FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 34
P200/26

Lord Clark

OPINION OF LORD CLARK

in the reclaiming motion in the cause

ALEXANDRIA GALLAGHER

Petitioner and Reclaimer

against

(1) THE CHIEF CONSTABLE OF THE POLICE SERVICE OF SCOTLAND AND
(2) THE POLICE INVESTIGATIONS AND REVIEW COMMISSIONER

Respondents

Petitioner and Reclaimer: Party
First Respondent (the Chief Constable): McGowan; Ledingham Chalmers LLP
Second Respondent (the PIRC): E MacEwan, sol adv; Anderson Strathern LLP

2 July 2026

Introduction

[1] The petitioner, Ms Gallagher, brought a petition for judicial review against decisions made by the two respondents. The Lord Ordinary refused permission to proceed in relation to the first respondent and allowed permission for part of the case against the second respondent. The petitioner seeks to bring a reclaiming motion against the Lord Ordinary's decision. The petitioner moved to have her reclaiming motion received and the respondents opposed that motion. A preliminary issue arose: whether the reclaiming motion was lodged late and, if so, whether it should be allowed to be received.

Background

[2] On 27 April 2026 the Lord Ordinary held that the application for judicial review was not brought until over 2½ years after the 3-month time limit in section 27A(1)(a) of the Court of Session Act 1988 had expired. As a result, the petition was held to be barred by the passage of time. The Lord Ordinary decided that there was no reason to extend that time period in terms of section 27A(1)(b). Having reached that decision, the issue of permission to proceed no longer arose for determination. If the Lord Ordinary had not found the petition to be time-barred in terms of section 27A(1)(a) and it had been necessary to decide this matter, he would have refused permission on the basis that in the particular circumstances of this case the decision of the first respondent not to progress the complaint in the absence of the information sought could not be said to be unreasonable, unlawful or perverse and there would therefore be no real prospects of success. Permission to proceed in relation to challenging one of the two decisions made by the second respondent was allowed.

[3] The decision of the Lord Ordinary on 27 April 2026 was given *ex tempore* ((ie given orally by the Lord Ordinary at the end of the hearing). The interlocutor was not issued until 6 May 2026, in part because the clerk of court liaised with parties and the Keeper to fix dates for hearings on the remaining aspects of the case and that took some time to resolve. The date put on the interlocutor was 27 April. The interlocutor had appended to it the Lord Ordinary's note of reasons, which set out what had been said by the Lord Ordinary in his *ex tempore* decision at the hearing on 27 April but also added some points. The petitioner intimated her reclaiming motion to the respondents on 11 May 2026 and lodged the reclaiming motion on 13 May 2026.

[4] On 30 April 2026, a clerk of court contacted the petitioner about potential dates for the procedural hearing and substantive hearing on the judicial review application in relation to that part of her case against the second respondent. In her reply on that day, the petitioner asked the clerk to confirm whether an interlocutor would be issued once the dates were fixed. Later that day the clerk responded, saying that the interlocutor was currently with the Lord Ordinary for signature and the clerk would hold off issuing it until the next day to give the petitioner time to check her availability for the substantive hearing. On 2 May 2026 the petitioner gave the dates for her availability and the clerk replied on 5 May, identifying the dates to be fixed and said that the interlocutor was with the Lord Ordinary for signature. It was then issued on 6 May. On 11 May the petitioner contacted the petitions' department saying that she would be grateful for procedural guidance in relation to two matters, one of which was a reclaiming motion under section 27D(2) of the 1988 Act. She also requested information on procedural points, including whether the reclaiming motion was in the correct format and whether any additional forms or procedural steps were required. In response on that day, the email from a member of the court staff explained that, if the petitioner wished to reclaim the interlocutor dated 27 April, the time limit was 7 days from the date of the interlocutor and not when it was issued and so the motion was currently late. The email also said "I understand this is frustrating due to the interlocutor not being issued until 6th of May but you can put this in the reasons for lateness." It also stated that the motion would need to be accompanied by, among other things, "all interlocutors issued in the matter so far." The petitioner replied on that day, confirming that she had followed that process. On 13 May the petitioner lodged her reclaiming motion.

Submissions

[5] The petitioner argued that she could not reclaim until the interlocutor had appeared. She was told by the court staff on 30 April 2026 that she would get the interlocutor the next day but on 5 May 2026 it was confirmed that the interlocutor was with the Lord Ordinary for signature. The petitioner contended that the clerk may have known that her appeal rights were being prejudiced. The petitioner also has health issues, including dyslexia. She was told that the interlocutor had to be added to the reclaiming print. There was said to be an administration error that caused the lateness of the application to reclaim, if indeed it was late, and that was not her fault.

[6] For the respondents, it was argued that the starting point for the 7-day period occurred on 27 April 2026, the date of the *ex tempore* decision, which also became the date of the interlocutor. The statutory provision restricted the period to 7 days and as a result the court could not use any of the Rules of the Court of Session (RCS) on dispensing powers (such as RCS 2.1) to allow the reclaiming motion to be lodged late.

Statutory provision

[7] Section 27D of the 1988 Act states:

> "(1) Subsection (2) applies where, after an oral hearing to determine whether or not to grant permission for an application to the supervisory jurisdiction of the Court to proceed, the Court— (a) refuses permission for the application to proceed, or (b) grants permission for the application to proceed subject to conditions or only on particular grounds.
>
> (2) The person making the application may, within the period of 7 days beginning with the day on which the Court makes its decision, appeal under this section to the Inner House (but may not appeal under any other provision of this Act)."

Analysis and decision

[8] The first issue is whether the 7-day period only commenced when the interlocutor was signed and issued or whether it started on the day when the *ex tempore* decision was given. If parties are made aware by the Lord Ordinary, on the day of a hearing, of the decision reached and are given the main reasons for that decision, that could be taken as the starting point for the period to bring a reclaiming motion. In several cases that has been done. Section 27D expressly states that the 7-day period begins on the day when the decision is made which could, at least arguably, be taken to mean the date of the *ex tempore* decision. While it was said in this case that certain points were added by the Lord Ordinary in his note of reasons, there was no indication that the decision and the key points which resulted in it were not addressed at the *ex tempore* hearing.

[9] However, a more fundamental matter arises in this case. Chapter 38 of the RCS makes a number of references to a reclaiming motion being made against an interlocutor. In RCS 38.1(2) it is stated that any party to a cause who is dissatisfied with an interlocutor pronounced by the Lord Ordinary "and who seeks to submit that interlocutor to review by the Inner House shall do so by reclaiming within the reclaiming days in accordance with the provisions of this Chapter". RCS 38.1(3) provides that "In this Chapter, 'reclaiming days' means the days within which an interlocutor may be reclaimed against". RCS 38.5(1) requires a person who seeks to reclaim to mark a reclaiming motion in Form 38.5. RCS 38.5(2)(a) requires that motion to be accompanied by a reclaiming print which must contain, in the form of a record, "the whole pleadings and interlocutors in the cause". Form 38.5 provides that the reclaimer has to state that the reclaiming motion is "for review by the Inner House of the interlocutor of [*date*] of the Lord Ordinary."

[10] The court has been advised that in this case if the interlocutor sought to be reclaimed against was absent, the offices of court would not accept the reclaiming motion, on the basis that the petitioner had failed to comply with the requirements of RCS 38.5(2)(a). This would, of itself, have precluded the petitioner in this case from lodging the reclaiming motion within 7 days from the *ex tempore* decision. There is also a basis for concluding that the date of a decree (ie determining a cause) is when the interlocutor is signed rather than the date of the interlocutor itself: *Cleland* v *Clark* 1849 11 D 601 at p 614, which could apply in relation to the first respondent. However, as explained in *Parachute Regiment Charity* v *Hughes' Executor (No 2)* [2020] SAC (Civ) 24, 2021 SLT (Sh Ct) 91, modern practice indicates that that interlocutors may not be signed and issued on the date when the decision is made. But it has been confirmed that the interlocutor in the present case was signed and issued on 6 May 2026, 9 days after the *ex tempore* decision. Accordingly, the earliest date when the petitioner could have competently marked a reclaiming motion was the date when she was sent the signed interlocutor, on 6 May 2026.

[11] The second point to be considered, although not raised at the hearing, is whether section 27D applies in circumstances where the Lord Ordinary has held that the petition is time-barred. RCS 38.8 provides that Chapter 38 of the RCS shall apply to certain appeals, in the same way as the chapter applies to reclaiming motions. The types of appeal are then listed and under RCS 38.8(d) it is:

> "an appeal from a decision of the Lord Ordinary concerning permission to proceed in petitions for judicial review under section 27D of the Act of 1988 (appeal following oral hearings)".

RCS 58.7(1)(a)(ii) provides that whether to grant an extension to the time limit of three months from the date of the decision, under section 27A of the 1988 Act, must be considered at the permission stage (see also *Philp* v *Highland Council* [2021] CSIH 28; 2022 SLT 514 at

para [20]). Accordingly, the 7-day time limit in section 27D applies to the time-bar aspect of a Lord Ordinary's decision on permission to proceed.

[12] The next question is whether the RCS deal with late lodging of an application to appeal against a decision refusing to allow a judicial review to proceed. In *Beggs* v *Scottish Ministers* [2017] CSIH 62, it was noted that section 27A of the 1988 Act introduced strict time limits (the 3-month period to bring the petition for judicial review) but also that there was a specific dispensing provision in section 27A(1)(b). In relation to appealing against a decision refusing permission to proceed, the petitioner in that case argued that it could rely on RCS 38.10, which can allow a motion for review to be received outwith the reclaiming days. The judge considered that the problem with this submission was that RCS 38.10 is designed to relieve a party in certain circumstances of a failure to comply with the rules relating to "reclaiming days". The rules relating to reclaiming days are found in RCS 38.2. The judge was unable to interpret this as giving power to the court to relieve a party from the consequences of a failure to comply with the 7-day period set out, not in the rules, but in the statutory provision relating to appeal. The judge noted that the Scottish Parliament had plainly considered that there might be a need for an equitable power to extend the time limit for application and provided such a power in section 27A(1)(b) but no such provision appears in section 27D. RCS 38.10 was held not to be applicable.

[13] In *Neilly* v *Nursing and Midwifery Council* [2019] CSIH 32, 2019 SC 565 (not a judicial review case) the Inner House referred to *Hume* v *Nursing and Midwifery Council* [2007] CSIH 53, 2007 SC 644 in which the court held that the statutory time limit was subject to the court's own procedural rules. In relation to the *Hume* case, RCS 41.20(1)(a) (now RCS 41.26(1)(a)) provided that "the appeal shall be lodged … within the period prescribed by the enactment under which it is brought". This was taken to show that a

failure to bring the appeal timeously could be treated as a failure to comply with the court's own rules and thus could fall within the scope of the general dispensing power in RCS 2.1(1), which states that:

> "(1) The court may relieve a party from the consequences of a failure to comply with a provision in these Rules shown to be due to mistake, oversight or other excusable cause on such conditions, if any, as the court thinks fit."

[14] In *Neilly* the court considered a wide range of decisions and held that *Hume* remains applicable, so that the general dispensing power in rule 2.1(1) was the vehicle through which the statutory time limit in that case could be extended. It also said at para [10]:

> "However, in light of the imperative terms of a statutory provision, which must carry great weight, the power to do so should be exercised not simply where there has been a mistake, oversight or other excusable cause but, as required by Art. 6.1 of the European Convention, only when the applicant has personally done all he or she can to bring the appeal on time, and if not on time, as soon as possible after that. That is the meaning of 'exceptional circumstances' in this context. The correct formulation should include 'reasonably' before 'can', rather than being stated in absolute terms."

The court concluded that however sympathetic the appellant's case was in terms of her mental health and the relatively short period of lateness, it did not meet the test as it could not be said that she did all that she reasonably could have done to bring the appeal on time.

[15] The case of *Beggs* was not referred to in *Neilly*. This could perhaps have happened because, as *Beggs* was a reclaiming motion in terms of RCS Chapter 38, there was no rule of court like RCS 41.26(1)(a) which specifically stated that the appeal shall be lodged within the period prescribed by the enactment under which it is brought. As noted, the very existence of RCS 41.26(1)(a) meant that there was a rule of court and hence the dispensing power in RCS 2.1(1) applied, because it deals with a failure to comply with a provision in the rules of court. The result is that the mere existence of a rule of court which states the obvious general point that the period in the statute has to be followed allows that rule to be

dispensed with, even though what is said in that rule applies in any event for statutory provisions. If this means that just because Chapter 38 of the RCS does not expressly state that the period prescribed in the enactment has to be followed then RCS 2.1 cannot apply, that is somewhat concerning in a case such as the present, unless there is something else in Chapter 38 which could deal with the problem.

[16] As already noted, RCS 38.8 states that the rules in Chapter 38 apply to an appeal from a decision of the Lord Ordinary concerning permission to proceed with a petition for judicial review. An appeal under section 27D of the 1988 Act is made by reclaiming motion (see RCS 38.8(d) and RCS 58.10). As stated above, in RCS 38.1(3) "reclaiming days" means the days within which an interlocutor may be reclaimed against. RCS 38.10 can allow a motion for review to be received outside "the reclaiming days". While RCS 38.2 has the sub-heading "Reclaiming Days" and does not mention statutory provisions such as the 7-day limit, it is open to argument that the very mention of "the reclaiming days" in RCS 38.10 could include the days set out in enactments. If so, this would result in the RCS dealing with the difficulties that can arise in cases such as the present. It will no doubt be of assistance if the Inner House could, if another such case arises, at some stage clarify whether "the reclaiming days" mentioned in RCS 38.10 are only those days referred to in RCS 38.2 or whether that also covers reclaiming days/time limits set out in a statute. However, for the reasons given below, that does not need to be determined in the present case.

[17] If I had decided that the approach taken in *Neilly* was to be followed here, even though there is no rule expressly stating that the statutory provision is to be complied with, the high test stated in *Neilly* would require to be met: the dispensing power should be exercised on the basis that the appellant personally has done all that she could reasonably have done to bring the appeal on time and, if not on time, as soon as possible after that. It is

clear that the interlocutor in the present case was issued some 9 days after the decision was given *ex tempore*. As noted above, while the statutory provision could be taken to mean that the starting point for the 7-day period was 27 April 2026 (the date when the decision was made) the unfortunate delay in the interlocutor being issued, caused by seeking to ascertain hearing dates, resulted in the petitioner lodging the reclaiming motion on 13 May, within 7 days after the interlocutor was signed and issued. It may be arguable that the reclaiming motion could have been lodged a few days earlier. However, having regard to all of the circumstances, the petitioner would in my view have established that the test is met.

[18] But in this case we do not get to that stage. The unfortunate delay in the interlocutor being issued resulting in the petitioner being unable to lodge her reclaiming motion within the time period should be taken as causing the starting point to be 6 May 2026. If that approach is not followed, it would not have been possible for the petitioner to reclaim. If the court were simply to proceed on the basis that the date of the *ex tempore* decision was the starting point, or that the wording of section 27D is to be taken as referring to that date, so that this application would be out of time and could never have been made, that would not comply with the requirements of natural justice. When the interlocutor which is to be attached to the reclaiming motion is not issued until after the 7-day period from when the *ex tempore* decision was given, in my view the reference to the day of the decision in section 27D can be interpreted as meaning that the time-limit to appeal will run from the date when the interlocutor was signed and issued. In these exceptional circumstances, taking a fair and pragmatic approach to the interpretation of the statutory provision, the starting date here was when the interlocutor was signed and then issued.

[19] In her motion, the petitioner also requested urgent disposal of the reclaiming motion. That matter was not addressed at the Single Bill hearing but is covered in each side's Note of

Argument. The court tends to grant urgent disposal only when there are exceptional circumstances or convincing reasons for the case to be dealt with urgently. In the present case, the premise for seeking urgent disposal is really based on the Outer House timetable and that is not a sufficiently exceptional or convincing reason. That part of the motion is refused.

[20] For the reasons given, the petitioner's motion that her reclaiming motion be received is granted. The respondents are found liable to the petitioner in the expenses occasioned by this motion.