

# COURT OF SESSION

## PRACTICE NOTE

No. 3 of 2017

### Judicial Review

1. This Practice Note has effect from 17 July 2017. It replaces Practice Note No. 5 of 2015 (Judicial Review).

2. The Lord Ordinary may disapply any provision of this Practice Note, on the motion of any party, or of the Lord Ordinary's own accord, in respect of any particular case.

3. This Practice Note covers:

- a. Judicial review procedure;
- b. The pre-proceedings protocol in immigration and asylum judicial reviews;
- c. Case management in judicial reviews;
- d. Bundles of authorities;
- e. Bundles of documents;
- f. Notes of argument.

### Judicial Review Procedure

4. This part of this Practice Note covers judicial review procedure, and in particular:

- a. Transfers to the Upper Tribunal;
- b. The permission stage;
- c. Notification of intention to contest;
- d. Notification of readiness to proceed to a substantive hearing.

5. The purpose of this part is to provide guidance about certain aspects of judicial review procedure and to set out the court's expectations about how judicial reviews will be conducted. Appendix 4 to this Practice Note contains a table setting out the timescales which apply to a petition for judicial review and the relevant legislative references.

#### *Transfers to the Upper Tribunal*

6. Where the Lord Ordinary makes an order transferring an application to the Upper Tribunal under RCS 58.5, the Deputy Principal Clerk of Session ("DPCS") will transmit the process to the Upper Tribunal within 4 days of the interlocutor being pronounced.

7. When transmitting that process, the DPCS will:

- a. give written notice of the transmission to the parties; and
- b. certify on the interlocutor sheet that the parties have been notified.

8. Failure by the DPCS to follow this procedure does not affect the validity of a transfer.

#### *The permission stage*

9. The petitioner, when lodging the Form of Petition in accordance with Rule 58.3, should, in paragraph 8, address the question of why permission to proceed should be granted. Paragraph 8 should set out the petitioner's view and the reasons for that view.

10. The petitioner should list, with reference to the schedule of documents, the documents necessary for the determination of permission.

11. A person served with the petition, when lodging answers under Rule 58.6, should include in the answers a headed paragraph addressing the matter of whether permission to proceed should be given. The paragraph should set out that person's view and the reasons for that view.

12. 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).

13. Where permission is refused (or permission is granted subject to conditions or only on particular grounds) without an oral hearing, the petitioner may request a review of the decision at an oral hearing (RCS 58.8). A reclaiming motion to the Inner House may only be made following an oral hearing.

14. The Keeper of the Rolls may group suitable oral hearings to be heard on the same day. Procedural and substantive hearings, particularly in immigration or asylum petitions, may be grouped to be heard on a single day.

#### *Notification of intention to contest*

15. Appendix 1 to this Practice Note contains a style of notice which should be used for notifying the court of an intention to contest a petition only if permission is granted (RCS 58.6(2) (b)). This should be sent to the Petition Department in hard copy.

#### *Notification of readiness to proceed to a substantive hearing*

16. Parties may email the Keeper of the Rolls to confirm their readiness to proceed to the substantive hearing (RCS 58.11(1A)). The Keeper of the Roll's email address for this purpose is petitions@scotcourts.gov.uk. Appendix 2 to this Practice Note contains a style email which should be prepared by one party on behalf of all of the parties. That party must have the permission of all parties to send this email.

17. Where parties have emailed the Keeper in accordance with RCS 58.11(1A), the Lord Ordinary may order that the procedural hearing be cancelled. This will be done by emailing a copy of the interlocutor to the party's address listed on the email. That party must inform all other parties of the cancellation.

#### The pre-proceedings protocol in immigration and asylum judicial reviews

18. The purpose of this part is to set out the terms of an undertaking which the Home Office has provided to the court concerning judicial reviews where the immigration or asylum status of an individual is at issue.

19. Where the Home Office is notified of a stated intention to raise judicial review proceedings in a pre-proceedings letter in accordance with the procedure set out in this Practice Note, such notification, of itself, will not cause the Home Office (i) to initiate or accelerate a decision to issue a removal direction, (ii) to initiate or

accelerate the removal of the person from the United Kingdom and access to Scottish jurisdiction or (iii) to use the notification as a factor in the initiation or acceleration of such directions or decisions.

20. If the Home Office receives a pre-proceedings letter before it has issued a removal direction, it will not remove the individual before it has responded to the letter. If removal directions have been issued before a pre-proceedings letter has been sent, agents of the individual do not need to send a pre-proceedings letter before commencing a judicial review application.

21. The agents of the individual should send any pre-proceedings letter to a designated official at the Home Office. The nominated addressee is "The Litigation Unit, Home Office, Festival Court, 200 Brand Street, Glasgow G51 1DH". Pre-proceedings letters can be faxed to the Home Office on 0370 336 9648 and can be emailed to [snjrteam@homeoffice.gsi.gov.uk](mailto:snjrteam@homeoffice.gsi.gov.uk). The Home Office will, ordinarily, acknowledge the pre-proceedings letter within 24 hours.

22. The wording of a pre-proceedings letter should follow as closely as is reasonably practicable the form in Appendix 3 to this Practice Note.

23. Except in cases of urgency, the petitioner's agents should allow 14 days after the delivery of the pre-proceedings letter for the Home Office to respond to that letter before commencing proceedings.

24. Upon lodging a petition the petitioner's agents will produce with the petition, and copy to the Office of the Advocate General (preferably in electronic form), the case documents in their possession which are relevant to the application (including, if any, the pre-proceedings letter and the Home Office's response to that letter).

#### Case management in judicial reviews

25. The purpose of this part is to set out the terms of a standard order which the Lord Ordinary may issue when granting permission for a judicial review to proceed (RCS 58.11(2)) and to provide an indication of the likely timescales of the procedural steps ordered.

26. A standard order may appoint the following:

- a. parties to adjust their pleadings until two weeks prior to the date of the procedural hearing; and to lodge final versions of their pleadings not later than one week prior to the procedural hearing;

- b. parties each to lodge a bundle of relevant documents, and to mark up those documents indicating the parts they intend to rely on not later than one week prior to the procedural hearing;
- c. notes of argument to be lodged not later than one week prior to the procedural hearing;
- d. statements of issues to be lodged not later than one week prior to the procedural hearing;
- e. affidavits to be lodged in respect of those facts founded on by a party at the substantive hearing not later than one week prior to the procedural hearing;
- f. parties each to lodge a list and bundle of authorities, which should be marked up to indicate the parts the party intends to rely on, not later than 10 days prior to the substantive hearing;
- g. parties to make their submissions in such form as the Lord Ordinary may decide. In particular the Lord Ordinary may refer to the length and font size of the submissions and to the use of footnotes.

#### Bundles of Authorities

- 27. The purpose of this part is to set out the court's expectations of a bundle of authorities, where one is ordered to be produced.
- 28. The bundle should be properly labelled, contain an index at the beginning, and be presented in a form that is robust and manageable. Where lever arch folders or ring binders are used, they should not be overfilled.
- 29. Parties should not lodge authorities on propositions not in dispute.
- 30. Parties should not normally lodge more than five authorities each, unless the scale of the substantive legal argument requires more extensive citation. The permission of the court is required to include any authorities beyond the maximum number of ten. For the purposes of this paragraph, authorities do not include statutory provisions upon which the petition or answers proceed.
- 31. Authorities which have been reported in Session Cases, or in the Law Reports published by the Incorporated Council of Law Reporting for England and Wales, should be cited from those sources. Where a case is not reported in the Session Cases or in the Law Reports, references to other recognised reports may be given.

Unreported opinions should only be cited where they contain an authoritative statement of a relevant principle of law not to be found in a reported case or where they are necessary for the understanding of some other authority.

### Bundles of Documents

32. The purpose of this part is to set out the court's expectations of a bundle of documents, where it is ordered that a bundle of relevant documents should be marked up and lodged.

33. Only documents which are relevant to the legal issues to be raised at the substantive hearing and likely to be referred to at that hearing should be lodged.

34. The documents should be arranged chronologically or in another appropriate order, such as by reference to the subject matter of the claim or the issues in dispute.

35. Where a passage in a document is to be referred to in the course of submissions it should be clearly marked or highlighted.

36. Where it would not be appropriate to mark a passage in an original document, a copy may be lodged and marked in its place.

### Notes of Argument

37. The purpose of this part is to set out the court's expectations of the content of a note of argument, where one is ordered to be produced.

38. A note of argument should comply with the following general principles:

a. it should be a concise summary of the submissions the party intends to develop at the substantive hearing;

b. it should contain a numbered list of points which the party wishes to make, set out as subparagraphs within a single paragraph;

c. it should be set out in numbered paragraphs;

d. it should not contain detailed legal argument;

e. it should be as brief as the issues allow and not more than eight A4 pages, double spaced, in font size 12, unless additional argument is necessary for proper presentation of the case;

f. each point should be followed by reference to any transcript of evidence or other document on which the party wishes to rely. The note of argument should identify the relevant passage in the document in question;

g. it should state, in respect of each authority cited:

(i) the proposition of law that the authority demonstrates; and

(ii) the passages of the authority (identified by page or paragraph references) that support the proposition;

h. more than one authority should not be cited in support of a given proposition unless the additional citation is necessary for a proper presentation of the argument;

i. except on cause shown, no submission will be permitted to be advanced and no authority will be allowed to be referred to at the substantive hearing which is not contained in the note of argument;

j. where a note of argument has been lodged and a party subsequently becomes aware that an argument included in the note will no longer be insisted upon, that party should inform the court of that fact at the earliest opportunity.

#### Failure to comply

39. Where a party fails to comply with any of the requirements of this Practice Note, the court may find that no expenses are payable, or may modify any award of expenses, in respect of the failure to comply.

Edinburgh

13 June 2017

*CJM Sutherland*

Lord President

## Appendix One

Petitions Department  
Court of Session  
Parliament House  
Parliament Square  
Edinburgh  
EH1 1RQ  
Court ref: [reference]  
Date: [date]

### Notification of intention to contest a petition for Judicial Review under Rule 58.6(2) of the Rules of the Court of Session

by

*(Name of party)*

I have been served with the petition of [A.B.] (*designation and address*) for Judicial Review of (*state briefly matter sought to be reviewed*) by [C.D.].

I do not intend to participate in the decision to grant or refuse permission.

I intend to contest the petition if permission is granted.

*(signed)*



## Appendix Two

The Keeper of the Rolls

Email: petitions@scotcourts.gov.uk

Court ref: [reference]

Date: [date]

### Notification of parties' readiness to proceed to a substantive hearing

by

*(Name of party)*

and

*(Name of party)*

[and ...]

I am writing on behalf of the parties to the petition of [A.B.] (*designation and address*) for Judicial Review of (*state briefly matter sought to be reviewed*) by [C.D.]. I have permission from the other parties to write on their behalf.

On (*date*) the Court fixed a procedural hearing for (*date*) and a substantive hearing for (*date*). The parties are ready to proceed to the substantive hearing. The parties confirm that they have complied with the requirements set out in the interlocutor fixing the procedural hearing and that [*insert the number of days set down for the substantive hearing*] is sufficient to address the issues.

*(signed)*

*(address and email address)*

### Appendix Three

[Name of designated official]  
The Litigation Unit  
Home Office  
Festival Court  
200 Brand Street  
Glasgow  
G51 1DH

Dear Sirs

PRE-ACTION PROTOCOL LETTER

**[Insert title, first and last name and address of the claimant]**

**[Insert date of birth and nationality of the claimant]**

**[Insert Home office, Port or other relevant reference]**

[Set out the name, address and reference details of any legal advisers dealing with the claim]

[Set out the details of any interested parties and confirm that they have been sent a copy of this letter]

[Set out the details of the matter being challenged]

[Set out the date and details of the decision, or act or omission being challenged, a brief summary of the facts and, in brief terms, why it is contended to be wrong]

[Set out the details of the remedy sought from the Home Office, including whether a review or any interim remedy is sought]

[Set out the details of any information that is sought. This may include a request for a fuller explanation of the reasons for the decision that is being challenged]

[Set out the details of any documents that are considered relevant and necessary. This should include details of any documentation or policy in

respect of which disclosure is sought and an explanation as to why these are relevant. If reliance is being placed on a statutory duty to disclose information, this should be specified]

[Set out the address for the reply to this letter by the Home Office and for the service of any court documents]

[Include a proposed date by which the Home Office should reply to this letter. The precise time will depend on the circumstances of the individual case. However, although a shorter or longer time may be appropriate in a particular case, 14 days is a reasonable time to allow in most circumstances]

*(signed)*

## Appendix Four

<b>Procedural step</b>	<b>Time limit</b>	<b>Legislative reference</b>
<b>Petition lodged</b>	3 months from the date on which the grounds giving rise to the petition first arose	Rule 58.3; Section 27A (1) of the Court of Session Act 1988; Article 4 of The Courts Reform (Scotland) Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2015
<b>Order for intimation and service</b>	Intimation within 7 days from the order granting intimation and service. Answers/notification within 21 days from the date of service	Rule 58.4
<b>Decision on permission</b>	Within 14 days from the end of the period for lodging answers	Rule 58.7
<b>If permission refused, request a review</b>	Within 7 days from the day on which the decision is made	Rule 58.8; Section 27C (2) of the Court of Session Act 1988
<b>Reclaiming following an oral hearing</b>	Within 7 days from the day on which the Court makes its decision	Rule 58.10; Section 27D (2) of the Court of Session Act 1988
<b>Permission granted: substantive hearing fixed</b>	Within 12 weeks from the date on which permission is granted	Rule 58.11 (1) (a)
<b>Permission granted: procedural hearing fixed</b>	Within 6 weeks from the date on which permission is granted	Rule 58.11 (1) (b)