Civil Appeals from the Court of Session

Response to Consultation

For further information please contact:
Tony Kelly, Chair of the Scottish Executive Committee
Email: scotland@justice.org.uk Tel: 01236 710999
Jodie Blackstock, Director of Criminal and EU Justice Policy
Email: jblackstock@justice.org.uk Tel: 0207 7626436
JUSTICE, 59 Carter Lane, London EC4V 5AQ Tel: 020 7329 5100
Fax: 020 7329 5055 E-mail: admin@justice.org.uk Website: www.justice.org.uk

Introduction

1. JUSTICE Scotland is the Scottish branch of JUSTICE. JUSTICE is an independent law reform organisation and is the UK section of the International Commission of Jurists. Established in 1957, JUSTICE works to improve the operation of the civil, criminal and administrative justice within the United Kingdom and to protect the rights of individuals within the law.

2. On 31 May 2013, the Scottish Government published a brief consultation document, consulting on the treatment of civil appeals from the Court of Session to the Supreme Court.[1] It proposes that the current arrangements - which provide an appeal route from the Inner House of the Court of Session to the United Kingdom Supreme Court on the certification of two counsel - should be replaced by leave to appeal similar to the arrangements for appeal from the Court of Appeal in England and Wales.

3. We welcome the opportunity to provide a response to the consultation document. JUSTICE Scotland considers the proposed change would be a pragmatic response to the realities of the new role adopted by the Supreme Court. This should be supported by a uniform system of referring matters to the Court, allowing it to focus on matters of public importance and to be actively involved in the management of its case load across the UK. However, we regret that fuller information on the proposed procedure for leave to appeal has not been published for consultation. We consider that detailed consideration will be required to ensure that while greater consistency is achieved, access to justice for Scots appellants is preserved.

Background

4. Comparatively, Scotland enjoys a much wider jurisdictional competency in assigning cases to the Supreme Court for further adjudication. This competency is in line with the previous jurisdiction of the House of Lords.[2] However, for some, this was an

[1] http://www.scotland.gov.uk/Publications/2013/05/6753/0
[2] Section 40(3) of the Constitutional Reform Act 2005 provides that: "An appeal lies to the Court from any order or judgment of a court in Scotland if an appeal lay from that court to the House of Lords at or immediately before the commencement of this section."

intentional ambiguity arising from the political debate surrounding the formation of the Union.[3]

5. Some historical concern regarding the potential abuse of the current system was expressed, suggesting it may be possible for an unsuccessful litigant to appeal to London in the hope of wearing down opponents and producing a more advantageous settlement: 'to concuss the victor to a composition rather than undertake a tedious uncertain journey to London'.[4] These concerns led to the introduction of some limitations on the unfettered right of access. However, the somewhat modest restrictions placed on Scottish litigants, whereby the Court of Session can regulate interim possession or suspensions pending the hearing of an appeal have not significantly altered this power of referral. Both Lady Hale[5] and Lord Bingham[6] note that the advantageous position of Scottish litigants remains substantively unaffected.

Supreme Court Appeals: leave, consistency and access to justice

6. When consulting on the arrangements for the creation of the Supreme Court, the then Department for Constitutional Affairs[7] outlined three reasons for refusing to alter the arrangements for the hearing of appeals from the Court of Session. First, it was long established; there was no evidence that an alteration was required; and so it was asserted there were strong arguments for leaving the right of appeal intact. Second, the consultation paper demonstrated that more of the court's resources would be used in deciding what cases to hear, resulting in fewer cases being heard and a possibility of delay in hearing of those cases chosen to be heard. Third, additional costs would be laid at the door of those seeking to petition the court for a right to appeal.

7. It is however of greater significance that the Court itself – the House of Lords and then the Supreme Court - has recognised that the time has come for this jurisdictional anomaly to end. Other than publicly expressing its disquiet, the Supreme Court is incapable of focusing on matters with a wider public application of its own initiative.

[3] At the time of the Union of the parliaments and the negotiations leading thereto, the decision was less than clear. It was thought on one view to be an intended fudge. Described as "sufficiently ambiguous" by some. See, Ford, *"The Legal provisions in the Act of Union",* 2007 CLJ 106
[4] SME, Vol 6, para.818, quoting Fountainhall Vol 2, p.463
[5] 'A Supreme Court for the United Kingdom?" L.S. 2004 24 pp.36-37
[6] "A New Supreme Court for the United Kingdom", The Constitution Unit, 1 May 2002
[7] "Constitutional Reform: a Supreme Court for the United Kingdom" CP11/03, July 2003,

In a series of seminars on the new Supreme Court at Queen Mary University of London an unidentified Scottish judge expressed a view that the cases referred to the Supreme Court tended to be appeals of matters of fact or on minor issues of law (such as the interpretation of individual contractual terms) rather than focused on the issues of general public importance more deserving of the Court's time and attention.[8]

8. That the current 'safeguard' of certification by counsel is insufficient, is indicated in successive judgments handed down by the Supreme Court.[9] Combining the provision of advice on prospects of success on appeal and the reasonableness of proceeding to the Supreme Court may produce inconsistencies which will place counsel in a difficult – and possibly inappropriate – professional position. Without a clear case for maintaining the current system in Scotland, we agree that the more appropriate, consistent and impartial gatekeeper for access to the Supreme Court hearings should be the judiciary, not individual counsel. [10]

9. The introduction of a leave provision would give to the Court a greater degree of control over the cases which come before it, allowing it to focus on issues of general public importance. Permission to appeal decisions are now routinely published and disclose a greater focus upon this issue. An almost unfettered right of Scottish litigants to access the Supreme Court simply hinders this shift towards a more constitutional form of Supreme Court, capable of representing each citizen equally.

10. It is unclear whether the introduction of a leave provision will impact upon the number of appeals going to the Supreme Court from Scotland. It may however, change the nature of the cases heard by the Supreme Court. Those affected will predominantly be litigants disappointed by the outcome of their proceedings before the Court of Session. An unsuccessful applicant for leave refused leave by the Court of Session

[8] *A Report on Six Seminars About the UK Supreme Court*, Andrew Le Seur, Queen Mary University of London, School of Law; December 2008 (Queen Mary School of Law Legal Studies Research Paper No. 1/2008)
[9] *Buchanan v. Alba Diagnostics Ltd* 2004 SC (HL) 9; *G Hamilton (Tullochgribban Mains) v. Highland Council* 2012 SLT 1148. See also the judgments of Lord Hope in *Wilson v. Jaymarke Estates Ltd* 2007 SC (HL) 135 and Lord Walker in *Uprichard v Scottish Ministers* [2013] UKSC 21.
[10] The Faculty of Advocates, in its response to this consultation, has outlined significant concerns about the propriety of the system of certification. See Consultation Response, dated 28 August 2013. http://www.scotland.gov.uk/Publications/2013/05/6753/0

will retain the right to directly petition the Supreme Court itself if the wider public importance of the case is demonstrable.

11. While JUSTICE supports the change proposed in principle, further consultation is needed on the procedures to be applied. Careful consideration will need to be given to ensuring that access to the Supreme Court for Scots litigants is not unduly restricted in practice and that the tests to be applied are capable of clear and consistent application within Scotland. In summary, we support the suggestion that the test for leave should be closely modelled on that as currently applied to appeals from the Court of Appeal in England and Wales and Northern Ireland. The manner in which that power is exercised has not been the subject of any express concern. Rather, it would appear, the Court has exercised the power in order to rule upon a wide range of issues of general public importance. Importantly, permission to appeal decisions are now routinely published and include greater justification for the Court's determination not to exercise its jurisdiction. This body of precedent should help provide clarity and consistency if a similar provision for leave is provided in Scotland.

JUSTICE Scotland

2nd September 2013