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FOR IMMEDIATE RELEASE

THE UK SUPREME COURT HAS A PROPER ROLE IN SCOTTISH APPEALS

Since the UK Supreme Court decision last week that the conviction in the case of *Fraser* should be quashed, the Scottish Government has indicated its displeasure at the power of the Court to rule on Scots cases and is now considering restricting or even removing the jurisdiction.

JUSTICE considers such a move would risk creating a worrying limitation on the ability of individuals in Scotland to vindicate their rights. Notwithstanding that the House of Lords has long since been the final court of appeal in civil cases from Scotland, the Supreme Court is **not** a final appeal court in all criminal cases. As a result of devolution, the UK Supreme Court now exercises a vital role in safeguarding the rights of Scottish individuals. The Court can only hear cases where the European Convention on Human Rights (the Convention) is said to have been breached. It hears very few cases from Scotland, and very rarely finds that the Scottish courts have ruled wrongly.

However, the Court ensures that all UK citizens can benefit from the same protections wherever they live and that all governments conform equally to our international obligations. An expert group convened by the Advocate General for Scotland to consider the ongoing role of the Court concluded that the jurisdiction should be maintained for this reason.

The recent cases of *Cadder* and *Fraser* that have caused so much objection involved fundamental breaches of the right to a fair trial – the former being lack of access to a lawyer when being interviewed by the police, and the latter, withholding evidence which would have crucially affected the way the case was decided. Fault lay at the feet of the Crown Office for not fairly administering justice at the outset, not with the Supreme Court for recognising it. In both cases, no bars were put on re-hearings: the issues were remitted to be reconsidered by Scottish Courts.

If the Government is to reconsider the role of the Court, it should carefully consider the findings of the Advocate General's review and the rulings the Court has actually made since devolution before assuming Scotland is better off without it. Further consideration might also usefully be given to the report by Professor Neil Walker, *Final Appellate Jurisdiction in the Scottish Legal System.*

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Notes for Editors

1. The Advocate General's review is available here http://www.advocategeneral.gov.uk/oag/262.102.html. JUSTICE's response is available on that website. Further consultation is currently taking place in relation to a draft clause amending the Scotland Bill that follows from the recommendations.

2. Since the Human Rights Act and the Scotland Act came into force, the Judicial Committee of the Privy Council, and subsequently the Supreme Court, have only heard twenty three cases, of which five were brought by the Crown. This number produced an average of two or three cases a year. Last year, the only case heard was *Cadder v HMA*. Of these cases, fourteen were dismissed (see *Holland v Sinclair* in particular), limiting the prospect of bringing similar points before the Court. Only nine appeals were allowed, four of which were in favour of the Crown (figures as at end May 2011).

3. The Report by Professor Walker is available at http://www.scotland.gov.uk/Publications/2010/01/19154813/0

4. Further information is set out below.

MYTHS SURROUNDING THE SUPREME COURT

1. The UKSC is interfering in Scottish criminal law

The UKSC is only concerned with ensuring minimum rights under the Convention are secured throughout all the jurisdictions of the UK. By signing up to the Convention the Government agreed to allow restrictions on our laws and jurisdiction in order to comply with the Convention. Minimum rights in domestic law and procedures must be secured to safeguard the rights of individuals under state control.

Convention rights are concerned with ensuring that the due process of law secures basic rights. For example, the Convention provides the right to access legal advice and the right to a fair trial. It has no say over what laws we have and how we define crimes. The Convention is only breached and the UKSC will only intervene where basic procedural rights are infringed.

Cadder was a failure in statutory procedures concerning interviewing of suspects – a failure shared by many in Europe who are altering their procedures. It was purely about procedural fairness. *Fraser* was a result of the Scottish appeal courts' refusal to consider and apply Convention rights. They refused to consider the fairness of the trial and the effect of non-disclosure, but rather insisted in treating the appeal absent any reference to the ECHR. In both cases the UKSC had to intervene and remedy the breach of a fair trial.

2. Involvement of the UKSC in criminal law was never the intention of the Scotland Act

It was always the intention of statute for appeals in respect of acts of Scottish ministers to be under review and subject to appeal to the Judicial Committee of the Privy Council (JCPC), the predecessor to the UKSC. The Scotland Act deliberately included the Lord Advocate as a Scottish minister and hence incompatible acts in the conduct of prosecutions.

3. The UKSC does not know or understand Scots criminal law

The best Scottish judges are appointed to the UKSC. Currently both are former Lord Justice Generals (the highest criminal law judge in Scotland) and one is also a former Lord Advocate. It is insulting to suggest they are unable to consider Scots cases correctly. If concern is really about needing 'Scottish' judges to determine 'Scottish' appeals, a solution would be to appoint one further Scottish judge to the UKSC and thereby produce a majority in Scottish appeals.

4. We could have our own supreme court in Scotland with appeals to Strasbourg.

Upon devolution, the function of the JCPC (subsequently UKSC) was 'to bring rights home' and secure directly in our domestic systems the immediate application of Convention rights, rather than relying upon later correction at Strasbourg. The constitutional structure enables courts to ensure minimum rights apply and the UKSC ensures a harmonised approach throughout the UK in the different jurisdictions.

If we are to separate from the UKSC that harmonisation will be lost. Scots would only have the one right of appeal restricted to the Scottish Court, whereas the rest of the UK would continue to appeal to an appeal court and then the UKSC. Scottish appellants would clearly be treated less favourably.

Furthermore, appeal to Strasbourg does not provide adequate remedy for breach of Convention rights in that:

a) It cannot quash a conviction where the trial has been unfair, it can only find a violation.
b) There are approximately 160,000 cases pending in the Strasbourg Court and it takes years to be heard. This delay creates further uncertainty for those affected, whether those wrongly convicted or witnesses and victims of crime.

Because there is no right of appeal under the Scotland Act to complain that our *courts* are not being fair, where the Scottish appeal court refuses to apply Convention rights, Scots will have no remedy were the UKSC jurisdiction to review the acts of the Lord Advocate removed. Given recent decisions refusing to apply Convention rights, it is highly likely that the Scots will find themselves exposed and without proper protection of their rights. Scotland will be going backwards whereas the individual in England will be at a considerable advantage.

5. We can look after our own

Scots courts have repeatedly refused to engage in and apply Convention rights in criminal cases. There are a host of reasons for this but it is in part because of a very narrow tradition failing to consider international approaches. This was the position in *Cadder* and *Fraser.* In both of these cases it was obvious what was required under the Convention, there had been a patent breach of Convention rights but despite this the Scottish courts would not recognise as such.

6. The issue has been raised for valid reasons

The complaint appears to have come largely from senior members of the legal profession. The previous Lord Advocate only raised the issue of interference and the role of the UKSC after losing *Cadder*. Her concerns, as expressed to the Scotland Bill committee, did not in JUSTICE's view accurately reflect how the court operates. She asked for a threshold test, which in reality already applies (as can be seen from the statistics at note 2 above). *Fraser* is a high profile murder case in which the Crown is understandably anxious to obtain a conviction. In cases such as these the Scottish appeal court cannot help but be influenced by the concerns of the Crown rather than Convention issues. The UKSC is, however, separate and independent.

Some Scottish judges raised concerns about the UKSC in submissions to the Calman Commission. Those submissions speak volumes of the real root of complaint, namely being found wanting by another court. There is little in those submissions about losing the identity of Scots criminal law, but much about their views being rejected.

The reality is that most criminal practitioners, both for the Crown and defence, find the role of the UKSC clear and helpful in determining whether Scots law is compatible with the Convention. They do not see it as a threat to national sovereignty as the Government suggests.