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The judicial review caseload

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THE JUDICIAL REVIEW CASELOAD

Abstract

The Scottish application of judicial review procedure was introduced in 1985, some seven years after a similar but not identical procedure was introduced in England and Wales. An examination of the use made of the procedure since its introduction reveals some similarities but also differences between Scotland and England and Wales. This article examines possible reasons for the differences, and asks whether or not they matter, before concluding that there is a need for a more detailed study of judicial review in Scotland as the procedure enters its fourth decade.

Introduction

In matters of public law Scots law has tended to follow the example of English law. So it was with the application for judicial review procedure introduced in 1985, following Lord Fraser's remarks in *Brown v Hamilton District Council,*[1] which was modelled on but not in all respects identical to the application for judicial review procedure introduced in England and Wales some seven years earlier; that it was not identical seems attributable to the method by which it was introduced rather than any desire that it be different.[2] The 30th anniversary invites consideration of the use made of the procedure since its introduction. Has there been an increase in the frequency of recourse to judicial review, bearing in mind that the Court of Session's supervisory jurisdiction was essentially moribund before the new procedure was introduced?[3] If there has been an increase, who is it being used by, against whom, in respect of what and with what results? Has the pattern of use remained constant over the period, or has it changed, and if so in what respects? How does the use made of the procedure compare with the use made of the English application for judicial review procedure? Is it essentially the same or different and, if so, in what respects? And, if there are differences, are these simply to be expected or are they matters about which we should be at all concerned? Answering these questions is a less straightforward matter than might be assumed. Until recently comprehensive statistics were lacking, and indeed were not always published because of a presumed lack of interest. With the aid of two earlier snapshots, however, we are able to build up a reasonably full picture of the use made of the procedure over the last 30 years, but not it should be said at the outset of the success or otherwise of applications throughout that period.

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[1] 1983 SC (HL) 1, 45.

[2] It was introduced by Act of Sederunt (Rules of Court Amendment No 2) (Judicial Review) 1985 (SI 1985 /500) i.e. rules of procedure made by the Court of Session itself, which precluded any change to the substantive law of judicial review; if further change was sought legislation would have been required.

[3] A Scottish Law Commission memorandum commented that "the volume of case law in this field between 1960 and 1970 does not afford evidence of an increase in judicial scrutiny of governmental matters like that experienced in England during the same period": *Remedies in Administrative Law* (Scottish Law Commission No 14, 1971) para 4.4. The same memorandum added (para 4.3) that "[m]erely because Scots law is free of many of the irksome procedural difficulties which are such a marked feature of English administrative law, it does not necessarily follow that Scots law would not benefit from the introduction of a flexible petition for review of official acts and omissions… even though the particular advantages of such a remedy would be different as between England and Scotland."

The early years

The first snapshot is provided by combining two academic studies carried out during the early years of the new procedure. The first, by Page and Deans, was an ESRC funded study of the 77 petitions disposed of, or not proceeded with, during the first two years of operation of the procedure, i.e., between 30 April 1985 and 29 April 1987.[4] The second, by Mullen, Pick and Prosser, was a Leverhulme Trust funded study of all judicial review proceedings raised in the six years between 1988 and 1993.[5]

The first study showed the number of petitions increasing from 49 in 1986, the first full year of operation of the procedure, to 88 in 1989, with housing being the most prolific source of petitions, which was unsurprising given that it was the unsatisfactory consequences of Scots law's reliance on the ordinary remedies in respect of the Housing (Homeless Persons) Act 1977 that had led to the introduction of the new procedure. The next most important source was planning, followed by education, licensing and welfare. The remaining petitions were of a miscellaneous nature. There was only one immigration petition in the three years covered by the study.

The second study showed the number of applications continuing to rise, from 86 (rather than 88) in 1989, the year the first study had left it, to 151 in 1993, with immigration and housing / homelessness petitions accounting for the bulk of the increase in the last two years of the period.[6] Immigration, licensing and housing were in fact the most common sources of petitions over the six years covered by the study.[7]

Table 1: Number of judicial review petitions 1985-1993

1985	1986	1987	1988	1989	1990	1991	1992	1993
27	49	44	66	86 (88)	62	78	117	151

Source: Page and Deans, Mullen et al, Table 3.1

In summary, there was a threefold increase over the first eight full years of the new procedure (1986-1993), with the bulk of that increase coming from immigration cases: after a slow start in which there was only one petition in the first three years, immigration accounted for more than a third of all petitions in 1993. The next most important sources were licensing, housing and planning. The following table from the second study provides a fuller breakdown of the subject matter of petitions over the six years covered by the study.

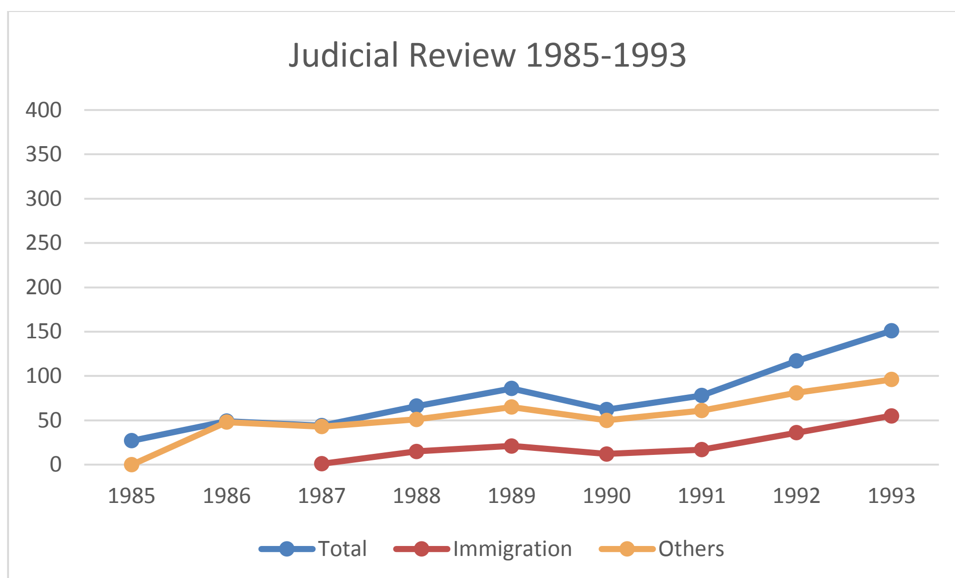
[4] Alan Page, 'Judicial Review in the Court of Session' in *Socio-Legal Research in the Scottish Courts, Volume 2* (Scottish Office, Central Research Unit, 1987)
[5] Tom Mullen, Katy Pick and Tony Prosser, *Judicial Review in Scotland* (Chichester: John Wiley &Sons, 1996)
[6] Mullen et al (n 5) 18-19.
[7] Mullen et al (n 5) 21.

Table 2: Subject matter of petitions 1988-1993

Subject	1988	1989	1990	1991	1992	1993	1988-93
Education	8	3	0	4	2	9	26
	12.1%	3.5%	0.0%	5.1%	1.7%	6.0%	4.6%
Employment	2	2	5	0	2	1	12
	3.0%	2.3%	8.1%	0.0%	1.7%	0.7%	2.1%
Housing	8	10	9	10	26	26	89
	12.1%	11.6%	14.5%	12.8%	22.2%	17.2%	15.9%
Immigration	15	21	12	17	36	55	156
	22.7%	24.4%	19.4%	21.8%	30.8%	36.4%	27.9%
Legal aid	2	0	1	2	1	3	9
	3.0%	0.0%	1.6%	2.6%	0.9%	2.0%	1.6%
Licensing	8	28	7	13	11	25	92
	12.1%	32.6%	11.3%	16.7%	9.4%	16.6%	16.4%
Local gov	4	1	5	3	8	9	30
	6.1%	1.2%	8.1%	3.8%	6.8%	6.0%	5.4%
Planning	8	7	10	8	8	5	46
	12.1%	8.1%	16.1%	10.3%	6.8%	3.3%	8.2%
Prisons	1	0	3	2	0	1	7
	1.5%	0.0%	4.8%	2.6%	0.0%	0.7%	1.3%
Social Sec	1	1	2	8	3	6	21
	1.5%	1.2%	3.2%	10.3%	2.6%	4.0%	3.8%
Taxes	0	1	0	2	0	1	4
	0.0%	1.2%	0.0%	2.6%	0.0%	0.7%	0.7%
Transport	0	2	0	4	3	0	9
	0.0%	2.3%	0.0%	5.1%	2.6%	0.0%	1.6%
Welfare	4	3	3	2	4	2	18
	6.1%	3.5%	4.8%	2.6%	3.4%	1.3%	3.2%
Other	5	7	5	3	13	8	41
	7.6%	8.1%	8.1%	3.8%	11.1%	5.3%	7.3%
Total	66	86	62	78	117	151	560

Source: Mullen et al, Table 3.2.

Graph 1 shows the total number of applications over the nine years covered by the two studies, with the number of immigration applications shown separately.



The two studies also revealed that most petitions were raised by individuals or companies; that most were raised against local government rather than central government, but that this was changing with the increasing number of immigration petitions; and also that most were unsuccessful. Of the 77 petitions disposed of by the time the first study was concluded, only 14 (18.2 per cent) were granted at first instance, which number fell to 13 (16.9 per cent) once appeals /reclaiming motions had been taken into account. The study did, however, identify a further 20 (26 per cent) petitions in which some sort of accommodation was reached between the parties, or an undertaking given to the court on the basis of which the petition could be concluded, and which could not therefore regarded as completely unsuccessful. The second study found that the success rate continued to be low, while recognising like the first study that success was not simply a matter of whether or not a petition was granted.[8]

Both studies saw the new procedure as having been a success. The most striking feature of the procedure that emerged from the first study was its speed, with many petitions being disposed of within two months of being raised,[9] which as well as being advantageous to petitioners partly accounted for its largely favourable reception among respondent authorities. Insofar as one of the main objectives of reform had been to expedite judicial review proceedings the evidence suggested that it had been successful. The second study - whose conclusions were acknowledged by its authors to be "perhaps, unusually positive for academic research"[10] - found that the procedure had provided a "relatively rapid and accessible" means of challenging the legality of administrative decision-making, while at the same time avoiding the problems of classification that had arisen in England and Wales following the House of Lords' insistence in *O'Reilly v Mackman* [11] that the application for judicial review procedure must be used in England and Wales where a challenge was based

[8] Mullen et al (n 5) 29.
[9] Of the 77 petitions examined, 63 proceeded to a final interlocutor with the period covered by the study. Of these 63, 16 (25 per cent) were disposed of within four weeks, 31 (49 per cent) with six weeks and 43 (68 per cent within two months of being raised. Only two were not disposed of within six months.
[10] Mullen et al (n 5) 136.
[11] *O'Reilly v Mackman* [1983] 21 AC 237

on rights entitled to protection under public law. The study found no evidence of the Court of Session being seriously overloaded as a result of a large number of weak petitions being raised. If there was problem, its authors argued, it was one of the underuse rather than overuse of the procedure given the relatively narrow range of subject matter in the majority of petitions examined, and the limited number of solicitors initiating judicial review cases.[12]

The Scottish Civil Courts Review

The second snapshot is provided by the Scottish Civil Courts Review (the 'Gill Review').[13]

Table 3: Judicial review petitions 2000-2006

	2000	2001	2002	2003	2004	2005	2006	2000-06
Immigration	45	68	68	99	95	74	101	550
	31.7%	32.7%	42.5%	56.9%	36.4%	32.3%	43.7%	39.1%
Misc.	55	76	61	45	39	57	59	392
	38.8%	36.5%	38.1%	25.9%	14.9%	24.9%	25.5%	27.9%
Prisons	4	7	5	9	90	82	54	251
	2.8%	3.4%	3.1%	5.2%	34.5%	35.8%	23.4%	17.9%
Licensing	3	22	2	8	7	3	0	45
	2.1%	10.6%	1.3%	4.6%	2.7%	1.3%	0.0%	3.2%
Housing	19	15	11	4	5	2	9	65
	13.4%	7.2%	6.9%	2.3%	1.9%	0.9%	3.9%	4.6%
Social Sec	2	4	3	4	8	1	0	22
	1.4%	1.9%	1.9%	2.3%	3.1%	0.4%	0.0%	1.6%
Planning	14	16	10	5	17	10	8	80
	9.9%	7.7%	6.3%	2.9%	6.5%	4.4%	3.5%	5.7%
Total	142	208	160	174	261	229	231	1405

Source: Scottish Civil Courts Review, *A Consultation Paper* (2007) Annex D

This showed the number of petitions increasing – from an average of 61.4 a year at the outset, if we take the first five full years of the procedure as the benchmark, to an average of 200.7 a year, with the increase being accounted for by immigration petitions and, in the latter part of the period, prison-related petitions. If immigration and prison-related petitions are excluded then there is still an increase but it is less marked - from an average of 50.6 a year to an average of 86.3 a year. (Tables 4 to 7).

[12] Mullen et al (n 5) 135.
[13]Scottish Civil Courts Review, *A Consultation Paper* (2007) Annex D

Table 4: Number of judicial review petitions 1986-1990

1986	1987	1988	1989	1990	Average
49	44	66	86	62	61.4

Table 5: Number of petitions 1986-90 with immigration and prison petitions excluded

1986	1987	1988	1989	1990	Average
47	44	50	65	47	50.6

Table 6: Number of judicial review petitions 2000-2006

2000	2001	2002	2003	2004	2005	2006	Average
142	208	160	174	261	229	231	200.7

Table 7: Number of petitions 2000-2006 with immigration and prison petitions excluded

2000	2001	2002	2003	2004	2005	2006	Average
93	133	87	66	76	73	76	86.3

Aside from the continuing increase in the number of petitions, two other features of this snapshot are worth noting. One is the increasing percentage of petitions overall accounted for by immigration petitions – from an average of 25.9 per cent over the six years of the second academic study to an average of 39.4 per cent a decade later, an increase of the order of 50 per cent. The Review itself said that the number of immigration petitions had more than doubled since 2000, constituting almost half of all judicial reviews in 2006.[14]

The other feature is the sudden and dramatic increase in prison-related petitions - from 9 in 2003 to 90 the following year – aimed, it is assumed, at the practice of 'slopping out' in Scottish prisons, which was held to amount to degrading treatment contrary to Art 3 ECHR in *Napier v Scottish Ministers.*[15] The Review said that from 2004 onwards, prison-related petitions also made a substantial contribution to the number of judicial reviews initiated.

Also noteworthy is the high percentage of miscellaneous petitions – 27.9 per cent of all petitions over the period - for which no breakdown was offered.

Immigration, prisons and miscellaneous petitions aside, planning, housing and licensing emerge as the other main sources of petitions but the numbers are small.

Graph 2 shows the total number of applications and the number of immigration and prison applications over the six years, with 'other', i.e. non-immigration and prison petitions shown separately.

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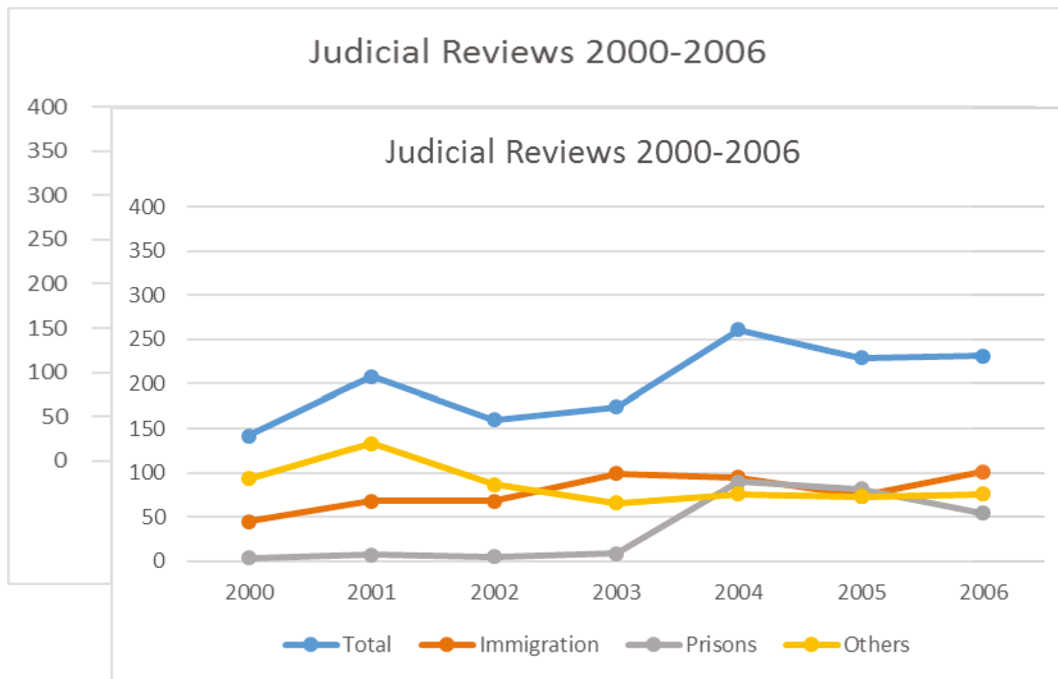
[14] *Report of the Scottish Civil Courts Review* (2009) ch 12, para 4

[15] *Napier v Scottish Ministers* 2005 1 SC 229



Whereas the earlier studies had concentrated on the extent to which the objectives of reform had been realised, the Review highlighted the disproportionate amount of court time taken up by petitions for judicial review – "disproportionate" because unlike other petitions most petitions for judicial review were opposed.[16] It recommended the introduction of a requirement of leave, on the English model, by which "unmeritorious applications could be sifted out", as well as a time limit within which applications must be brought. Its recommendations were implemented by the Courts Reform (Scotland) Act 2014.[17] The Review also recommended statutory relaxation of the rules relating to title and interest to sue but this was overtaken by the UK Supreme Court's decision in *Axa.*[18]

The Civil Law Statistics

The final source is provided by the Civil Law Statistics.

[16] *Report of the Scottish Civil Courts Review* (2009)
[17] Courts Reform (Scotland) Act 2014, s 89, inserting new ss 27A and 27B in Court of Session Act 1988. For critical comment, see Aileen McHarg, 'Access to Judicial Review in Scotland' UK Const l Blog (30 July 2013) (available at http://ukconstitutionallaw.org)
[18] *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46; 2012 SC (UKSC) 122

Table 8: Judicial Review petitions 2008-09 to 2013-14

	2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2008-09-2013-14
Environment	0	0	2	2	1	5	10
	0.0%	0.0%	0.6%	0.8%	0.3%	1.5%	0.6%
Housing	2	1	4	1	0	2	10
	0.9%	0.3%	1.2%	0.4%	0.0%	0.6%	0.6%
Immigration	177	210	266	195	224	236	1308
	76.3%	55.6%	77.8%	80.2%	76.5%	71.5%	71.9%
Licensing	0	1	1	0	1	2	5
	0.0%	0.3%	0.3%	0.0%	0.3%	0.6%	0.3%
Planning	5	10	8	11	8	6	48
	2.2%	2.6%	2.3%	4.5%	2.7%	1.8%	2.6%
Prisons	18	107	7	3	10	18	163
	7.8%	28.3%	2.0%	1.2%	3.4%	5.5%	9.0%
Social Sec	0	0	0	0	1	0	1
	0.0%	0.0%	0.0%	0.0%	0.3%	0.0%	0.1%
Other	30	49	54	31	48	61	273
	12.9%	13.0%	15.8%	12.8%	16.4%	18.5%	15.0%
Total	232	378	342	243	293	330	1818

These show the number of petitions continuing to increase – from an average of 200.7 a year over the seven years analysed by the Gill Review to an average of 303 a year, with the increase again being accounted for by immigration petitions and by a second surge in prison-related petitions as a result of the failure to end slopping out in Peterhead Prison. Aside from immigration and prisons, however, the use of the procedure has been declining - from an average of 86.3 a year over the seven years analysed by the Gill Review to an average of 57.8 a year once these two areas are excluded, which is not much more than the average of 50.6 a year for the first five full years of the new procedure (Tables 7 and 10). The continued increase in immigration and prison-related petitions thus appears to have masked a decline in the use of judicial review in other contexts, which was already underway when the Gill Review reported (Graphs 2 and 3).

Table 9: Number of judicial review petitions 2008-09 to 2013-14

2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	Average
232	378	342	243	293	330	303

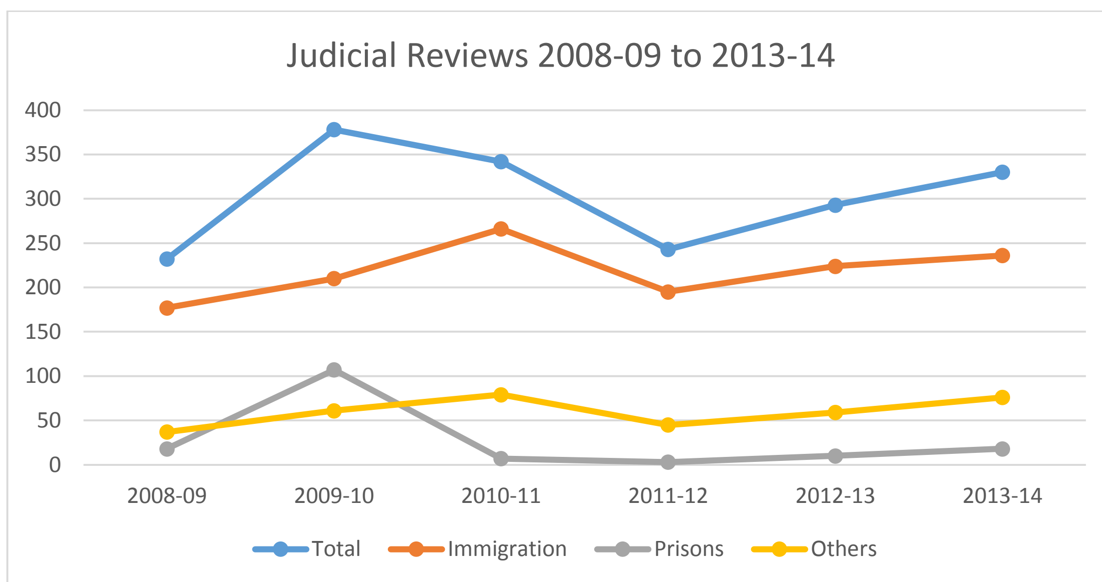
Table 10: Number of petitions 2008-09 to 2013-14 with immigration and prison petitions excluded

2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	Average
37	61	69	45	59	76	57.8

Immigration, prisons and petitions aside, planning emerges as the other main source of petitions in recent years. Housing and licensing on the other hand have effectively disappeared as subject-matters of judicial review.

Noteworthy again is the high percentage of applications classified as 'other', which it is said cannot be broken down further.

Graph 3 shows the total number of applications and the number of immigration and prison applications over the last six years for which figures are available, with 'other', i.e. non-immigration and prison petitions again shown separately.



The Civil Law Statistics are silent on the outcome of petitions. A study of judicial review of planning decisions between 2003 and 2012, however, confirmed that petitions were more often unsuccessful than not. Almost 75% of cases decided by judges were unsuccessful.[19]

Overall

The picture we thus have is of a judicial review caseload that has been steadily increasing since the procedure was introduced, with the two main areas of growth having been immigration and prisons. Whereas the growth of immigration petitions has been continuous throughout the period, with immigration accounting for almost three quarters of all petitions in the last six years (an average of 73.1 per cent a year over the last six years, and 71.9 per cent of all petitions over the period), the growth in prison petitions has been confined to the two surges, with the numbers declining dramatically since the second surge (from 107 in 2009-10 to seven a year later). Once these two areas are excluded, however, the picture is of a

[19] Brodies, 'Judicial Review of planning decisions in Scotland' (February 2013).

judicial review caseload that has been declining in recent years to levels not much higher than those recorded when the procedure was first introduced.

At the same time the composition of the caseload has been changing. While planning remains a small but important source of petitions, housing and licensing petitions have effectively disappeared. The high number of “miscellaneous” or “other” applications, however, makes it impossible to say in what other respects the composition of the caseload has changed, save that devolution has meant that it now includes challenges to Acts of the Scottish Parliament as well as administrative acts and omissions.

England and Wales

The obvious comparison is with England and Wales, a comparison noted by Mullen, Pick and Prosser who calculated that the 1993 figure of 151 petitions represented one petition per 34,000 inhabitants in Scotland, a figure considerably lower than for England and Wales where the 1992 figure was one application per 21,000, a divergence they thought partly explicable by the likelihood of London giving rise to homelessness cases and the role of Heathrow as the main airport of entry in immigration cases.[20]

Table 10: Judicial review applications 2000-2014

	Civil-Immigration and Asylum	Civil-other	Criminal	Total
2000	2,151	1,727	348	4,238
2001	2,414	1,956	344	4,722
2002	3,281	1,812	276	5,372
2003	3,845	1,810	282	5,938
2004	2,220	1,666	314	4,200
2005	3,139	1,926	291	5,356
2006	4,069	2,037	315	6,422
2007	4,343	2,030	311	6,684
2008	4,609	2,137	346	7,093
2009	6,648	2,102	344	9,098
2010	8,147	2,034	366	10,547
2011	8,854	2,141	363	11,360
2012	9,957	2,091	384	12,432
2013	13,130	2,191	273	15,594
2014	1,891	1,903	268	4,062

Source: Ministry of Justice, *Judicial and Court Statistics Quarterly: Accompanying Tables* (March 2015).

Note: the figures are not directly comparable, those for Scotland being for the financial year (1 April to 31 March), while those for England and Wales are for the calendar year.

[20] Mullen et al (n 5) 18.

The incidence of judicial review in Scotland continues to be lower than in England and Wales. If we exclude JR Criminal and JR Civil (Immigration and Asylum) cases and concentrate only on JR Civil (Other) and JR Unknown cases, i.e. the second column in Table 10, then judicial review is running at in the region of 2,100 (2,072) applications a year over the last five years. Given that Scotland is roughly one tenth of the size of England (one eleventh of the size of England and Wales), we would expect non-immigration judicial review applications in Scotland to be running at 210 or so cases a year (195 if we take one eleventh as the measure). On the figures for the last six years, however, it is running at 85.3 a year, i.e. at roughly 40 per cent of what we would expect on the basis of population size – 40.6 per cent if we take one tenth as the measure, 43.7 per cent if we take one eleventh as the measure.

As noted above, Mullen, Pick and Prosser offered Heathrow's status as the main port of entry in immigration cases as one explanation for the difference. That may have been the case at the time but twenty years later judicial review in Scotland is no less heavily dominated by immigration cases than judicial review in England and Wales. In 2012 immigration accounted for 82.6 per cent of all judicial reviews in England and Wales. In Scotland the figure was 76.5 per cent.

> "[T]he much advertised growth of judicial review in recent times is in large measure a function of strict immigration policies, the standards of decision-making in a department of state officially characterised as 'unfit for purpose', and the evident incentive for would-be immigrants to litigate."[21]

Harlow and Rawling's comment applies as much to Scotland as it applies to England and Wales.

Since 2013, the number of applications in England and Wales has dropped dramatically following the transfer of the majority of immigration and asylum judicial reviews to the Upper Tribunal. There have been no moves to follow suit in Scotland, but were that to happen the judicial review caseload of the Court of Session would be substantially reduced.

What, however, of the decline in judicial review applications? Has there been the same decline in non-immigration applications in England and Wales as there has been in Scotland. On the evidence of the statistics it would seem not. Judicial review outside the immigration field has continued to grow during a time when it has been in decline or else steady in Scotland. It is only in the last year that they have recorded their first decline in England and Wales since 2004.

Accounting for the difference

There is of course no reason why - immigration and asylum aside - the Scottish experience of judicial review should be the same as that of England and Wales. A number of reasons, however, may be suggested as to why it should be different. One possibility is that there is

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[21] Carol Harlow and Richard Rawlings, *Law and Administration,* 3rd edn. (Cambridge: Cambridge University Press, 2009) 713.

less need for judicial review in Scotland than in England and Wales. Judicial review after all is a remedy of last resort (Rule of Court 260B 3). So long as there are sufficient alternative means of challenging the legality of administrative action, it ought not to matter that the incidence of judicial review in Scotland is less than in England and Wales. This would be a reassuring explanation if true. But we would need to know a great deal more about the working of the administrative justice system in Scotland as a whole before we were justified in concluding that was the case.

A second possibility is cultural in nature. In their study of paths to justice in Scotland, Genn and Paterson found a significantly lower reported incidence of "justiciable events" in Scotland compared with England and Wales, which they suggested may be attributable to a more stoical attitude to the vicissitudes of life - the 'Ach tae hell with it' syndrome - or to a more communitarian spirit in which problems or disputes are more likely to be seen in collective rather than individual terms.[22] There may well be something in this but it is difficult to reconcile with the evidence of the increasing use made of other mechanisms of redress in Scotland in recent years. In its first full year of operation (2003-2004), there were 1,791 complaints and inquiries to the Scottish Public Services Ombudsman. A decade later that figure had risen to 4,819, an almost threefold increase. When it comes to government there is little to suggest that Scots are any less likely to complain than citizens elsewhere in the United Kingdom.

A third possibility is that it reflects not so much the adequacy or otherwise of the existing remedies, or the willingness or readiness of Scots to complain, as the fact that individuals including their representatives may not be aware of judicial review or of what it can achieve, which in turn raises questions about access to legal advice and services. The Final Report of the Administrative Justice Steering Group, emphasised the need to improve the availability of appropriate advice and representation at the same time as improving the system of remedies for citizens' grievances.[23]

It may also reflect the cost, time and uncertainty involved in judicial review proceedings. 'There is a widespread perception that legal proceedings involve uncertainty, expense, and potential long-term disturbance and that only the most serious matters could justify enduring those conditions.'[24] Judicial review may be beyond many petitioners' means without some form of legal aid. It may take a long time to get a decision, particularly if appeals are involved. A decade ago it was recorded as

> "a common complaint of administrative lawyers in Scotland that, by the time a point is argued in the Outer House, the English are arguing the same point in the Court of Appeal. Whilst waiting for a hearing in the Inner House, the English have the point in

[22] Hazel Genn and Alan Paterson, *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* (Oxford: Hart Publishing, 2001) 82-84; "the stronger socialist tradition which looks to community solutions rather than individual action" was Dame Brenda Hale's summing up (Foreword p viii)).
[23] *Administrative Justice in Scotland – the Way Forward* (June 2009) paras 8.74-75, available at: http://www.consumerfocus.org.uk/scotland/files/2010/10/Administrative-Justice-in-Scotland-The-Way-Forward-Full-Report.pdf
[24] Genn and Paterson (n 22) 250

> the House of Lords. Much of our administrative law is decided, by default, as it were in England."[25]

And there is no certainty of success. Even if a petition is successful, it only results in a finding of illegality - the same decision may be taken again, shorn of the illegality.

Then, finally, there is the question of Scottish judicial attitudes towards the role of the courts in the control of government, which arguably have been slower to change, or more resistant to change, than judicial attitudes south of the border, with the result that Scots law has lagged behind English law in matters such as standing, the reviewability of errors of law within jurisdiction and, in an earlier era, recourse to the European Convention of Human Rights in the interpretation of statutes.[26] The restrictive approach to the question of standing in particular is said to have had the effect of discouraging applications and of work being lost to London.[27]

Concluding remarks

The critical question, however, is whether this difference matters. The Faculty of Advocates in its response to the consultation on the draft Courts Reform (Scotland) Bill certainly thought that it did. In its response, the Faculty argued:

> "The position in Scotland is quite different from the position in England and Wales, and any perceptions based on the experience in that jurisdiction that there is a large volume of judicial review applications, many of them unmeritorious, would be unfounded. On one view, the real issue in relation to judicial review in Scotland is the low incidence of petitions, particularly outside the immigration and asylum field, as compared with the position in comparable jurisdictions. The reasons for this are obscure, but it may reflect badly on the rule of law in Scotland and indicate a level of unmet legal need."

As I have indicated, we would need to know more about how the Scottish administrative justice system as a whole was working before we were justified in drawing any firm conclusions about unmet legal need or indeed the rule of law in Scotland. The importance of judicial review to our understanding of the control of government is such, however, that there is a clear need for a fresh examination of judicial review in Scotland as the procedure enters its fourth decade.

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[25] Blair and Martin, 'Judicial Review 20 Years On – Where Are We Now?' 2005 SLT (News) 173, 175.

[26] CMG Himsworth, "Judicial Review in Scotland" in Brigid Hadfield (ed), *Judicial Review: A Thematic Approach* (Dublin: Gill &Macmillan, 1995) 305-306; Aileen McHarg, "Border Disputes: The Scope and Purposes of Judicial Review" in Aileen McHarg and Tom Mullen (eds), *Public Law in Scotland* (Edinburgh: Avizandum, 2006) 235.

[27] Blair and Martin (n 25) 176