not contrary to the existing law"
>
> (*Stair Memorial Encyclopaedia*, volume 4, paragraph 4, sv "Civil Jurisdiction"). As Lord Hope of Craighead said in *Davidson v Scottish Ministers* (No. 2) 2005 SC (HL) 7 (para 64):
>
> > "The general rule is that the power may be exercised in exceptional or unforeseen circumstances to provide a remedy which will prevent the oppression and injustice which would otherwise result from the lack of any other remedy."

My view, on the basis of the limits of the supervisory jurisdiction as it may be invoked in judicial review described in *West*, and the procedure adopted in *Helow*, is that if it were necessary to set aside the interlocutor of a Lord Ordinary in relation to a decision on permission, that would have to be done by way of a petition to the *nobile officium*. I express no view as to whether setting aside of the interlocutor would necessarily follow in the event that a statute governing procedure were found not to be law.

Disposal

[60] I refuse the petitions. I sustain the first plea in law for the Lord Advocate in AP and Burns, and the third plea in law for the Lord Advocate in Millbank. I repel the pleas in law for the petitioner in each case, and the first plea in law for the Lord Advocate in Millbank.