

Public interest judicial review in cross-border perspective

Chris McCorkindale* and Paul Scott†

This paper assesses challenges in England and in Scotland to the ‘public interest conception’ of judicial review according to which judicial review is intended primarily to promote the public, rather than private, interest. It shows that though recent decades have seen the public interest conception of judicial review in the ascendancy south of the border, there has been in the recent past a changing of the tide: the public interest conception of judicial review has been chipped away by legislative developments which reject the premise upon which it is based – largely by implementing procedural rules which are in significant tension with it. In Scotland, on the other hand, the courts have shown less enthusiasm for that conception, with many of the procedural rules and developments which reflect it having been resisted by the Scottish judiciary or acceded to only belatedly and with some reluctance. On the basis of a consideration of the issues of standing, protective costs orders and third party interventions, it shows that, though the conception of judicial review which sees it primarily as a tool by which the public interest can be pursued and protected is in poor health on both sides of the border, the details of, and reasons for that conclusion, differ in interesting ways.

KEY WORDS: public interest; judicial review; locus standi; standing; protective costs orders; protective expenses orders; third party interventions.

INTRODUCTION

Recent decades have seen a public interest conception of judicial review in the ascendancy. This is evidenced in the first place by common law developments: think the judge-led expansion of administrative law in England in the 1970s; the carving out of common law rights during the late-1990s and early-2000s as well as their more recent revival; and the threat to (in *Jackson v Attorney General*)¹ or the hollowing out of (in *R (Evans) v Attorney General*)² the sovereignty of Parliament by the highest court. It is equally visible, however, in the legislative sphere: in enacting the European Communities Act 1972, the Human Rights Act 1998 and the devolution

* University of Strathclyde

† University of Southampton

¹ [2005] UKHL 56, [2006] 1 AC 262 – see in particular the dicta of Lord Steyn, Lord Hope and Baroness Hale.

² [2015] UKSC 21.

statutes Parliament has required domestic courts to wrestle with the public interest in considering the lawfulness of legislative and executive acts. Whilst there are good reasons to call into question the legitimacy or efficacy of judicial review as a method of promoting the public interest,³ the present work will take that conception as its starting point. It argues that the public interest conception of judicial review is currently being undermined by legislation in England and by a reactionary judiciary in Scotland, not by (or, at least, not *only* by) way of an attack or retreat on the *substance* of judicial review,⁴ but instead by chipping away at the means of *access* to the courts by public interest litigants. While the conception of judicial review which sees it primarily as a tool by which the public interest can be pursued and protected is in relatively poor health on both sides of the border, the reasons for that observation as regards the two jurisdictions differ in important ways.

THE PUBLIC INTEREST CONCEPTION OF JUDICIAL REVIEW

There is an old English tradition which conceives of public law as a process by which the individual secures his or her rights as against the state, without reference to the wider public interest. According to this school of thought, it was the Attorney General alone who represented and protected the public interest during the course of litigation.⁵ As it was put by Lord Wilberforce in *Gouriet v Union of Post Office Workers*, it is a ‘fundamental principle’ of English law’

³ This is a possible implication of the idea of political constitutionalism as exemplified by, for example, John AG Griffith, ‘The Political Constitution’ (1979) 42 *Modern Law Review* 1, and *The Politics of the Judiciary* (Fontana Press, 5th edn 1997); Keith D Ewing, ‘The Politics of the British Constitution’ [2000] *Public Law* 405; Adam Tomkins, *Our Republican Constitution* (Hart Publishing, 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007). It should be noted though, that much of the contemporary literature is concerned with rights-based review of legislative action rather than review of executive action on standard common law grounds: the former raises different, more difficult, issues than does the latter.

⁴ That said, debates around the repeal of the Human Rights Act and its replacement with a British Bill of Rights and, more immediately in England, the new section 31(2A) of the Senior Courts Act 1981 which *requires* the court to refuse permission where it appears to the court that the outcome for the claimant would not have been substantially different but for the conduct complained of – lead us also in that direction.

⁵ Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge, 1992) 144-5.

that 'private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public.'⁶ This view, of course, predates the recognition by the House of Lords of a stark divide between public and private law, with the former to be pursued only via the application for judicial review.⁷ Since that procedure was introduced in 1977 the tendency in English law has been very much away from a private interest conception of judicial review, towards one in which judicial review protects private rights not (solely) as an end in themselves, but as an aspect of the task of protecting a wider public interest: the interest, that is, that the public as a whole has in public authorities acting lawfully and in accordance with standards of good governance. Several of the developments which will be discussed below reflect that broad and still-dominant tendency. In Scotland, the question is complicated by (at least) three differentiating factors. First, the absence of a clear distinction between public and private law as regards judicial review, and the consequent existence of a phenomenon unknown to English law, judicial review in the private law sphere, has required judges in the Court of Session to retain, at least in part, their private law sensibilities even in the exercise of their supervisory jurisdiction.⁸ Secondly, and related to this, is the belated emergence of public law as a distinct field of study in Scotland. Lord Reed has said, reflecting on his own experience as a law student:

As far as I can remember, administrative law did not exist as a subject at Edinburgh University when I studied there. There was certainly no such thing as public law. There were one or two lectures at the end of the first year constitutional law course on judicial review of administrative action, but the emphasis, as I remember, was on the limited role of the courts in this field. The fashionable view at that time was that the role of the courts was of peripheral significance ... We also learned much about administrative

⁶ *Gouriet v Union of Post Office Workers* [1978] AC 435, 477, quoted in Harlow and Rawlings (n 5) 145.

⁷ *O'Reilly v Mackman* [1983] 2 AC 237.

⁸ For the historical and doctrinal explanations behind this see Lord Hope's judgment in *West v Secretary of State for Scotland* 1992 SC 385, 413. For analysis, see James Wolffe, 'The Scope of Judicial Review in Scots Law' [1992] *Public Law* 65; Aileen McHarg, 'Border Disputes: the Scope and Purposes of Judicial Review' in Aileen McHarg and Tom Mullen (eds), *Public Law in Scotland* (Avizandum, 2006).

tribunals, which were regarded as the bodies which were in reality responsible for administrative justice.

This educational climate has to be borne in mind by those who may be inclined to criticise the Scottish courts, or the Scottish legal profession more generally, for being slow to respond to the legal developments which were occurring south of the border.⁹

The third difference lies in the use that is made of judicial review in Scotland as compared to England. On the one hand, there is the relative infrequency of petitions to the Court of Session as compared to applications made to the High Court in England (even allowing for the much smaller population north of the border).¹⁰ On the other hand, in Scotland judicial review has been heavily dominated by immigration challenges (making up 72% of the judicial review case load in between 2008-2013) and, to a much lesser degree, by prison challenges (9.7% during the same period), with relatively few housing, social security, planning or other cases coming before the court.¹¹ In each case the public interest is seen to be served first and foremost by ensuring that public authorities have acted lawfully in respect of their treatment of individual petitioners, with the court rarely asked to push beyond that question in pursuit of some wider public interest. As will be seen, therefore, not only has the public interest conception been slower to develop in Scotland, but judicial review is, in turn, less likely to attract the sort of legislative reaction which has taken place in England. In considering the barriers to public interest litigation north and south of the border, three matters will be considered: rules of standing, protective costs/expenses orders, and third party interventions made in the public interest.

⁹ Robert Reed, 'The Development of Judicial Review in Scotland' (2015) *Juridical Review* (forthcoming) – remarks delivered to the 30 Years of Judicial Review in Scotland Conference at the University of Strathclyde (January 2015).

¹⁰ See Alan Page, 'Thirty Years of Judicial Review: The Judicial Review Caseload' (2015) *Juridical Review* (forthcoming), who makes the point that the approximately 2100 (non-immigration) applications brought per year in England would lead us to expect (at roughly one tenth the size) 210 (non-immigration) petitions to be raised in Scotland: in fact the figure is much lower still, at just 83.2 per year.

¹¹ *Ibid.*

STANDING

England

The well-known liberalisation of the rules of standing which took place in England during the 1980s and early 1990s significantly enhanced the possibility of employing judicial review for public interest ends. The background is the Senior Courts Act 1981,¹² s 31(3) of which requires that the High Court not grant leave to make an application for judicial review ‘unless it considers that the applicant has sufficient interest in the matter to which the application relates.’¹³ The availability of standing is therefore a function of the interpretation of the phrase ‘sufficient interest’. Though in *R v Inland Revenue Commissioners, ex parte National Federation of Self Employed and Small Businesses Ltd*¹⁴ (‘IRC’) it was held that the Federation lacked sufficient interest in the matter to challenge the lawfulness of a tax amnesty granted by the Inland Revenue to the so-called ‘Fleet Street casuals’, the dicta of Lord Diplock (who allowed the appeal on narrower grounds than did the majority in the House of Lords) came to represent the dominant approach to future interpretation of the statutory formulation:

It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped...¹⁵

¹² Formerly the Supreme Court Act 1981.

¹³ The 1981 Act gives effect to certain changes originally implemented as part of the introduction in 1977 of the application for judicial review, which swept away the complex rules of standing associated with the prerogative remedies. The changes were ‘designed to stop the technical procedural arguments which had too often arisen and thus marred the true administration of justice’ *R v Inland Revenue Commissioners, ex p National Federation of Self Employed and Small Business Ltd* [1982] AC 617, 657 (Lord Roskill).

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 644.

Nor is the question of standing wholly distinct from that of the merits of the case: instead, it ‘must be taken together with the legal and factual content.’¹⁶ This position was accompanied by the affirmation that the exclusivity of the Attorney General’s role as guardian of the public interest, outlined in *Gouriet*, did not stretch to a situation in which public law powers were being exercised,¹⁷ leaving room for private actors to assume that role in suitable cases. Though the approach of the courts was not thereafter unanimous,¹⁸ these words act as the starting point for the emergence of a generous rule of standing,¹⁹ which reached its zenith in the Pergau Dam case. There, Rose LJ held that the World Development Movement (WDM), a pressure group, had sufficient interest in the matter of the granting of aid to build a hydroelectric dam in Malaysia. In so holding, he made a pointed reference to the generosity of the approach to standing which had been taken in perhaps less deserving cases:

if the Divisional Court in *ex parte Rees Mogg*, eight years after *ex parte Argyll Group*, was able to accept that the Applicant in that case had standing in the light of his ‘sincere concerns for constitutional issues’, a fortiori, it seems to me that the present Applicants, with the national and international expertise and interest in promoting and protecting aid to under developed nations, should have standing in the present application.²⁰

The first of the factors upon which Rose LJ placed reliance in holding that WDM had sufficient interest in the matter was ‘the importance of vindicating the rule of law’.²¹ Not only does this

¹⁶ *Ibid*, 630.

¹⁷ *Ibid*, 639.

¹⁸ See in particular *R v Secretary of State for the Environment ex parte Rose Theatre Trust* [1990] 1 QB 504.

¹⁹ A key example is *R v Secretary of State for Employment ex p Equal Opportunities Commission* [1995] AC 1, in which the House of Lords held that the EOC had sufficient interest in the EU-law compatibility of the relevant domestic legislation to bring a challenge to it. See also *R v HM Inspectorate of Pollution, ex parte Greenpeace (No. 2)* [1994] 4 All ER 329.

²⁰ *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386, 396. The reference is to *R v Secretary of State for Foreign Affairs, ex p Rees Mogg* [1994] QB 552. On standing to challenge the ratification of treaties (the issue in *Rees Mogg*) see also *R (Wheeler) v Office of the Prime Minister* [2008] EWHC 936 (Admin) where standing was not contested.

²¹ [1995] 1 WLR 386, 395. Key also was the likely absence of any other ‘responsible challenger’.

hark back to Lord Diplock in *IRCs*: it also provides a clear link between the question of standing and those later dicta which posit the availability of judicial review as a ‘constitutional fundamental’.²² Rules of standing of sufficient liberality as to permit public interest judicial review are therefore central to the actualisation of a key constitutional ideal and should not, these dicta suggest, be challenged lightly. They are also central to the public interest conception of judicial review, encapsulated in response of Sedley J to an attempt, post-*WDM*, to push back against a generous interpretation of the ‘sufficient interest’ requirement:

Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power.²³

The dominant approach, therefore, has been such as to allow public law challenges to be brought notwithstanding that the applicant has no direct private interest in the matter at issue, making room for both ‘associational standing’, where a body that does not itself have a direct interest acts on behalf of individuals who do, and pure ‘public interest standing’, in which a body purports to represent the public interest generally ‘rather than the interests of any identified or identifiable individuals.’²⁴ Public interest standing will, it seems, be denied only where the applicant seeks to bring the challenge ‘out of ill-will or for some other improper purpose.’²⁵ The law therefore accords with the public interest conception of judicial review but without

²² *Jackson* (n1) [102] (Lord Steyn).

²³ *R v Somerset County Council, ex parte Dixon* (1998) 75 P&CR 175, 183.

²⁴ Peter Cane, ‘Standing up for the public’ [1995] *Public Law* 276.

²⁵ *R (Feakins) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWCA Civ 1546.

implementing an unlimited rule of standing – the mere fact that there is an objective public interest in testing the lawfulness of a decision will not in and of itself be sufficient.²⁶

The central status accorded to a liberal approach to standing makes it particularly noteworthy that the proposals which eventually resulted in the recent reforms to judicial review – the second set in quick succession²⁷ – expressed so directly the belief that the approach to standing has become too lax, ‘allowing judicial review to be used to seek publicity or otherwise to hinder the process of proper decision-making.’²⁸ In advancing its case the government made direct reference to the public interest – seeking not to deny its relevance to judicial review but instead to (re)assert the principle that:

Parliament and the elected Government are best placed to determine what is in the public interest. On that basis, judicial review should not be used to undermine this role by putting cases before the courts from individuals with no direct interest in the outcome.²⁹

On one hand this language demonstrates a certain strategic nous, turning the language used by proponents of the public interest conception of judicial review back against them. On the other, it quickly and unhelpfully conflates two quite different invocations of the public interest: the claim that the public interest is served by making it possible for courts to determine the legality of what is done by a public actor is in no way incompatible with, and is probably complementary to, the claim that, in the case of disputes as to what the public interest *requires*, it should be the political organs which enjoy the final word. If any of the rules of administrative law are in

²⁶ *Ibid.*

²⁷ For the first, relating to time limits for judicial review, applications for permission to bring a judicial review and fees, see Ministry of Justice, *Judicial Review: Proposals for Reform*, Consultation Paper CP25/2012. The resulting reforms were implemented without recourse to primary legislation.

²⁸ Ministry of Justice, *Judicial Review: Proposals for Further Reform* (Cm 8703, 2013) [79].

²⁹ Ministry of Justice (n 28) [80].

conflict with this expression of (so-called) political constitutionalism, it would seem to be the grounds of review rather than the rules of standing; these latter being (potentially) open to the criticism that in their modern form they allow political question to be answered by the courts rather than political actors. If, conversely, it is accepted that the grounds of judicial review are, even after several decades of very substantial evolution in English administrative law, not such as to permit the courts to substitute their views as to what the public interest requires for those of the original decision-maker, then the identity of the parties permitted to seek judicial review would seem to be of no consequence: the government's attempt to appropriate the language of the public interest therefore misses the mark. Weaknesses in its deployment of the concept of public interest aside, the government expressed the view that 'people who bring judicial reviews should have an interest in the case' and sought opinions on 'whether the test for standing should require a more direct and tangible interest in the matter to which the application for judicial review relates. That would exclude persons who had only a political or theoretical interest, such as campaigning groups.'³⁰

Translated into primary legislation, the requirement of a 'direct and tangible' interest would exclude a large proportion of 'public interest' cases. It is clear, for example, that the World Development Movement had no such interest in the lawfulness of the disbursement of public funds for the purpose of building a dam in Malaysia. But the effect of such a change would not merely be to prevent applications for judicial review being brought by certain individuals or groups. Because many of the powers of public authorities are such that their exercise affects the public as a whole (or some broad section thereof) rather than any particular individual, it may be that *no* applicant would, in relation to that decision, meet the required threshold. The change would, that is, effectively place such a decision beyond the supervisory jurisdiction of the courts. The response to this proposal was, for this reason and others, largely negative, with respondents

³⁰ Ministry of Justice (n 28) [80].

focusing on the small number of claims which would be caught by any change,³¹ the impact a change would have upon meritorious claims, the uncertainty that would be created by legislation on this point and the fact that a change might be counter-productive, in that it would encourage multiple individuals to bring parallel challenges where currently one is brought.³² Most interesting, however, is the claim made by some of the respondents that, as paraphrased in the government's response, 'a direct interest test would alter the purpose of judicial review, moving the focus from challenging public wrong to protecting private rights.'³³ Not only does this objection bring to the fore the divergent conceptions of the underlying purpose of judicial review (of which the rules of standing are perhaps the most important artefact), but it reflects the clear sense on the part of the respondents that, at least as things then stood, the public interest conception was dominant. The changes originally floated would have rendered such an understanding less plausible by amending a rule central to that conception.

Having been subject to broad criticism, the standing proposal was promptly dropped – so promptly that one might query whether there was ever a genuine intention to pursue it³⁴ – to be replaced by 'a strong package of financial reforms to limit the pursuit of weak claims' and a reform of 'the way the court deals with judicial reviews based on procedural defects.'³⁵ The public interest conception of judicial review would, that is to say, not be the subject of such a head-on attack, but undermined in a series of less direct ways. This retreat might be interpreted as suggesting that the government was not confident that its own perception of the purpose of judicial review was shared by the courts which would have to give effect that statutory restriction: the implications, perhaps, of 30 years of rule of law rhetoric in relation to standing. When that

³¹ Approximately 50 applications for judicial review each year from which we can discount the 30% which are environmental cases in relation to which, as a result of EU law, a more liberal approach must be left in place Ministry of Justice (n 28) [78]- [81].

³² The responses are summarised at Ministry of Justice, *Judicial Review – proposals for further reform: the Government response* (February 2014) [33].

³³ Ministry of Justice (n 32) [33].

³⁴ On which, see Stephen Sedley, 'Beware Kite-Flyers', *London Review of Books* (12 September 2013).

³⁵ Ministry of Justice (n 32) [35].

language was employed in *Jackson* to identify a possible hypothetical limit upon the legislative competence of Parliament, it is clear that the judiciary were positioning themselves against legislative attacks on the availability of judicial review. For some judges, such availability was to be maintained at any cost; specifically, even if to do so meant rejecting the unambiguous intention of Parliament expressed, as had been held not to be the case in *Anisminic*,³⁶ in suitably explicit words.³⁷ Parliament has not, since *Jackson*, attempted to oust the judicial review jurisdiction of the courts. Nevertheless, enough has been said in the meantime to keep the *Jackson* flame alive that any attempt to do so carries with it the very real risk of provoking a constitutional crisis of the sort that might see extinguished Dicey's vision of the English constitution. No great leap is required to see that less direct attempts to oust judicial review, including *inter alia* by restricting the rules on standing, might evoke similar judicial ire. The proposal in question here was not, however, (necessarily) of that sort. Though it can fairly be understood as part of a conscious attempt to extinguish the public interest conception of judicial review, and would have likely prevented some – but by no means the most controversial, from the government's point of view – actions and decisions of public authorities from being judicially reviewed, it would not have deprived the continued availability of judicial review of all or even most of its practical effect. It was not, that is to say, an ouster clause in disguise. This is the case not only because it would leave untouched cases in which the applicant has a direct interest, but also because in many cases otherwise brought by a public interest applicant, a suitable private individual could often be found to cross the hurdle of the more strict test. That the proposal was not pursued might however be taken to indicate that the executive was conscious of the possibility that the judiciary might respond with a strong hand. As we shall see, developments in Scotland will only have strengthened that suspicion. Either way, the liberal approach to standing is well-established in English administrative law and, in the short term at least, likely to remain so.

³⁶ *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

³⁷ *Jackson* (n 1) [102] (Lord Steyn), [105]-[107] (Lord Hope), [159] (Lady Hale).

If, however, the changes discussed below do not have the desired effect, it may be that the idea of re-writing the law on standing quickly returns to the table.

Scotland

The extent to which the rule of law requires a liberal conception of standing – perhaps up to the point that a statutory provision restricting it might be called into question by the courts – creates a useful point of contrast with the Scottish position.³⁸ In Scotland, of course, the notion of an untrammelled Parliamentary sovereignty has been far more frequently called into question,³⁹ and the possibility of restricting the ability of the legislature to limit access to courts might therefore be assumed to be more attractive to the courts there. Yet the Scottish courts have generally been less, rather than more, willing to permit access to the courts for petitioners claiming to act in the public interest: the Scottish suspicion of Parliamentary sovereignty does not go hand in hand, as such suspicion does in its modern English form, with a special concern for the rule of law; or, where it does, the rule of law ideal has not usually been identified with a liberal approach to standing. A contrast between the two jurisdictions is interesting, then, for at least two reasons. First, because the markedly less generous approach that has been taken by the Court of Session to the question of standing betrays a more fundamental difference between the two jurisdictions as to the proper *function* of judicial review. Secondly, because the attempts made by the Supreme Court to reform the law on standing in Scotland offers clues as to how that court might respond to any statutory narrowing of the equivalent English law.

We have seen that in England the modern development of judicial review has had a distinctively public law flavour, with the liberalisation of the law on standing reflecting the view that the

³⁸ An earlier version of the reflections on standing and public interest interventions in Scotland contained in this article was published as Christopher McCorkindale, 'Public Interest Litigants in the Court of Session' (2015) 19 *Edinburgh Law Review* 248.

³⁹ *McCormick v Lord Advocate* 1953 SC 396.

function of judicial review is the maintenance of the rule of law and the redress of public wrongs. In Scotland, the Court of Session has interpreted its role much more narrowly. Prior to the judgments of Lords Hope and Reed in *AXA General Insurance v Lord Advocate*,⁴⁰ those petitioning for judicial review were required to cross the threshold of title and interest. This two-step test was firmly grounded in the private law tradition, with the authorities which define it returning us to a time – the first quarter of the twentieth century – when public law had yet to emerge as a separate and distinct field of study and of practice. In *DJ Nicol v Dundee Harbour Trustees*,⁴¹ Lord Dunedin held that to have title to sue a litigant was required to demonstrate that he was ‘a party (using the word in its widest sense) to some legal relation which gives him some right which the person against whom he raises the petition either infringes or denies.’⁴² Likewise, the test for interest set out by Lord Ardwall in *Swanson v Manson*⁴³ (a private law case relating to succession) required the pursuer to demonstrate a ‘real interest...which involves [the protection or enforcement of] his pecuniary rights or his status.’⁴⁴ In Scotland, in other words, judicial review *has* been (recalling and inverting the dicta of Sedley J) at base about rights, and not wrongs: the unlawful acts of public bodies were not open to judicial scrutiny unless they interfered with a legal right or status held by the petitioner and capable of enforcement. Despite his express intention *not* to ‘risk a definition’ of title and interest,⁴⁵ the Court of Session continued to rely on Lord Dunedin’s dicta long after the liberalisation of standing rules in England. In *Rape Crisis Centre v Secretary of State for the Home Department*⁴⁶ it was held that – although the Rape Crisis Centre had sufficient *interest* in the Home Secretary’s decision to allow the boxer and convicted rapist, Mike Tyson, to enter the UK – they lacked *title* to do so, the Immigration Act 1971 creating a

⁴⁰ [2011] UKSC 46, [2012] 1 A.C. 868.

⁴¹ 1915 SC (HL) 7.

⁴² *Ibid*, 12-13.

⁴³ 1907 SC 426.

⁴⁴ *Ibid*, 433.

⁴⁵ *D&J Nicol* (n 41) 12.

⁴⁶ 2002 SLT 389.

legal relationship exclusive to the Home Secretary and Mr Tyson.⁴⁷ Conversely, in *Scottish Old People's Welfare Council, Petitioners*⁴⁸ it was held that the petitioners did have *title* to challenge guidance issued by the Chief Adjudicating Officer relating to social security payments for severe weather conditions, but that as an organisation representing the interests of the aged generally, rather than a specific class of recipients, the group lacked the requisite *interest*. The problems created by the narrow interpretation of the rules of standing were two-fold. First, the practical problem of forum shopping: public interest cases that might have been brought in Scotland were – on the advice of counsel – instead brought in England, where applicants had a better chance of clearing the hurdle of sufficient interest.⁴⁹ The second problem, one of principle, was neatly demonstrated by Lord Hope in his reflections on the Mike Tyson case:

The fact that the argument on its merits was found by Lord Clarke to be unsound tends to mask the point that, if that argument had been well-founded, there would have been no means under the Scottish system of obtaining from the courts an effective remedy.⁵⁰

It was on this point – the point of constitutional principle – that the law turned in *AXA*. For Lord Hope, whilst:

in cases that lie within the private sphere it will no doubt be appropriate to ask whether the petitioner has a title and interest to bring the proceedings... it is hard to see the

⁴⁷ The difference between the Scottish and English positions was particularly salient here, as a parallel challenge brought before the High Court in England was allowed to proceed to (although ultimately failed on) the merits, the standing of the applicants having gone unchallenged: *R v Secretary of State for the Home Department, ex p Bindel* [2001] Imm AR 1.

⁴⁸ 1987 SLT 179.

⁴⁹ Lord Hope of Craighead, 'Mike Tyson comes to Glasgow – a question of standing' [2001] *Public Law* 294, 302-304.

⁵⁰ *Ibid*, 307.

justification for applying that test... which is rooted in private law to proceedings which lie within the field of public law.⁵¹

The time had therefore come to develop a new test for standing in public law cases,⁵² one which could not ‘be based on a concept of rights, but must be based on a concept on interests.’⁵³ In language familiar from *IRC* and *Jackson*, Lord Reed spelled out what was at stake:

A rights based approach to standing... is incompatible with the performance of the courts’ function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights.

For Lord Reed, drawing a direct parallel with the approach taken south of the border, the correct terminology must now be standing, based on sufficient interest.⁵⁴ For Lord Hope, the words ‘directly affected’, construed broadly to include those acting with genuine concern for the public interest even in the absence of any private right or interest of their own, was appropriate.⁵⁵ Differences of terminology aside, it is clear that on the substantive effect of this change the Scottish justices were as one: judicial review in Scotland must no longer privilege private rights and individual grievances over public wrongs and the rule of law.⁵⁶ This is doubly significant. First, because the dicta deployed here reminds us what is at stake where the executive attempts,

⁵¹ *AXA* (n 40) [58].

⁵² Both Lord Hope and Lord Reed sought to restrict the scope of reform to those judicial review cases that fall within the sphere of public law. In private law cases Lord Hope (at [58]) said that it “will no doubt be appropriate to ask whether the petitioner has title and interest to bring the proceedings”, and so the old test (for now) retains some force. This is a point on which the common law might soon be overtaken by statute. Prior to the decision of the Supreme Court in *AXA*, in his *Scottish Civil Courts Review* (2009) Lord Gill (at chapter 12) recommended that the overly restrictive approach to standing be replaced by a single test, of sufficient interest. Along with the introduction of time limits and a permission stage that will (at least on the surface) bring Scottish procedure into line with that in England, the resulting legislation, the *Courts Reform (Scotland) Act 2014*, will, when brought into force, amend the *Court of Session Act 1988* so as to implement a statutory ‘sufficient interest’ test.

⁵³ *AXA* (n 40) [62].

⁵⁴ *Ibid*, [171].

⁵⁵ *Ibid*, [63].

⁵⁶ *R v Somerset County Council ex p Dickson* [1998] Env LR 111, 7 (Sedley J).

by legislation, to narrow the rules of standing: the battle will be fought by the Supreme Court on the grounds of constitutional principle, potentially bringing the rule of law into conflict with the sovereignty of Parliament. Second, because in Scotland it has not been the illiberal instincts of the executive, but instead the reactionary attitudes of the judiciary that have, thus far, erected the most effective barriers against public interest judicial review.

The lines of resistance were first drawn by the Court of Session in *Walton v Scottish Ministers*,⁵⁷ a statutory appeal⁵⁸ in which Mr Walton sought to challenge the validity of certain orders and schemes made by the Scottish Ministers relating to the construction of a road network on the periphery of Aberdeen. In determining whether he was (in the relevant statutory language) a ‘person aggrieved’ and therefore entitled to raise proceedings, the Inner House held that Mr Walton had failed to demonstrate that the construction of the road had any substantial impact upon his interests, or would negatively affect his property. But, the opinion added, had this been an exercise of the supervisory jurisdiction and not a statutory appeal, the court would have been minded to hold that Mr Walton lacked ‘sufficient interest’, not least because of the considerable distance between his property and the new route. If the narrow interpretation of Mr Walton’s interests here looked like a subtle attempt to reintroduce the restrictions of the title and interest test under the guise of sufficient interest (the emphasis being placed on *his* rights, *his* interests), it was an attempt to which the Supreme Court, on appeal, gave short shrift.⁵⁹ Despite the fact that Mr Walton’s entitlement to bring proceedings had not been contested by the Scottish Ministers, Lord Reed took the opportunity to reinforce the spirit and the implications of *AXA*. In pointed disagreement with the Inner House, he concluded that Mr Walton – who had demonstrated a genuine concern about the proposal, and been an active member of organisations concerned with the environment generally and opposition to the new route specifically – ought to have had

⁵⁷ [2012] CSIH 19.

⁵⁸ Roads (Scotland) Act 1984 Sch 2 para 2.

⁵⁹ *Walton v Scottish Ministers* [2012] UKSC 44.

standing as a party with a sufficient interest, though those proceedings would likely have failed on their merits. The court's constitutional function of maintaining the rule of law, he said, could no longer be ignored in favour of 'an approach which presupposed that the court's supervisory jurisdiction was to redress individual grievances.'⁶⁰ Lord Hope reinforced the point by way of colourful illustration:

Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.⁶¹

That a proper interpretation of *AXA* and *Walton* required the Court of Session to take a qualitatively different approach to standing can be seen in the contrasting treatment given to that issue by the Outer and Inner Houses in *McGinty v Scottish Ministers*.⁶² Marco McGinty, a keen birdwatcher and member of the Royal Society for the Protection of Birds ('RSPB'), sought to challenge the designation of a new power station and transshipment hub as a 'national development', thereby giving it priority in any subsequent application for development consent, on the basis that statutory requirements for consultation were not complied with. In the Outer House, Lord Brailsford declined to delay his opinion until the Supreme Court's judgment in

⁶⁰ *Ibid*, [90].

⁶¹ *Ibid*, [152].

⁶² See respectively *McGinty v Scottish Ministers* [2011] CSOH 163, and the reclaiming motion *McGinty v Scottish Ministers* [2013] CSIH 78.

AXA had been handed down, and – applying the test of title and interest – dismissed the petition. Whilst the Lord Ordinary took the view that Mr McGinty might have had *title* to sue in order to ‘prevent a breach by a public body of a duty owed to the public by that body’,⁶³ as an individual who resided some five miles from the land in question, and whose only connection to that land was to use it infrequently for recreational purposes, Mr McGinty could not be said to have had a ‘real and legitimate’ or ‘real and practical’ interest in the matter, capable of enforcement by the court.⁶⁴ Following the Supreme Court’s decisions in *AXA* and in *Walton*, however, when the petition was reclaimed to the Inner House that court felt bound to adopt a different approach. Agreeing with Lord Reed that the rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no-one was able to challenge it,⁶⁵ Lord Brodie held that ‘applying the approach now desiderated by the Supreme Court’ it was no longer permissible to dismiss Mr McGinty as a mere busybody.⁶⁶ His Lordship considered as relevant the petitioner’s concern for the environment and for the activity of birdwatching; his knowledge of both; and his willingness to make representations during any consultation process that preceded the decision.⁶⁷

We should not, however, rush to conclude that *McGinty* marks the last word on the question of standing or the final acceptance (or, acceptance finally) by the Court of Session of the liberal approach envisaged in *AXA* and *Walton*. Whereas in England it is rare for applicants to fail to clear the hurdle of sufficient interest, in Scotland the question of standing remains a substantial (if reduced) obstacle. In *Christian Institute v Lord Advocate*⁶⁸ Lord Pentland appeared to construe narrowly the ‘directly affected’ test when he refused standing to four of seven petitioners, holding that a failure by the Christian Institute, the Family Education Trust and the Young ME

⁶³ *McGinty (OH)* (n 62) [25] (Lord Braisford).

⁶⁴ *Ibid*, [26].

⁶⁵ *McGinty (IH)* (n 62) [46].

⁶⁶ *Ibid*, [48].

⁶⁷ *Ibid*.

⁶⁸ [2015] CSOH 7.

Sufferers Trust to engage in the consultation exercise which preceded the Children and Young People (Scotland) Act 2014, and the general and insubstantial response to that consultation made by CARE, betrayed a lack of genuine concern for the legislation and its effects.⁶⁹ Additionally, the Lord Ordinary took the view that none of these organisations possessed sufficient expertise to be deemed properly representative of the public or a section thereof directly affected by the scheme, adding that the rule of law would not be compromised in this case as the competence of the legislation would be tested by three more petitioners, whose children it would impact directly.⁷⁰ In both *McGinty* and in *Christian Institute* we see *AXA* and *Walton* applied in ways which lower the threshold of standing but which, by requiring public interest litigants to be fully engaged in prior political processes and/or to be possessed of expertise in lieu of enforceable legal rights, nevertheless impose a more substantial barrier to litigation than might be placed before their counterparts in England.⁷¹

PROTECTIVE COSTS ORDERS

England

In general, the approach taken to costs in judicial review cases follows that taken in other civil proceedings in that expenses follow success.⁷² Even after the liberalisation of standing in England, the prospect of having a costs order made against them was often sufficient to deter potential public interest applicants: ‘the risk of an adverse costs order,’ it has been said, ‘and crucially the difficulty in quantifying that risk creates the greatest obstacle to court access for

⁶⁹ *Ibid*, [93].

⁷⁰ *Ibid*, [95].

⁷¹ At the time of writing the *Christian Institute* case has been reclaimed to the Inner House, and we await with interest the approach taken by that court to the question of standing.

⁷² CPR 44.2.

public interest litigants.⁷³ Therefore, the costs regime has been capable of doing what the government has not dared attempt through legislation: closing the doors of the courts to those not directly affected by the action or decision in question.⁷⁴ Exceptionally, no costs order would be made against unsuccessful litigants, in recognition of the importance of the issues at stake,⁷⁵ but this prospect was sufficiently unusual that it could not counter the ‘chilling’ effect of a potential costs order. It is now, however, well-established that in certain circumstances the courts may make a protective costs order (PCO), placing a limit upon the costs that the losing party will be required to pay. The making of such an order is closely related to the public interest in a given case being heard.⁷⁶ In *R (Corner House Research) v The Secretary Of State for Trade and Industry*, the Court of Appeal identified criteria for the making of a PCO, demonstrating very clearly that PCOs reflect the public interest conception of judicial review:

- i) The issues raised are of general public importance;
- ii) The public interest requires that those issues should be resolved;
- iii) The applicant has no private interest in the outcome of the case;
- iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;

⁷³ Shami Chakrabarti, Julia Stephens and Caoilfhionn Gallagher, ‘Whose cost the public interest?’ [2003] *Public Law* 697, 699.

⁷⁴ See, in this regard, the Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014, which introduced a ‘no permission, no payment’ rule for those applications for judicial review which are funded by legal aid. In *R (Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin) those regulations were quashed for reason of being incompatible with the purpose of the statute, the Legal Aid, Sentencing and Punishment of Offenders Act 2012, under which they were made.

⁷⁵ Chakrabarti et al (n 72) 700-2, tracing the idea back to *Liversidge v Anderson* [1942] AC 206.

⁷⁶ See *R v Lord Chancellor ex parte Child Poverty Action Group* [1999] 1 WLR 347, in which Dyson J identified a restrictive set of criteria for the making of a ‘pre-emptive costs order’. For him, the ‘essential characteristics of a public law challenge are that it raises public law issues which are of general importance, where the applicant has no private interest in the outcome of the case’ (at 353).

- v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.⁷⁷

The merits of the application will likely be enhanced where the applicant's representatives are acting pro bono, and it is for the court to decide whether it is 'fair and just' to make such an order.⁷⁸

Of the five criteria identified, the most interesting is the third, strict application of which would distinguish between cases in which a public interest augments the applicant's private interest in the resolution of the matter, and those in which it is entirely free-standing: it might well exclude, that is, the making of a PCO in cases where the applicant was 'associational' rather than pursuing a pure public interest.⁷⁹ Had this been insisted upon, the effect would have been to severely limit the availability of PCOs, rewarding only those applicants who were acting entirely altruistically – a category likely to be very small.⁸⁰ The narrow application of this condition was evidenced in *Goodson v HM Coroner for Bedfordshire*,⁸¹ where it was noted that this particular requirement was phrased 'in unqualified terms, although the court could easily have formulated [it] in more qualified terms... if it had thought it appropriate to do so.'⁸² The claim that it should be considered sufficient 'that the public interest in having the issue decided transcends... or wholly outweighs the interest of the particular litigant' therefore failed, and the applicant, seeking judicial review of the coroner's refusal to conduct an Article 2 ECHR-compatible inquiry and to appoint an independent medical examiner to assess the circumstances of her father's death, was left with

⁷⁷ R (*Corner House Research*) v *The Secretary Of State for Trade and Industry* [2005] EWCA Civ 192 [74]. On the first and second requirements, see R (*Compton*) v *Wiltshire Primary Care Trust* [2008] EWCA Civ 749 [21]-[23] and [73]-[78].

⁷⁸ R (*Corner House Research*) (n 77) [74].

⁷⁹ Cane (n 24).

⁸⁰ See on this point *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam); R (*England*) v *Tower Hamlets LBC* [2006] EWCA Civ 1742; R (*Bullmore*) v *West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin).

⁸¹ [2005] EWCA Civ 1172.

⁸² *Ibid*, [27].

uncapped costs. Subsequent case law indicated a belief, however, that a more flexible approach to the ‘no private interest’ requirement was required (albeit sometimes made entirely in *obiter*),⁸³ and in *Morgan v Hinton Organics*⁸⁴ the Court of Appeal endorsed that flexibility – not just in relation to the third requirement, but to all of the *Corner House* criteria.⁸⁵

A key dispute surrounding the circumstances in which it will be appropriate to make a PCO centres on the idea of their ‘exceptionality’. In *Child Poverty Action Group*, it was said by Dyson J that ‘the discretion to make pre-emptive costs orders even in cases involving public interest challenges should be exercised only in the most exceptional circumstances.’⁸⁶ In *Corner House*, the Court of Appeal endorsed this statement, but noted that ‘of itself it does not assist in identifying those circumstances’,⁸⁷ and in *Compton*, Waller LJ took the view that in *Corner House*, ‘exceptionality’ had not been identified as one of the criteria for the making of a PCO but was, rather, ‘a prediction as to the effect of applying the principles.’⁸⁸ Agreeing with him, Lady Justice Smith held that ‘if all the requirements [in *Corner House*] are satisfied and the court thinks it right to exercise its overall discretion, nothing more is required. In those circumstances, exceptionality is satisfied. And indeed, it must be accepted that it will be a rare case which satisfies all five requirements.’⁸⁹ Though restrictive, therefore, it seems to be the case that the criteria to be applied do not separately and explicitly require that the case be an exceptional one: if PCOs are made rarely, it is a function of the strictness of the *Corner House* criteria, even once their flexible application is accounted for.

⁸³ R (Buglife) v Thurrock Thames Gateway Development [2008] EWCA 1209.

⁸⁴ [2009] EWCA Civ 107.

⁸⁵ *Ibid*, [39].

⁸⁶ R v Lord Chancellor ex parte Child Poverty Action Group [1999] 1 WLR 347, 355.

⁸⁷ [2005] EWCA Civ 192, [72].

⁸⁸ R (*Compton*) v Wiltshire Primary Care Trust [2008] EWCA Civ 749 [24]. Lady Justice Buxton dissented on this point, describing the relevant dicta of the Court of Appeal in *Corner House* as ‘plainly the language of cumulative criteria, and not a statement that because the §74 requirements are satisfied exceptionality is necessarily satisfied as well’ [64].

⁸⁹ [2008] EWCA Civ 749 [82].

Alongside the abortive proposal to limit standing, a key element of the consultation on (further) reform of judicial review was the topic of ‘rebalancing financial incentives’; in particular the desire to adjust the approach to costs in judicial review so as ‘to encourage claimants and their legal representatives to consider more carefully the merits of bringing a judicial review and the way they handle proceedings.’⁹⁰ Not – it must be noted – to do anything so crude as to actively obstruct the bringing of a judicial review. Five areas of costs were specifically identified for the task of rebalancing the relevant incentives, amongst them PCOs.⁹¹ Due to ongoing uncertainty about the extent to which the Aarhus convention requires PCOs to be available in environmental cases the proposal, like that on standing, was limited to the context of ‘non-environmental cases’.⁹² Of particular concern to the government was the flexibility, noted above, that has come to prevail in the application of the Corner House requirements and the supposed demise of the requirement that a case be ‘exceptional’ before a PCO would be made.⁹³ As the discussion above demonstrates, it is not clear that, properly understood, such a requirement ever prevailed and to that extent we might take the proposals to be based upon a misconception. Nevertheless, the effect of the more generous approach, it was claimed, was that ‘the balance’ (between what was not stated) had been tipped too far, and ‘now allows PCOs to be used when a claimant is bringing a judicial review for his or her own benefit.’⁹⁴ Again, however, even after the flexible approach to the Corner House criteria was established, it is not clear that an applicant for judicial review who acts purely or even primarily for his or her own benefit will benefit from the making of a PCO – no example of such a thing happening was offered. The point was specifically linked, along the axis of judicial review as a campaign tool, to the question of standing in public interest cases:

⁹⁰ Ministry of Justice (n 28) [113].

⁹¹ Ministry of Justice (n 28) [113]. The other areas were the removal of legal aid where permission to bring a judicial review was denied, the costs of oral permissions hearings, wasted costs orders, and costs relating to third party interventions.

⁹² Ministry of Justice (n 28) [156].

⁹³ Ministry of Justice (n 28) [157].

⁹⁴ Ministry of Justice (n 28) [158].

There is a degree of overlap between the issues of standing and the PCO regime. In particular, and to the extent that the standing rules permit ‘public interest’ claims to be brought where there is no claimant with a direct or immediate interest, the Government questions whether it is right – as a PCO will provide – for the public body defendant to be required to fund its own costs of defending that case, if the claim fails.

The consultation therefore sought views on a variety of changes to the PCO regime. As with standing, the responses offered to the proposals derived in in large part from the belief, as summarised in the government’s response, that ‘judicial review is about public wrongs’⁹⁵ – a view which, it has been noted, was not necessarily shared by the then government.

Unlike the proposals for the reform of standing, those on PCOs were carried forward into the Criminal Justice and Courts Act 2015, which enacts that a PCO (a ‘costs capping order’) may be made only where leave to apply for judicial review has been granted and only if the court is satisfied that three conditions are met. First, that the proceedings are ‘public interest proceedings’, meaning that: an issue which is the subject of the proceedings is of general public importance, the public interest requires that issue to be resolved, and the proceedings are likely to provide an appropriate means of resolving it.⁹⁶ Factors to be taken into account here include the number of people likely to be ‘direct effected if relief is granted’; the likely significance of the effect on those people; and whether the proceedings ‘involve consideration of a point of law of general public importance.’⁹⁷ This list is capable of extension by the Lord Chancellor and the House of Lords Constitutions Committee drew that House’s attention to the question of whether it was constitutionally proper for the Lord Chancellor to enjoy such a Henry VIII

⁹⁵ Ministry of Justice (n 32) [56].

⁹⁶ Criminal Justice and Courts Act 2015 s 88(6)(a) and (7).

⁹⁷ Criminal Justice and Courts Act 2015 s 88(8).

power,⁹⁸ capable, it will be noted, of being used to further restrict the availability of PCOs.⁹⁹ The second point of which the court must be satisfied is that the applicant would withdraw the application or otherwise cease to participate if no order was made; the third is that it would be reasonable for the applicant to do so.¹⁰⁰ Even where these conditions are met, a PCO is not automatic: the statute instead requires the court, in deciding whether to make such an order and if so in what terms, to have regard to a list of factors, including whether ‘the applicant... is an appropriate person to represent the interests of other persons or the public interest generally’ and the resources of parties to proceedings (and whether any third party is providing financial support).¹⁰¹ In addition, cost-capping orders may no longer be unilateral, but must limit or remove the liability of the party to whose cost they relate to pay the applicant’s costs if relief is granted.¹⁰²

When these provisions come into force, they can be expected to do significant harm to the public interest conception of judicial review, notwithstanding that – like the *Corner House* criteria – they are couched in terms which imply that public interest cases are those uniquely deserving of the capping of costs. This is the likely effect, in the first place, of the diminished flexibility that results from the placing of the rules on a statutory footing, but also of the more limited understanding of ‘public interest proceedings’ reflected in the statute. The limited conception of the public interest at play is reflected most obviously in the considerations which must be taken into account, including the reference to the number of people affected, as though the public interest is engaged against the unlawful actions of a public authority acting only where few people are affected. This is compounded by the ability to make a PCO only where leave has been

⁹⁸ House of Lords Constitution Committee, *Criminal Justice and Courts Bill* (HL 2014-15, 18) [15].

⁹⁹ Note, though, that in the statute as enacted, any amendment to the list of factors to which the court must have regard in deciding whether to make a PCO is subject to the affirmative procedure: Criminal Justice and Courts Act 2015, s 88 (9).

¹⁰⁰ Criminal Justice and Courts Act 2015 s 88(6)(b) and (c).

¹⁰¹ Criminal Justice and Courts Act 2015 s 89(1).

¹⁰² Criminal Justice and Courts Act 2015 s 89(2).

granted and the requirement that any PCO granted be bilateral, so that if the application for judicial review results in the grant of relief, the defendant need not pay the applicant's costs in full. Applicants are in this way punished both for being unsuccessful and for being *too* successful – in the latter case, notwithstanding that the court has recognised the bringing of the proceedings as being in the public interest.

Scotland

Inspired by the decision in *Corner House*, public interest litigants in Scotland were quick to test the competence of protective expenses orders (PEOs) in the Scottish courts. Two early applications produced contradictory results and uncertainty for petitioners as well as for respondent public authorities. In *McArthur v Lord Advocate*,¹⁰³ relatives of the deceased sought a PEO in order to pursue a judicial review of decisions by the Lord Advocate and by the Scottish Ministers not to hold inquiries into the deaths of a number of patients NHS hospitals who had been infected by Hepatitis C when receiving blood transfusions. On behalf of the respondents it was argued first that the making of such orders was incompetent in Scots law, and secondly, that if the order was competent it was nevertheless inappropriate to do so at the outset of proceedings: to do so would fetter the discretion of the court hearing and resolving the substantive dispute to take into account the behaviour of the parties when deciding on the award of expenses.¹⁰⁴ For Lord Glennie, however, there was 'no doubt that it is competent to make an order in the terms sought,' and this because the award of expenses falls within the court's very broad discretion.¹⁰⁵ Having established competence, the 'real question[s]' in Lord Glennie's view were (i) whether it is appropriate to make such an order within that discretion, and if so (ii) according to which

¹⁰³ *McArthur v Lord Advocate* 2006 SLT 170.

¹⁰⁴ *Ibid*, [6].

¹⁰⁵ *Ibid*, [10].

principles, and (iii) at what stage in proceedings.¹⁰⁶ Here his Lordship provided a welcome degree of clarity. First, whilst recognising important differences in procedure and substance in Scotland and in England, Lord Glennie nevertheless agreed with the principle which underpinned the decision by the Court of Appeal in *Corner House*: that ‘in a certain category of case it may be in the public interest that there be a departure from the ordinary approach to costs;’ a principle, he continued, that applied equally in both jurisdictions.¹⁰⁷ Secondly, having extrapolated and applied that principle, Lord Glennie applied with it the *Corner House* criteria in determining whether it was appropriate to make an award in this instance.¹⁰⁸ Finally, without seeking to downplay the general rule that expenses follow success, and the general exception to that rule which rests on the behaviour of the parties during the proceedings, Lord Glennie held that a PEO could competently be made at the outset of proceedings. There was, in his view:

no intrinsic problem with making such an order where the court is able, in advance, to form a sufficient view of the importance of the case being brought and of its merits; and to be satisfied that the future conduct of the case would not cause it, at the end of litigation, to form a different view.¹⁰⁹

The clarity offered by Lord Glennie, sitting in the Outer House, was undone almost immediately by the experience of Friends of the Earth in the Inner House. There, in an unreported challenge to the Scottish Ministers’ decision to approve the extension of the M74, doubt was cast from the bench about the very competence of making PEOs in Scots law.¹¹⁰ As a result of this uncertainty, and in light of advice from counsel that an award was unlikely to follow, Friends of the Earth

¹⁰⁶ *Ibid*, [11].

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*, [15].

¹⁰⁹ *Ibid*, [10].

¹¹⁰ Tom Mullen, ‘Protective expenses orders and public interest litigation’ (2015) 19 *Edinburgh Law Review* 36, 46.

withdrew their challenge¹¹¹ – a reminder that ‘[t]here is little point opening doors to the court if litigants cannot afford to come in.’¹¹² Seen in this light, PEOs become a matter of constitutional principle: no less than the court’s constitutional function of preserving the rule of law is at stake where public spirited litigants are dissuaded from action by the prohibitive cost of judicial review.

On one reading, subsequent developments have offered some encouragement in the direction of greater protection for public interest litigants: PEOs have been awarded to petitioners in *McGinty, Petitioner*¹¹³ and in *Road Sense v Scottish Ministers*,¹¹⁴ and to public interest interveners in *Scotch Whisky Association, Petitioner*,¹¹⁵ the Inner House has had occasion to consider and to approve the practice of making PEOs in *Fife Council v Uprichard*,¹¹⁶ and the Rules of Court have been amended to create a framework for making a special category of PEO in environmental cases, in line with the Public Participation Directive 2003/35/EC. Protective expenses orders, in other words, are indeed now ‘firmly part of the furniture’.¹¹⁷ A deeper reading, however, reveals the still salient wariness of the judiciary to open up the courts to public interest litigation. At common law (that is, those applications that fall outwith the scope of environmental challenges under Chapter 58A of the Court of Session Rules) there remain problems of practice and principle. The practical problem relates to cost. Whereas PEOs made under Chapter 58A are capped at £5000, in *McGinty* a cap of £30,000 was deemed appropriate for a petitioner in receipt of jobseekers allowance and possessed only of modest savings, whilst in *Road Sense*, litigation that eventually made its way to the Supreme Court in the guise of *Walton* (above – Mr Walton was the chairman of the organisation set up to oppose the route of the proposed by-pass), the cap was set at

¹¹¹ ‘Natural Justice: Are costs putting people off standing up for their environment?’ *Holyrood Magazine* (8 April 2013).

¹¹² Toohey J, Address to the Australian National Environmental Law Association (1989), cited in R (*Corner House Research*) (n 77) [31].

¹¹³ [2010] CSOH 5.

¹¹⁴ 2011 SLT 889.

¹¹⁵ [2012] CSOH 156.

¹¹⁶ [2011] CSIH 7.

¹¹⁷ For a fuller discussion of the development of PEOs in Scottish judicial review cases see Mullen (n 109) and Kenneth Campbell, ‘Protective expenses orders: where have we got to?’ 2014 SLT 19.

£40,000.¹¹⁸ For many would be litigants, the prospect of exposure to a liability in five figures will retain a certain chilling effect (and, of course, this is partly the point in that it works to weed out vexatious claims). The constitutional point flows directly from here: that where the actions of public bodies go unchallenged not because a petition would be without merit, but because the cost of doing so remains a barrier *even accounting for* the potential award of a PEO, the court is no less stymied in the exercise of its constitutional function than if those same litigants were shut out by narrow rules on standing. Strategically, for judges wedded still to Scotland's private law tradition, title and interest is easy ground to concede where cost can more subtly be used to deter public interest challenges: not by denying the competence of PEOs *per se* (as previously hinted at by the Inner House), but instead by setting the ceiling high, or by setting burdensome preconditions for the making of an award. With regard to the former, recent case law has offered some comfort. In *Hillhead Community Council v Glasgow City Council*,¹¹⁹ Lord Bannatyne applied the Corner House criteria and, determining that the Community Council had an arguable case that parking controls had been implemented unlawfully by the City Council, and that the resources of the Community Council were such that it would be unable to continue proceedings in lieu of a PEO, capped the liability of the petitioners at just £1000. It remains to be seen whether this is the beginning of a trend towards the making of lower awards in common law cases, or a mere outlier set against the much higher awards made in previous cases. In terms of the latter, however, decisions by the Outer House to forgo the making of a PEO in *John Muir Trust, petitioner*¹²⁰ and in *J Mark Gibson, petitioner*¹²¹ – where the petitioners were unable to demonstrate to the court that their income and assets, including pending legacies (in the former case), a pension

¹¹⁸ In his *Review of Expenses and Funding of Civil Litigation in Scotland* (2013), at chapter 5, Sheriff Principal Taylor argued that the power to apply for a protective expenses order should be available in all public interest cases, but that the level of award should remain a matter of judicial discretion, unless otherwise provided for in Rules of Court (as has been the case with regard to environmental challenges). However, as these (and, as we shall see, subsequent) cases demonstrate, it is precisely the way in which that discretion has been exercised that has proven to be so problematic for litigants, actual and potential.

¹¹⁹ [2015] CSOH 35.

¹²⁰ [2014] CSOH 172A.

¹²¹ [2015] CSOH 41.

fund, as well as the possibility of raising funds by selling of part of his large estate (in the latter), could not withstand exposure to a potential six figure liability – recall the warning by Chakrabarti *et al* that the difficulty of quantifying risk presents a very real barrier to public interest litigation.¹²² In Chapter 58 proceedings too, where a degree of certainty is afforded to petitioners by the £5000 ceiling and by setting down in the Rules of Court criteria against which such an application should be assessed, the predisposition of the judiciary *against* making such an award has coloured the interpretation given to that criteria by the court. It was, ironically, in *making* the first award of a PEO under the new environmental regime in *Sally Carroll v Scottish Borders Council*¹²³ that the reactionary tendencies of the Court of Session resurfaced. In interpreting the requirement in rule 58A.2(6)(a) that an applicant demonstrate a ‘sufficient interest’ in the subject matter of the proceedings, Lord Drummond Young took the view that this could not be equated to (post-*AXA* and *Walton*) the liberal interpretation of sufficient interest relating to standing. There, he said, the court is concerned with the ‘very fundamental right to bring proceedings.’ By way of contrast, because PEOs are instead concerned with ‘immunity from the normal rules governing liability in expenses’, Lord Drummond Young read in to those rules a more stringent test – one which requires ‘the person seeking the order...to demonstrate...a genuine interest in the outcome of the decision’ – closer in spirit to the private law tests of the past than to the emerging public law jurisprudence encouraged by Lords Hope and Reed.¹²⁴ To the extent that this approach reflects a broader judicial hostility to the public interest conception of judicial review, it is unsurprising that the need for legislative intervention has not (yet) been felt.

PUBLIC INTEREST INTERVENTIONS

England

¹²² Chakrabarti *et al* (n 73).

¹²³ [2014] CSIH 30.

¹²⁴ *Ibid*, [13].

Just as public interest standing in England was not, ultimately, attacked directly but instead via the issue of costs, so too have attempts to discourage third party intervention in judicial review taken the form not of an attack on the practice itself but on the associated costs regime. The regime which permits third-party intervention is at heart simple. CPR 54.17 states that ‘Any person may apply for permission’ either ‘to file evidence’ or to ‘make representations at the hearing of the judicial review.’¹²⁵ The Supreme Court rules provide that ‘any official body or non-governmental organization seeking to make submissions in the public interest’; ‘any person with an interest in proceedings by way of judicial review’; or any person who intervened in a lower court or whose submissions were taken into account at the leave stage, may apply for permission to intervene in the appeal.¹²⁶ Though a fee is payable by an intervener in the Supreme Court, it is provided that ‘[w]here an application for permission to intervene in an appeal is filed by a charitable or not-for-profit organisation which seeks to make submissions in the public interest, the Chief Executive of the Supreme Court may reduce or remit the fee in that case.’¹²⁷ Recent decades have seen considerable growth of the making of third-party interventions. Though as recently as the mid-1980s the application by the Children’s Legal Centre to intervene in *Gillick v West Norfolk & Wisbech Area Health Authority* was robustly rejected by the House of Lords,¹²⁸ nearly a third of the cases decided by that court in the final year of its operation involved at least one intervener.¹²⁹ As it was put by Sedley LJ, in explaining why he felt the Secretary of State should not have been permitted to intervene in a private law dispute simply due to his interest in a potential risk burden which might fall upon tramway operators as a result, the greatest value

¹²⁵ The process in the Court of Appeal is more complex, because the CPR makes no formal provision for third party interventions. For an explanation see JUSTICE, *To Assist the Court: Third Party Interventions in the UK* (2009), [25]-[29] and Sir Henry Brooke, ‘Interventions in the Court of Appeal’ [2007] *Public Law* 401.

¹²⁶ Supreme Court Rules 2009 (SI 2009/1603) Rule 26 (1).

¹²⁷ Supreme Court Fees Order (SI 2009/2131) schedule 2 para 21, added by the Courts and Tribunals Fee Remissions Order 2013/2302 art 7(5)

¹²⁸ Carol Harlow contrasts its treatment – being ‘brusquely shown the door’ – with that of official bodies which were permitted, and at times invited, to intervene. Carol Harlow, ‘Public Law and Popular Justice’ (2002) 65 *Modern Law Review* 1, 7.

¹²⁹ JUSTICE (n 125) [5].

from such interventions is in public law cases, ‘where aspects of the public interest in a legal issue of general importance may be represented by neither of the two parties before the court.’¹³⁰

The question of who will bear the costs associated with such an intervention is left to the discretion of the court, which enjoys the power, under section 51 of the Senior Courts Act 1981 and CPR 46.2, to make an award of costs against a person who is not one of the parties to the claim (a ‘non-party costs order’).¹³¹ The courts have indicated that the making of such an award will normally be exceptional,¹³² and will not normally be exercised against what are known as ‘pure funders’¹³³ - that is, ‘those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course’.¹³⁴ The reason given for exercising discretion in this way is that the court thereby gives ‘priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.’¹³⁵ Where, however, the non-party not merely funds but also controls the proceedings or will benefit from them, considerations of justice will usually require that it pay the successful party’s costs, for in such a case the non-party ‘is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes.’¹³⁶ This does not, it seems, require that the non-party is in some sense *the* party to the litigation if a costs order is to be made against him but merely that he be considered *a* party.¹³⁷ The courts’ discretion to grant permission to intervene on a conditional basis have allowed them to permit an intervention

¹³⁰ *Roe v Sheffield City Council (No. 1)* [2003] EWCA Civ 1 [84].

¹³¹ See *R v Central Criminal Court ex p Francis & Francis* [1989] AC 346, where the Law Society intervened in the House of Lords and was required by that court to pay any additional costs incurred by either party to the case as a result of its intervention.

¹³² Though see *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39 [25] in which it was said that ‘exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense’ (Lord Brown).

¹³³ *Ibid*, [25].

¹³⁴ *Hamilton v Al Fayed (No. 2)* [2002] EWCA Civ 665 [40].

¹³⁵ *Dymocks* (n 132) [25].

¹³⁶ *Ibid*, [25].

¹³⁷ *Flatman v Germany* [2013] EWCA Civ 278 [26]-[28].

‘on terms that no order for costs is made either in [the intervener’s] favour or against them’,¹³⁸ providing an intervener with a degree of certainty capable of countering the disincentive created by the cost of intervening. Interveners, like parties to the proceedings themselves, can seek and will occasionally be granted a PCO in relation to their costs.¹³⁹ It will be seen from this sketch that the rules governing interventions broadly reflect the public interest conception of judicial review.

The coalition government, in its proposals for reform, expressed concern that third-party interventions potentially raise the cost of litigation – a problem which it predicted, somewhat perversely, was likely to worsen if proposed changes to standing went ahead and the number of third-party interventions consequently increased. It therefore consulted on changes to the costs regime, afterwards proposing to ‘introduce a presumption that interveners will bear their own costs and those costs arising to the parties from their intervention. The courts will retain their discretion not to award costs where it is not in the interests of justice to do so.’¹⁴⁰ Non-party costs orders were considered to be relevant due to the perception that the costs regime was being undermined by creation of representative bodies specifically in order to bring claims (the purpose of doing so being to limit the financial risk borne by members of those organisations) and that ‘funding for a claimant body may also be provided by other individuals or bodies who would not have a sufficient interest to bring a claim, but who are prepared to provide financial support for the claim because they agree with its aims.’¹⁴¹ This would seem to describe at least some of the ‘pure funders’ against whom the courts have indicated that non-party costs orders will not normally be made. The 2015 Act makes two relevant changes to the regime described

¹³⁸ *Countryside Alliance v Attorney General* [2005] EWHC 1677 (Admin).

¹³⁹ See *R (E) v Governing Body of JFS* [2009] UKSC 15, in which a PCO granted to the United Synagogue at first instance was upheld by the Supreme Court, which nevertheless required it to pay 20% of the applicant’s costs in relation to proceedings in the Court of Appeal, where it had assumed ‘much responsibility’ for presenting the respondent’s case [216].

¹⁴⁰ Ministry of Justice (n 32) [62].

¹⁴¹ Ministry of Justice (n 28) [173].

above: first, parties to the proceedings may not be ordered to pay the intervener's costs except in exceptional circumstances.¹⁴² Second, if a party to the proceedings can show that the intervener has acted in effect 'as the sole or principal applicant, defendant, appellant or respondent'; that its intervention has not been of significant assistance to the court; that a significant part of the intervention relates to matters that the court need not consider to resolve the issues in the proceedings; or that the intervener has behaved unreasonably, the court must (barring exceptional circumstances) order the intervener to pay any costs incurred by the parties as a result of the intervention.¹⁴³ The criteria which limit the reach of this second duty were not to be found in the Bill as introduced, which would have made the intervener's liability for costs incurred by the parties as a result of its intervention a general presumption. The breadth of this had seen the Joint Committee on Human Rights, in reviewing the Bill, note that the intervener would be liable for parties' additional costs 'even where the outcome of the case is as argued for by the intervener and the intervention made a significant contribution to that outcome.'¹⁴⁴ Evidence submitted to it had suggested that potential interveners would be deterred by such a change from intervening in future.¹⁴⁵ It noted too that the Government had not provided evidence either of abusive interventions or of cases in which parties' costs were 'significantly and unjustifiably' raised by an intervention.¹⁴⁶ Paying tribute to the 'great value' of third-party interventions, it recommended that the Bill be amended so as to leave the current judicial discretions as to the costs associated with such interventions intact.¹⁴⁷ The government response indicated that it disagreed with the characterisation of the Bill as removing judicial discretion.¹⁴⁸ It accepted, however, that 'this clause has caused some disquiet and... it is looking seriously at

¹⁴² Criminal Justice and Courts Act 2015 s 87(3) and (4).

¹⁴³ Criminal Justice and Courts Act 2015 s 83(6) and (7).

¹⁴⁴ Joint Committee on Human Rights, *The implications for access to justice of the Government's proposals to reform judicial review* (2013-14, HL 174, HC 868), [89].

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*, [91].

¹⁴⁷ *Ibid.*, [92]-[93].

¹⁴⁸ Ministry of Justice, *Government response to the Joint Committee on Human Rights: The implications for access to justice of the Government's proposals to reform judicial review* (Cm 8896, 2014) [72].

how to help make sure that interveners consider carefully the cost implications of intervening while not deterring those that intervene in appropriate cases.¹⁴⁹ As can be seen, the 2015 Act falls closer to the government's position than to that of JCHR: it removes much (perhaps most) of the courts' discretion over interveners' costs and, by discouraging interveners from coming forward even where capable of making a significant contribution to the case, does potentially significant harm to the ability of judicial review to protect the public interest.

Scotland

This concern with regard to cost in England and Wales arises because in that jurisdiction, and in the Supreme Court, such interventions occur frequently. There, the role of the public interest intervener has been praised (though, it must be said, not universally so¹⁵⁰) by academics,¹⁵¹ practitioners,¹⁵² interveners themselves¹⁵³ and, crucially, by judges¹⁵⁴ for the value that they add to proceedings. As Lord Hoffmann put it in *E (A Child) v Chief Constable of the Royal Ulster Constabulary*,¹⁵⁵ so long as they avoid the mere repetition of arguments made already by the parties,¹⁵⁶ permission is granted to interveners 'in the expectation that their fund of knowledge or particular point of view will enable them to provide the [court] with a more rounded picture [of law, policy, fact or context] than it would otherwise obtain.'¹⁵⁷ In Scotland, however, public interest interveners are viewed with a degree of scepticism. The procedure for public interest interventions appears in rule 58.8A of the Rules of Court. Since its introduction in 2000, there

¹⁴⁹ *Ibid*, [73].

¹⁵⁰ Harlow and Rawlings (n 5).

¹⁵¹ Sangeeta Shah, Thomas Poole and Michael Blackwell, 'Rights, interveners and the Law Lords' (2014) 34 *Oxford Journal of Legal Studies* 295; Lorne Neudorf, 'Intervention at the UK Supreme Court' (2013) 2 *Cambridge Journal of International and Comparative Law* 16.

¹⁵² Michael Fordham QC, 'Public interest interventions in the Supreme Court: ten virtues' (2010) 15 *Judicial Review* 18.

¹⁵³ JUSTICE (n 125).

¹⁵⁴ Baroness Hale, 'Who guards the guardians?' (2014) 19 *Judicial Review* 1.

¹⁵⁵ [2008] UKHL 66.

¹⁵⁶ *Ibid*, [2].

¹⁵⁷ *Ibid*, [1].

has been only one reported instance of this procedure being used successfully. In *Scotch Whisky Association, Petitioner*¹⁵⁸ Lord Hodge allowed a charity, Alcohol Focus Scotland (AFS), to intervene in a challenge to the validity of the Alcohol (Minimum Unit Pricing) (Scotland) Act 2012, recognising that the challenge raised a matter of public interest (alcohol abuse and associated harm); that the intervention would neither unduly delay the hearing nor increase the costs thereof; that the analysis put by AFS in support of the contested policy was distinct from that being made by the Scottish Ministers; and that the intervention would therefore be of benefit to the court.

Subsequently the record has been much more bleak. AFS themselves were refused permission to intervene by way of a 5000 word written submission when the petition was reclaimed to the Inner House.¹⁵⁹ There, in a short (and rather blunt) opinion, Lord Eassie took the view that the point of European law upon which AFS sought to intervene had been heard but even had this not been so, the intervention would add nothing of substance to the arguments put by the parties. This seems questionable, however, not only in light of the preliminary reference made by the Inner House, which would allow two further opportunities to make substantive arguments (in Luxemburg, and again in Scotland applying the reference) but also in light of the minute of intervention, which introduced an argument about subsidiarity, and which sought to develop an argument about the role of the precautionary principle in the proportionality analysis, neither of which were dealt with in the Lord Ordinary's first instance decision.¹⁶⁰ Furthermore, Lord Eassie took the view that AFS had sought to intervene primarily in the erroneous belief that they would (or could) by virtue of that intervention be granted the status of a 'party' to the proceedings, thus enabling the applicants to secure *locus standi* to make written and oral arguments on the issue

¹⁵⁸ [2012] CSOH 156.

¹⁵⁹ *Alcohol Focus Scotland, Applicants* [2014] CSIH 64.

¹⁶⁰ On file with author, use permitted by AFS.

before the Court of Justice of the EU (“CJEU”).¹⁶¹ Contrast this approach, however, with that taken in the High Court in *R (on the application of Philip Morris Brands Sarl) v Secretary of State for Health*.¹⁶² There Turner J held that, although not automatically a party to proceedings as a result of having been granted permission to intervene, the expertise and perspectives offered by a number of interveners was sufficient to persuade the court to amend a preliminary reference to include those organisations to be listed as parties, thereby granting to them an opportunity to make submissions to the CJEU.¹⁶³

Perhaps more surprising still, in *Sustainable Shetland v Scottish Ministers*¹⁶⁴ the court needed just a single paragraph to hold that the RSPB was not entitled to intervene in a reclaiming motion to the Inner House against a decision by the Scottish Ministers to grant consent for a wind farm in Shetland, with (the petitioner claimed) harmful effects on a rare bird species.¹⁶⁵ In the Lord Justice Clerk’s view, the RSPB’s interest in the dispute had been recognised at the earliest stages when that body was consulted by the Scottish Ministers and made its objections to the development known. Had the RSPB wished subsequently to challenge the decision to grant consent, his Lordship continued, it had ample opportunity to do so either as a petitioner raising an action for judicial review in its own name, or by intervening in the Outer House. Thus, the court concluded that it would be “[in]appropriate to allow them to enter the process at the appellate stage under the guise of a public interest intervention.”¹⁶⁶ Given, however, that the Court of Session has no mechanism to flag up cases that might be of interest to interveners (compare the Court of Session’s website with the Supreme Court’s much more informative and transparent one); given the costs and the risks which attach to intervention at an early stage, and the extent to which arguments might (and oftentimes do) evolve (to the greater or lesser interest

¹⁶¹ *AFS* (n 158) [3]-[5].

¹⁶² [2014] EWHC 3669 (Admin).

¹⁶³ *Ibid*, [25]-[29].

¹⁶⁴ [2013] CSIH 116.

¹⁶⁵ The Supreme Court dismissed *Sustainable Shetland*’s appeal: see [2015] UKSC 4.

¹⁶⁶ *Sustainable Shetland* (n 164) [22].

of the potential intervener) as a case progresses to the appellate stage; given finally that interveners depend to a large extent on the goodwill of the parties disclosing case documents in order to self-assess the value of their mooted contribution (goodwill that, as Lord Reed has suggested – and contrary to the experience in England – is not always forthcoming in Scottish appeals),¹⁶⁷ this seems an unnecessarily restrictive approach to take to those with expertise to assist the court by way of a relatively modest written intervention.

There is, of course, an argument from the public interest that falls the other way. This would run along familiar lines: that unhelpful interventions which add nothing of substance to proceedings should be discouraged as a cause of undue delay and of adding to the burden placed on both the public purse and on the finite resources of private parties. Such a concern clearly resonates even with our more liberal judges. As Lord Hope has recently said, a responsibility falls on interveners – and on counsel on their behalf – to be wary of the legislative developments across the border that have been described above, and therefore to be mindful:

that the government will be watching... and that, if they think that our system is operating against what they judge to be in the public interest, they may follow the English example to make the use of the jurisdiction much more difficult.¹⁶⁸

Nevertheless, a default position which limits public interest intervention to a 5,000 word written submission, with oral or longer written submissions only in exceptional circumstances (and with the agreement of the parties), should strike a reasonable balance between the public interest in the efficient and cost effective administration of justice on the one hand, and the public interest

¹⁶⁷ Robert Reed (n 9).

¹⁶⁸ Lord Hope of Craighead, ‘A Judicial Perspective on Strategic Litigation’ delivered at the Development of Strategic Litigation Seminar hosted by the Faculty of Advocates and the Equality and Human Rights Commission on 24 November 2014. On file with author and used with permission.

in assisting the court on the other. By adopting so restrictive an approach the Court of Session currently stands out of line with senior courts both within and outwith the UK.¹⁶⁹

CONCLUSION

In each of the three areas of law considered, a similar pattern emerges. The conception of judicial review which sees it as oriented primarily to the public interest is, in England, well-established in the judicial imagination, but potentially or actually subject to a degree of legislative contestation which clearly demonstrates that it is strongly contested elsewhere in the constitutional order. In Scotland, however, this conception, perhaps because of the quite different scope of judicial review specifically and the belated development of a distinct thread of public law more generally, has not yet found widespread favour amongst the judiciary. While at least some judges continue to harbour evident suspicions of the public interest conception of judicial review, there is little need for – and scant prospect of – legislative push back. Given, however, the change of government which has occurred since the Criminal Justice and Courts Act 2015 was enacted, it is possible that this pattern will not hold much longer: if the relevant conception of judicial review comes under fresh attack south of the border, we may well find that even a hesitant embrace of it by the Scottish judiciary is sufficient to render the pursuit of the public interest via judicial review more feasible there than in England. In that case, the response of the courts – how far they are willing to go to defend the public interest conception of judicial review – will likely end up defining the emerging era of administrative law. The stakes are high: models of judicial review which retain the substance of a public interest conception but which narrow the class of actors capable of litigating to those directly affected and capable of bearing considerable financial risk effectively entrust the articulation of the public interest to a narrow elite: they give rise to a zero sum game played out in the court room between

¹⁶⁹ See Neudorf (n 151); Ruth Chateris, 'Intervention – in the public interest?' 2000 SLT (News) 87.

government (broadly put) on the one hand and, on the other, wealthy litigants disguising their private interests as those of the public.