

XII COLLOQUIUM OF THE STATE COUNCILS AND THE SUPREME ADMINISTRATIVE COURTS
OF THE EUROPEAN COMMUNITIES MEMBERS STATES QUESTIONNAIRE FOR THE STUDY OF
THE CHOSEN WORK TOPIC.

THE UNITED KINGDOM

The United Kingdom comprises three distinct areas, each with its own legal system, its own Courts and its own legal profession. The three areas are respectively (1) England and Wales (2) Scotland and (3) Northern Ireland. The position in Northern Ireland is not set out in this paper as it is largely the same as in the united Kingdom but special note is made of the position in Scotland where that differs significantly from the position in England.

We have approached the subjects raised in the Questionnaire under eight headings.

- I The structure of Courts and Tribunals.
- II The quantity of subject matter reviewed.
- III Locus standi of appellants and applicants.
- IV The rights of third parties.

V Time limits.

VI Other restraints on appellants and applicants.

VII Time taken to dispose of cases.

VIII Examples of initiating processes.

I The structure of Courts and Tribunals.

A. The statutory framework.

In the majority of cases the primary responsibility for dealing with complaints about administrative action rests upon one or other of a host of specialist Tribunals set up for that purpose by statute, or under delegated statutory powers. They are intended to provide a quicker, cheaper and more accessible forum than the courts of law. There are more than seventy different kinds of such Tribunals, dealing with matters as diverse as for example, social security, employment law, the assessment of controlled rents, civil aviation and income tax and value added tax. Some idea of the volume of work dealt with by such Tribunals may be gained from the fact that in the year to April 1988 the Social Security Appeals Tribunals processed approximately 300,000 cases. The processing was done by 650 Chairman and 7,000 members. In the year 1987 the General Commissioners of Income Tax, who number some 4,500 in total and whose work consists mainly of the simpler type of income tax appeals, dealt with almost 600,000 cases.

(These income tax figures cover Scotland as well as England and Wales).
The vast majority of income tax cases never resulted in a contested hearing, but 8,000 did so.

The functions of Tribunals in England and Scotland are supervised by the Council on Tribunals, which makes recommendations to ensure that, for example, complainants have proper opportunities of access and that the rules of natural justice are observed. The members of Tribunals are chosen by reference to the requirements of the subject-matter, and therefore are not necessarily (and not normally) lawyers; but as a general rule a Tribunal composed of laymen will have a legally qualified chairman or clerk. In many cases, the statute under which the particular Tribunal is created confers a specific right of appeal to the High Court upon a point of law. In many other cases, such a right is conferred by the more general provisions of Section 13 Tribunals and Inquiries Act 1971. There are some Tribunals, however, from whose decisions no statutory right of appeal exists.

There are also some areas of administrative law in which there is no right of appeal to a Tribunal, but the relevant statute confers upon the subject a right of appeal to the Government Minister concerned, followed by a right of application to the High Court to review the decision of the Minister. This latter right may be exercised either by the subject or by the body whose original decision was the subject of appeal to the Minister. The most important areas in which rights such as these are to be found are those involving the granting or refusal of permission for the development of land, or involving the compulsory acquisition of land.

In addition to the formal links between Tribunals and the Courts which are provided by the rights of appeal and application mentioned, less formal links are formed by the appointment of Judges as the Presidents or Chairmen of the more important Tribunals. Thus the Social Security Appeals Tribunals, the Value Added Tax Tribunal and the Industrial Tribunals all have a senior Circuit Judge as their President. The Employment Appeal Tribunal, which hears appeals on points of law from Industrial Tribunals, (and from which there is a right of appeal to the Court of Appeal), has a High Court Judge as its President, and he or another High Court Judge sits with two lay members on the hearing of all appeals.

B. Non-statutory remedies.

The High Court in England and Northern Ireland and the Court of Session in Scotland have inherited and developed a supervisory jurisdiction over the proceedings of inferior Tribunals, government departments, and all other public bodies performing public law duties. This jurisdiction, originally derived from the prerogative powers of the Crown, has come to be known as judicial review. It is not, strictly speaking an appellate jurisdiction. In so far as it is concerned with administrative action it is not designed to substitute the opinion of the Court for that of the body whose decision is under review. The function of the Court is to see whether the decision was arrived at by a legal and fair process. If it fails this test it may be quashed. In England the relevant order is called an order of certiorari. If the administrative body or tribunal has failed to perform a legal duty it may be directed to perform it. In England the relevant

order is called an order of mandamus. If it has exceeded, or proposes to exceed its powers, it may be restrained from doing so by an order of prohibition. Or the Court may simply make a declaration, or give a declaratory judgment, setting out the true position in law. A decision of an administrative body or tribunal may also be quashed by way of judicial review if it is manifestly perverse and therefore cannot be justified as a matter of law. Thus, although as we have said it is not an appellate jurisdiction, judicial review in some respects resembles an appeal on a point of law.

Judicial review is normally confined to cases where no, or no adequate, alternative remedy exists: but it may, in the Court's discretion, be extended to other cases. The question for the court is which is the most effective and convenient remedy in all the circumstances, not merely for the applicant but in the public interest. Immigration law is one of the main areas in which this question has arisen in recent years.

Pending the hearing of the application for judicial review interim relief (normally in the form of an injunction or a stay of proceedings) may be obtained. In urgent cases, interim relief can be obtained within hours or even minutes. An application for such relief can be made to a Judge of the High Court, or (in Scotland) of the Court of Session, by telephone if necessary, at any hour of the day or night. An interim injunction cannot be granted against the Crown but Government Departments, once informed that an application for judicial review is being made, invariably hold their hand until the decision of the Court is given.

II The quantity of subject matter reviewed.

A. The statutory framework.

In 1988 the High Court in England dealt with 354 appeals or applications under rights conferred by statute. Of these no less than 265 arose out of decisions affecting the development of land. The figures for 1987 and (so far available) for 1989 are similar. The Court of Session in Scotland disposed of 33 appeals from tribunals or other statutory bodies during 1989.

B. Judicial Review.

In England and Wales the total number of cases dealt with in 1988 was 1,229 of which 359 (the largest single group) were immigration cases. The total number of cases has risen sharply in recent years. In 1980 it was 491. In 1987 it was 1,529, of which 697 were immigration cases. The figures so far available for 1989 (1,439 up to the end of October) suggest that 1988 was exceptional and that the upward trend has resumed. The decline in number in 1988 was probably mainly due to a decision of the Court of Appeal in 1986 (*R v. Secretary of State for the Home Department ex parte Swari* (1986) 1 WLR 477) that immigrants who were refused entry on arrival must normally rely on their statutory right of appeal rather than seek judicial review.

In Scotland the total number of applications for judicial review during 1989 was 88. The figure is rising. The largest single group related to

matters of licensing (i.e. the permitting by a local authority of the sale or supply of certain regulated goods or services). Immigration and deportation formed the second largest group and planning was the third.

III. Locus standi of appellants and applicants.

In England statutory rights of appeal are commonly conferred upon 'any person aggrieved' by the decision in question. Judicial review may be sought by a person who has 'a sufficient interest in the matter'.

In the past the former phrase has sometimes been construed in a restrictive manner, as if 'aggrieved' meant 'legally or financially affected'. Thus it has been held that a local planning authority cannot claim to have been 'aggrieved' by the quashing of one of its own decisions (*Ealing Corporation v. Jones* (1959) 1 QB 384). In later cases however, a more generous interpretation has been adopted, and recently the Court of Appeal has in terms rejected the restrictive approach, stating that 'there is no need for a legal or financial burden to be placed on a party to proceedings to give a right of appeal. A decision against the party suffices' (*Cook v. Southend Borough Council* July 1989).

The test of locus standi for statutory purposes has thus been brought closer to the broad concept adopted for Judicial review. The speeches in the House of Lords in *R v. Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses* (1982) AC 617 indicate that the test of a 'sufficient interest' may be satisfied not only where

the personal rights or interests of the applicant are involved but also where, as a responsible citizen, he has discovered some substantial default or abuse of public law by a public body.

In Scotland a person seeking judicial review must show that he is an appropriate person to make the application and that he has a real interest in the result. Where the alleged wrong is one of a breach of a duty owed by a public body to the general public an individual member of the public will have a title to seek judicial review. The sufficiency of the interest required is a matter of circumstances, but the interest need not be a financial one. The position regarding statutory rights of appeal is the same as in England.

IV. The rights of third parties.

In the case of statutory appeals and applications the Rules of the Supreme Court in England make detailed provision for the service of notice of the proceedings upon third parties, so that they have the opportunity to make representations to the Court (Orders 55 and 94 of the Rules of the Supreme Court).

Similarly, in the case of judicial review, the Rules provide for notice to be served on 'all persons directly affected'. (Order 53).

In Scotland, Rule of Court 260B provides both for public advertisement of the application for judicial review when the Court thinks fit and for

service of the application upon anyone who may be thought to be interested. Intimation of statutory appeals to third parties is not usual.

V. Time limits.

The time limits laid down by statute for the launching of appeals and applications vary greatly. Many statutes contain a provision which allows an appeal or application to be made only within a very short period (usually six weeks) and thereafter bars it completely. One such provision applies generally to orders for the compulsory acquisition of land, the object being to make it safe for public money to be spent by the acquiring authority if no protest is made within the specified time. In the case of statutory appeals from decisions of Tribunals the Rules of the Supreme Court impose a time limit, normally of 28 days, for the entry of the notice of motion, but this may be extended by the Court. In Scotland the time limits prescribed by the Rules of Court vary according to the subject matter and the form of appeal. The range of time limits is generally between 14 and 42 days.

In the case of Judicial Review in England, an application for leave to apply must, under the Rules, be made 'promptly and in any event within three months from the date when the grounds for the application first arose'. (Order 53). The Court has power to extend the time, but the power is used sparingly. Parliament has provided that the Court may refuse to extend time 'if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the

rights of any person or would be detrimental to good administration'. (Section 31 (6) Supreme Court Act 1981). In all cases, statutory and non-statutory, the Rules of the Supreme Court lay down time limits for varying periods (normally between three and eight weeks, but extendable by the Court) for the filing of evidence by respondents.

In Scotland no time limit is prescribed for applications for judicial review but circumstances may occur where an applicant has acquiesced in the matter of which he complains so that he may thereby be prevented from challenging it. In practice applications are usually made soon after the event in question.

VI. Other restraints on appellants and applicants.

There is no other restraint upon the exercise of statutory right of appeal or application, save for those persons who have been declared by the High Court, at the suit of the Attorney General in England or the Lord Advocate in Scotland to be 'vexatious litigants'. A vexatious litigant can bring no proceedings of any sort without leave of the Court.

In England in the case of Judicial Review, application can only be made with leave of the Court, which will be granted if, but only if, the applicant puts forward an arguable case. All applications for leave are made ex parte and are considered in the first instance by a single Judge. Unless the applicant requests otherwise that consideration will be on the papers, and without an oral hearing. If the single Judge refuses leave

the applicant may renew his application (within seven days) in the Court of Appeal.

44 per cent of applicants were refused leave in 1987 and 45 per cent in 1988.

In Scotland no leave is required for the making of an application for judicial review. After the application has been lodged it is put before a judge who may grant any necessary interim orders and otherwise orders service and advertisement of the application.

VII. Time taken to dispose of cases.

(1) In the High Court in England.

The methods employed for the listing and disposal of cases are described in the attached note headed 'The Role of the Crown Office'. The Crown Office deals with all of the appeals and applications, statutory and non-statutory, to which this paper refers.

The time taken to dispose of cases depends principally upon the degree of urgency. Cases requiring immediate attention are dealt with immediately. The hearing of less urgent cases may be expedited by the direction of the Judge who has given leave to apply, or the Master of the Crown Office. These expedited cases are listed as soon as practicable, at the cost of delay to those which have not been expedited. The overall

average time for disposal varies considerably. Between July and October 1989, measured from the dates when the cases entered Category B (regarded as ready for hearing) it ranged from approximately 20 to 25 weeks.

Some cases (and in particular all criminal cases dealt with in the Crown Office list) have to be heard by a Divisional Court, which normally consists of a Lord Justice of Appeal and a High Court Judge. Habeas corpus applications and exceptionally important civil cases are also dealt with by a Divisional Court. The rest come before one of the eighteen nominated High Court Judges sitting alone. At any one time there would normally be one or two Divisional Courts and two single Judges working on the Crown Office list. So far, this number has normally been sufficient to ensure the disposal of cases within a reasonable time.

(2) In the Court of Session in Scotland.

All statutory appeals and all applications for judicial review are processed through the centralised office of the Court of Session which is concerned with the administration and listing of the whole business of the Court of every kind. The present period from the lodging of a statutory appeal to its disposal is seven and a half months. Applications for judicial review may on average be disposed of in about 4 weeks after lodging, but if the matter is of particular complexity in fact or in law a longer period is required. In two cases recently the matters were disposed of within 7 days after lodging the application.

(3) On appeal from the High Court or the Court of Session.

In civil cases both parties have the right of appeal to the Court of Appeal. There is a further right of appeal to the House of Lords with leave either of the Court of Appeal or of the House of Lords, if the case is of exceptional legal interest or public importance. The time taken to dispose of appeals again depends upon the urgency of the case. In non-urgent cases it may be a year or more at each level.

In criminal cases there is a right of appeal from the Divisional Court direct to the House of Lords if the Divisional Court formally certify that a point of law of general public importance is involved and if leave is given by either the Divisional Court or the House of Lords. The appeal is likely to be heard within a matter of months or more rapidly if its urgency so requires. There is no right of appeal in criminal cases from the Scottish Court to the House of Lords. Appeals are only competent in civil cases.

VIII. Examples of initiating processes.

(1) England.

A completed Notice of Motion (as used for statutory appeals and applications) and Form 86A (as used for seeking leave to apply for Judicial Review) are attached.

(2) Scotland.

Form 42 as used in the Court of Session for a statutory appeal is also attached, and there is added an example of an application to the Scottish Court for judicial review.

THE ROLE OF THE CROWN OFFICE

Background and History

Holders of the post of Master of the Crown Office (and Queen's Coroner and Attorney) can be traced back to the 12th century.

The Master of the Crown Office is also the Registrar of Criminal Appeals. The current Master of the Crown Office is Master McKenzie.

The Head of the Crown Office is a lawyer assisted by two other lawyers and exercises the day to day management of the caseload. The Crown Office staff also consists of a Head Clerk (and Senior Crown Office Associate), two listing officers and four other administrative staff as well as four court associates.

The Crown Office works to the eighteen High Court judges nominated to the hear matters in the Crown Office list and to the Deputy Chief Justice who exercises particular responsibility in relation to the List.

All cases entered in the Crown Office are examined by one of the lawyers, upon receipt in the Office and also before any hearing by the Court. Each lawyer has a number of topics and case as falling within those topics are his or her responsibility. Where appropriate the lawyer will remind the Judge or the Court of the relevant authorities, particularly any unreported cases, and will alert him to any cases pending in the Crown Office List which raise the same or related points.

In order to fulfil the lawyers' responsibilities the Office holds an index of notable judgments in the Crown Office List. The index is compiled by one of the lawyers and is circulated to the nominated judges. A card index showing the subject matter of pending cases is held by the lawyer responsible for the relevant topics, with a master index being kept by the Head of the Crown Office. These management tools are used to effect constructive listing within the List, avoiding a situation in which cases raising similar issues might be listed very close together in time but before different constitutions of the Court who are unaware of the existence of the other cases.

Practitioners who believe that there may have been an unreported case in the Crown Office List which is of relevance to a case pending in the List may approach the Crown Office legal staff who will be ready to assist. The Office is not able to provide practitioners with copy judgments - those must be obtained from the Court shorthand writers.

Listing in the Crown Office

When the case is moving towards the top of Part B of the List the Crown Office informs the applicant's solicitors. If it is not confirmed within two weeks of the date of the Crown Office's letter that the case is still active, the matter is placed before the Master of the Crown Office with a view to it being struck out for want of prosecution.

Dates for hearing are fixed with counsel's clerks and it is the responsibility of the clerks to inform their instructing solicitors of the date fixed.

The Court requires the submission, to the Crown Office and in adequate time before the hearing, of a document containing the list of issues, a skeleton argument and chronology of relevant events. Documents for the Court should be bundled and paginated. If the matter is to be heard by a Divisional Court, two sets of documents must be supplied.

Settling

If any party considers that there is a possibility that the case will settle, application should be made to stand the case into Part C.

Where a case is to settle but a court order is required to put into effect the terms agreed, the terms may be submitted to the Crown Office and, if approved by a Judge, the case is listed for pronouncement of the order in open court without the need for parties or representatives to attend.