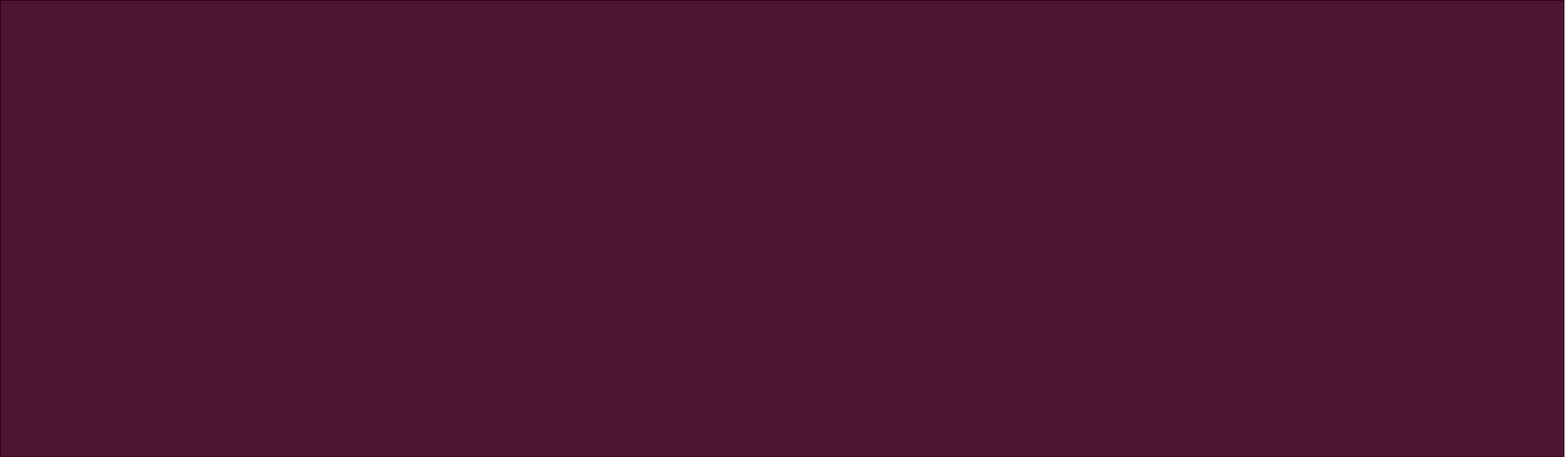




JUDICIAL REVIEW UPDATE

PAUL REID

27 AUGUST 2020



TOPICS

- Alternative remedies (and time limits?)
- Legitimate expectations
- Permission
- Protective Expenses Orders
- Standing/relevant considerations



ALTERNATIVE REMEDIES

(AND TIME LIMITS?)



ALTERNATIVE REMEDIES

- *McCue v Glasgow City Council* [2020] CSIH 51 (<https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2020csih51.pdf?sfvrsn=0>)
- Is a complaint to the SPSO an alternative remedy?
- *“Where proceedings for judicial review have been presented, and there remains the possibility of a successful remedy thereby, the jurisdiction of the SPSO will be ousted, at least insofar as relates to any complaint which asks the SPSO to address the same matter as addressed in the judicial review.”* (para.44)
- In substance (if not in terms) approves Lord Ordinary in *Lauchlan v O’Neill* [2020] CSOH 28 at para.23
- Availability of SPSO can still lead to dismissal of petition (para.45) but that would really be discretionary withholding of a remedy

ALTERNATIVE REMEDIES

- Had been held at first instance that SPSO was an alternative remedy thus judicial review incompetent
- “alternative remedies” jurisprudence to be treated with care?
- Timing:
 - 3 months to raise a JR
 - *Odubajo v Secretary of State for the Home Department* 2020 SLT 103 (appeal heard: 21 August 2020)
 - 1 year to complain to SPSO
 - Cannot exhaust SPSO process and then return to JR



LEGITIMATE EXPECTATIONS



LEGITIMATE EXPECTATIONS

- *McHattie v South Ayrshire Council* 2020 SLT 399: legitimate expectation of consultation before decision taken to close adult day care centre; also example of the bite of Equalities Act 2010
- *Lauchlan & O'Neill v Scottish Ministers* [2020] CSOH 28: said because SM had represented SPSO as final stage of appeal, legitimate expectation no time bar plea would be taken; no proper basis on which legitimate expectation could be said to have arisen
- *Sharp v Scottish Ministers* [2020] CSOH 74: concerns COVID support measures and whether business owner had a legitimate expectation as to form of relief based on statements made by the Chancellor and Cabinet Secretary; statements were not sufficiently clear, unambiguous and devoid of relevant qualification so expectation had not been created



PERMISSION



PERMISSION

- *Prior v Scottish Ministers* 2020 SLT 762
 - Need for an oral hearing at permission stage (cf. *Dinsmore v Scottish Ministers* [2019] CSOH 18)
 - New arguments need permission: “Where a new ground is to be advanced, it requires to be the subject of a judicial decision which can be seen as the equivalent of the grant of permission. That decision is one which allows the petition to be amended.” (para.39)
 - Adjustment of grounds of challenge?
 - It is lawful to refuse permission without an oral hearing having taken place.
- Stats for 2019 (para.60): 44% of JR's granted permission with an oral hearing; 38% appointed to an oral hearing (1/3 granted permission); 20% refused permission without a hearing; 47% applications for review at oral hearing refused
 - Importance of drafting: if permission is not granted on the papers, odds are against permission being granted

PERMISSION

- Footnote: the importance of procedure/form
 - At para.37 the Lord President quotes Honoré (About Law, p.77):

“One might think that, in contrast with content, requirements of form and procedure are not important. That would be a mistake. Forms and procedures are important for a number of reasons. They make for certainty, they encourage careful reflection, and they promote fairness.”



PROTECTIVE EXPENSES ORDERS



PROTECTIVE EXPENSES ORDERS

- *Keatings v Advocate General for Scotland* [2020] CSOH 75
- Rare example of a common law PEO (NOT Ch.58A – environmental PEO)
- Review of the applicable law: paras.4-9
- At common law, court has a discretion as to form and content of PEO (i.e. less prescriptive than Ch.58A): *“The order is to be tailored to the circumstances of the case, depending on what is appropriate and fair.”* (para.8 – examples then given)
- Common law test (is it fair and just?) is not the same as environmental test (not prohibitively expensive) but can be helpful to look to environmental decisions (para.9)

PROTECTIVE EXPENSES ORDERS

- Corner House rules ([2005] 1 WLR 2600):
 - Does the case have a real prospect of success?
 - It is in the public interest to make the order?
 - Public interest assessed by reference to 5 criteria:
 - Issues raised are of general public importance
 - Public interest requires that those issues should be resolved
 - Applicant has no private interest in the outcome
 - Having regard to the respective financial resources, and the likely costs, it is fair and just to make the order
 - If the order is not made, applicant will probably discontinue proceedings and it would be reasonable for them to do so



STANDING AND RELEVANT CONSIDERATIONS



STANDING AND RELEVANT CONSIDERATIONS

- *R (on the application of DSD and others) v The Parole Board of England and Wales* [2019] QB 285
 - London mini-cab (Warboys) case
 - Mayor of London lacked standing to challenge the decision despite sincere concerns at the decision: *“The test for standing is discretionary and not hard-edged. We are not to be understood as saying that the Mayor is a ‘mere busybody’ and that his bona fide concerns carry no weight ... The Mayor cannot be regarded as a proxy for the interests of the victims because these have been fully safeguarded [by another party] ... Overall, the Mayor’s interest falls the wrong side of the line.”* (para.111)

STANDING AND RELEVANT CONSIDERATIONS

- “Evidence of wider offending” was said to be “obviously” a relevant consideration that had been left out of account. No, on the facts:

“The distinction between relevant considerations, properly so called, and matters which may be so obviously material in any particular case that they cannot be ignored, is not merely one of legal classification; it has important consequences. If a consideration arises as a matter of necessary implication because it is compelled by the wording of the statute itself, the decision-maker must take it into account, and any failure to do is, without more, justiciable in judicial review proceedings. If, on the other hand, the logic of the statute does not compel that conclusion ... then it is for the decision-maker and not for the court to make the primary judgment as to what should be considered in the circumstances of any given case. The court exercises a secondary judgment, framed in broad Wednesbury terms, if a matter is so obviously material that it would be irrational to ignore it.” (para.141)

- But see paras.134-140 for a helpful review of the authorities



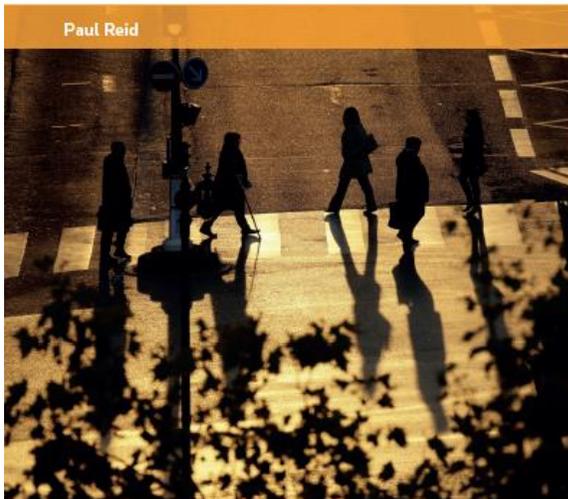
AND FINALLY...



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