Scotland Bill

House of Lords Committee Stage

Briefing and Suggested amendments

Clause 17 The Role of the Supreme Court

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Introduction

1. JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is the British section of the International Commission of Jurists. On Scottish matters it is assisted by its Scottish Advisory Group.

2. The Secretary of State for Scotland introduced amendments to the Scotland Bill following a review conducted for the Advocate General, chaired by Sir David Edward at the end of 2010. The amendments at clause 17 aim to remove undue burden from the Office of the Advocate General but retain the essential safeguard of appeal to the Supreme Court where an incompatibility with the European Convention on Human Rights (ECHR) or European Community (EU) law has occurred through an act of the Lord Advocate.

3. We welcome the conclusion of the Expert Group and the Advocate General that the Supreme Court plays an important role both constitutionally and to ensure consistent adherence to international obligations in the European Convention on Human Rights and EU law across the UK.

4. However, the Scottish Government has indicated its displeasure at the power of the Court to rule on Scots cases and considered restricting or even removing the jurisdiction. Its interest came as a result of two recent decisions of the UKSC. In June 2011 the Court decided that the conviction of Nat Fraser should be quashed.[1] *Fraser* follows the seminal case of Peter Cadder[2] where the Supreme Court also overturned the decision of the Scottish High Court. The cases of *Cadder* and *Fraser* 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 (a safeguard not available in Scotland until the UKSC ruling), and the latter, withholding evidence which would have crucially affected the way the case was decided by the jury. But the Government saw these decisions as interference with the Scottish judiciary which had dismissed the appeals.

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[1] *Fraser v HM Advocate* [2011] UKSC 24

[2] *Cadder v HM Advocate* [2010] UKSC 43

5. The Scottish Government set up a second enquiry, the Supreme Court Review, chaired by Lord McCluskey to consider the ongoing role of the UKSC. Lord McCluskey concluded in line with the Advocate General's Expert Group that the Court continues to have a role as a final appellate court to consider Convention and Community rights in criminal cases. However he recommended procedural changes ought to be made to the mechanism of appeal. The changes include creating a leave requirement, removing the role of the UKSC in providing a remedy, and allowing references from the Lord Advocate and Advocate General to the higher courts. Significantly, Lord McCluskey recommends extending the appellate right to cover acts of all public authorities engaged in criminal proceedings rather than the current limitation to the Lord Advocate alone.

6. Fundamentally, we do not agree with the need to restrict the role of the UK Supreme Court in relation to Scottish matters, which is founded upon the suggestion made by Government and elsewhere that there has been 'interference' by the UKSC in Scots criminal law. By incorporating EU law and the ECHR into domestic law, Scots criminal law has necessarily had to adapt and develop in order to ensure compatibility. Such changes inevitably arise – whatever Court enforces them. The UKSC has simply applied, and is obligated to apply, the minimum requirements of Convention rights to our law and procedures.

7. We also consider that Lord McCluskey's conclusions are incoherent in that they recommend unifying leave to appeal across all UK jurisdictions, yet also recommend the creation of specific procedures in relation to such appeals to the UKSC solely for Scotland.

8. Notwithstanding that the Appellate Committee of 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 UKSC now exercises a vital role in safeguarding the rights of Scottish individuals. The Court can only hear cases where the ECHR is said to have been breached, or matters of EU law are in issue. The Court ensures that all UK citizens can benefit from the same protections wherever they live and that all UK authorities conform equally to our international obligations.

9. Furthermore, the UKSC hears very few cases from Scotland, and very rarely finds that the Scottish courts have ruled wrongly. Since the Human Rights Act and the

Scotland Act came into force, the Judicial Committee of the Privy Council, and subsequently the UKSC, have only heard twenty seven cases, of which nine were brought by the Crown, and four of these were references or appeals brought by the Crown in the second half of 2011 in answer to issues arising from *Cadder*. This number produced an average of two or three cases a year. Of the appeals, fourteen were dismissed, limiting the opportunity to bring similar points back before the Court. Only ten appeals were allowed, five of which were in favour of the Crown.[3] There is no evidence from these appeals and the judgments handed down that the UKSC has extended its jurisdiction or heard cases it ought not to. Indeed it appears to us that the UKSC operates entirely within its special jurisdiction, and appropriately respects the position of the High Court of Justiciary, the final court of appeal in Scotland.

10. This is because leave of the High Court is already required, which if not granted, requires special leave of the Supreme Court. This is not given lightly and operates to ensure that only ECHR or EU law issues are heard, as the reasons given for refusals of leave have shown. If leave is granted, the Court is slow to overturn decisions of the Scottish courts. In particular, in dismissing the appeal in *McInnes v HM Advocate*[4] their Lordships made clear that its remit and treatment of Scottish matters is very narrowly defined. Furthermore, the Court's own practice directions require it to consider whether there is a point of general public importance before it will hear a case.[5]

11. Lord Hope made plain in a speech to the Scottish Young Lawyers Association[6] that, despite the jurisdiction being newly created upon devolution, the treatment of criminal cases is no different to that of civil matters which have historically been heard in London. Whilst there are similarities in civil law between the UK jurisdictions, there are also marked differences. The judges of the Court have coped with these differences, as they have with areas of law in English or Commonwealth appeals with which they are less familiar. They have ensured that Scottish judges make leave decisions and that Scottish judges sit on Scottish appeals, leading the debate between the panel members and invariably giving the majority judgments.

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[3] Information gained from the Privy Council and Supreme Court websites and online case search resources. Correct to January 2012.

[4] 2010 SCCR 286.

[5] Practice Direction 3.3.3.

[6] 1st April 2011, available from http://www.supremecourt.gov.uk/docs/speech_110401.pdf

12. Before any amendments are made to the process of appeal, the appropriate question must be what *need* is there to amend the system. Lord Hamilton, President of the Court of Session in his letter of 16th January 2012 to the House expresses his view that a certification procedure may add value to the appellate process, but it is not clear why this should be so.

Lord McCluskey's Amendments

13. On 23rd December 2011 Lord McCluskey proposed amendments to clause 17 of the Bill in accordance with his recommendations in the Supreme Court Review. It is therefore appropriate to respond to those proposed amendments.

Extension to acts of public authorities

Page 11, leave out lines 7 to 10 and insert—

"( ) This section applies to any act or failure to act of any public authority occurring in the course of criminal proceedings if, in the course of those proceedings before any criminal court, that act or failure to act is alleged to be incompatible with any of the Convention rights or with Community law.

( ) In this section the term "public authority" has the same meaning as in section 6 of the Human Rights Act 1998.

( ) In this section the term "in the course of criminal proceedings" means and includes any time commencing with ~~the detention or arrest~~ **the suspicion that any person has committed** a crime or offence that is the subject of those proceedings and ending with the pronouncing of the final interlocutor in proceedings before the High Court."

14. We welcome the suggested extension to ensure all public authorities acting out with compatibility with Convention and EU law requirements can be the subject of an appeal to the Supreme Court. The limitation of the appeal structure to acts or omissions of the Lord Advocate alone in some circumstances artificially widened the ambit of the Lord Advocate's responsibility past that which he ought to be held to account for, and more importantly provided immunity to other bodies where such an extension was impossible. Notwithstanding their duties under section 6 of the Human Rights Act to comply with Convention Rights, alleged violations could not be appealed to the Supreme Court.

15. However, we disagree with the definition provided of criminal proceedings. We do not think it is helpful to include a definition of proceedings as this may impose an artificial limitation on matters which are criminal but excluded from the definition. In any event criminal proceedings begin earlier than the suggested definition, at the point when suspicion arises, as the recent case of *Ambrose v Harris*[7] has demonstrated. The Court

[7] [2011] UKSC43

held that the right of access to a lawyer is engaged when a person is suspected of an offence, not only when their freedom of action is curtailed through detention so that, subject to a consideration of the circumstances as a whole, it may be necessary for police to refrain from questioning a suspect under caution until they are given the opportunity of access to a lawyer. This raising of this issue would not have been possible under Lord McCluskey's proposed definition.

Certification

Page 11, leave out lines 17 to 19 and insert—

"( ) An appeal to the Supreme Court under this section against a determination by a court of two or more judges of the High Court of Justiciary lies only with permission of that court or, failing such permission, with permission of the Supreme Court; but permission shall not be granted unless it is certified by the High Court that a point of law of general public importance is involved in the decision; and also it appears to the High Court or the Supreme Court (as the case may be) that the point is one which ought to be considered by the Supreme Court.

16. We set out at length in our evidence to the McCluskey Review the history of the appellate structure in England and Wales and Scotland.[8] From that evidence it is clear that the certification requirement from the appellate courts in England, Wales and Northern Ireland was introduced to limit the number of appeals to the House of Lords Appellate Committee. The reason this was necessary was because the role of the Supreme Court for these three jurisdictions relates to the entire legal system, but particularly in criminal matters, substantive and procedural law. It was enacted long before international obligations placed any requirement for uniform decision making on the courts across the UK. Most importantly, as seems to be the aim of this amendment, it was not to prevent the Supreme Court exercising its judicial function over the lower courts' decisions, but to stop numerous unmeritorious cases getting there in the first place given the wide remit of the Court's jurisdiction.

17. Of crucial importance, had certification been in place since the devolution arrangements came into force, the decisions in *Holland*[9], *Cadder*[10] and *Fraser*[11]

[8] Our evidence to the Supreme Court Review is available here http://www.justice.org.uk/data/files/resources/298/JUSTICE-Response-to-McCluskey-Consulation.pdf

[9] Holland v HM Advocate 2005 SC (PC) which considered the limitations of dock identification and prosecution requirements to disclose evidence in ensuring a fair trial

[10] Cadder v HM Advocate 2011 SC (UKSC) 1

[11] Fraser v HM Advocate 2011 SC (UKSC) 1

would not have been heard by the Supreme Court.[12] The result would have been that not only would Scots law have proceeded in clear contradiction with Convention law, but that the safeguards of suspects and accused persons in the course of criminal proceedings would not be as strong, and therefore as fair, as they are today.

18. Lord Hamilton's letter to the House suggests that considering petitions for leave cannot be regarded as useful expenditure of the Court's time. However, Lord Hope in his evidence to the Advocate General's inquiry made clear that the number of petitions for leave received by the Court are not burdensome and take up a small amount of the Court's time as the majority are dealt with on paper[13] (by the two Scottish justices and President or the Northern Irish judge[14]).

19. It seems that the argument in favour of a certification procedure is premised upon ensuring uniformity with the other jurisdictions of the United Kingdom, but since the appellate procedure relates to entirely different systems, there is no logical reason to seek this uniform approach. The Court in appeals from Scotland is concerned with matters relating solely to Convention rights and EU law obligations. It is appropriate for the Court therefore to make the decision whether there is a point of law of general public importance *for the UK in its international obligations* rather than the Scottish appellate courts. It is the best placed court for making this decision and it is obliged to do so in accordance with its own practice directions.[15]

20. Furthermore, allowing the UK Supreme Court discretion to consider the application of Convention and EU law issues is of crucial importance given the approach of the

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[12] The speech of Lord Hope given to the Scottish Association for the Study of Offending annual conference on 19th November at pages 23 to 25 underlines this point, available at http://www.supremecourt.gov.uk/docs/speech_111119.pdf

[13] Lord Hope, Response to the Advocate General's Review of Devolutions Issues and acts of the Lord Advocate, 5th October 2010, available from http://www.oag.gov.uk/oag/files/Consultation%20Response%20-%20Lord%20Hope%20of%20Craighead.pdf

[14] See Lord Hope's speech to the Scottish Young Lawyers Association, note 7 above, page 14.

[15] Practice Direction3, at [3.3.3]: Permission to appeal is granted for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal. An application which in the opinion of the Appeal Panel does not raise such a point of law is refused on that ground. The Appeal Panel gives brief reasons for refusing permission to appeal.

Scottish judiciary to international obligations thus far in Scotland. This can be demonstrated in a number of ways. Firstly, leave was refused in *Fraser* where the appellant argued that the case raised a point of law of general public importance. The High Court of Justiciary rejected this argument and refused leave, stating:

> [W]hat is clear is that the allowance of leave for such an appeal as this would authorise a procedure under which the Judicial Committee, in the circumstances of this case, would, quite simply, review the merits of the decision reached by this court.[16]

However, when the UKSC considered the leave application Lord Hope said this:

> [I]t appeared to this court, applying the tests set out in McInnes v HM Advocate, 2010 SLT 266, paras 19-20 and 28-30, that it was seriously arguable that material had been withheld from the appellant which ought to have been disclosed to him and his advisers with the consequence the appellant did not receive a fair trial and that the unfairness had not been remedied by the approach taken by the Appeal Court.[17]

As such, the UKSC was not simply carrying out a review of the decision below, rather it was ensuring that the question of whether the article 6 ECHR right to a fair trial had been breached was answered correctly by the court below, which the Court held it was not. This distinction was simply missed by the HCJ.

21. Secondly, Lord Hamilton in his letter to the House argues that the domestic criminal courts are better placed to decide on the operation of criminal law than any other, which would be accurate if the matter in issue were criminal rather than Convention or EU law. His only reference to the benefits of the UK being an apex court deciding on UK issues is dismissed because of the certification process from England, Wales and Northern Ireland. This approach does not seem to appreciate the role of the Court. Thirdly, the Judicial response to the Calman Commission described the approach of the Court in considering human rights issues to be distinct to the review mechanism of the HCJ, expressed to be limited to questions of miscarriage of justice. This, it complained was problematic and undermined the approach of the Scottish

[16] *Fraser v HMA* [2009] HCJAC 27, para 13.

[17] *Ibid.* para 12

judiciary. Yet it did not consider at all that the role of Scottish judges was to apply Convention rights themselves, as interpreted by the Strasbourg and the Supreme Court.[18] This implies a misunderstanding of what the Court is there to review and how its decisions should be applied by the Scottish courts. A final objection to the Court's jurisdiction is once again put forward by the judiciary to the Advocate General's review[19] on grounds of delaying the administration of justice by devolution minutes being raised. Whilst this may be a laudable complaint and a justification to revisit rules of procedure, it is not a reason to prevent cases being heard by the Court at all.

22. Accordingly in our view, no valid reasons have been given for the *need* for a certification procedure that stand up to scrutiny, and, crucially, benefit the people of Scotland that would be concerned in the limitation of their rights of appeal. We do not therefore accept an amendment that will limit the current leave arrangements.

Time Limits

An application for permission to appeal under this section—

(a) if made to the High Court, must be made within 28 days of the date of the final determination of the proceedings in that court or, as the case may be, the determination on a reference under section 17A (Compatibility questions: references to High Court and Supreme Court) of the Scotland Act 2012;

(b) if made to the Supreme Court, must be made within 28 days of the date on which the High Court refused permission under section 17A (Compatibility questions: references to High Court and Supreme Court) of the Scotland Act 2012.

23. There is no reason suggested for the time limit proposed in subsection (6) other than that one applies in England and Wales. We do not see that this is a good enough reason to limit the possibility of appealing to the Supreme Court on a compatibility issue and, without evidence of a need for a specific time limitation in addition to the current limitations on appeal set out in the Criminal Procedure (Scotland) Act 1995, we would leave out the amendment. Were the amendment deemed necessary, we would at least seek to ensure that the High Court and the Supreme Court are afforded the discretion to extend or dispense with the time limit where the circumstances require it.

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[18] Submission by the Judiciary in the Court of Session to the Calman Commission, 20th October 2008, http://www.commissiononscottishdevolution.org.uk/uploads/2008-10-20-judiciary-in-the-court-of-session.pdf

[19] Submission by the Judiciary in the Court of Session and the High Court of Justiciary to the Advocate General's Expert Group on Devolution Issues and the Role of the Lord Advocate, http://www.oag.gov.uk/oag/files/Consultation%20Response%20-%20Judiciary%20in%20the%20Court%20of%20Session%20and%20High%20Court%20of%20Justiciary.doc

Resolution of issues

Page 11, leave out lines 35 to 41 and insert—

"( ) In relation to an appeal under this section, the Supreme Court may (when determining a question relating to compatibility)

(a) determine and resolve the point of law of general public importance raised in the certificate;

(b) restate and reformulate the point of law, if it considers that to be necessary in the interests of justice, and determine the point of law as restated and reformulated;

(c) remit any issue for determination by the High Court.

( ) When the Supreme Court has determined an appeal under this section, it shall remit the case to the court below to proceed as accords in the light of that determination."

24. The amendment restricts the jurisdiction of the Court to remedy the issue upon which it has adjudicated. In our view it is entirely appropriate for the Supreme Court to continue to exercise all the powers of the courts below, as it has always done in civil appeals from Scotland and as it has always done when constituted as the Privy Council for jurisdictions across the world that appeal to it. It would be a remarkable delimitation of its powers to restrict the Court's ability to finally determine the outcome of an appeal. At the Lord Rodger memorial lecture during the SASO conference in November,[20] Lord Hope referred to the judgments where the Court considered it appropriate to quash convictions in cases where it was clear that the trial had been unfair. Where a conviction is clearly based on an unfair trial, there is no appropriate decision but to quash the conviction. But Lord Hope continued,

> Even so, in *Fraser* at [43] he held: I would, however, remit the question whether authority should be granted to bring a new prosecution under section 119 of the Criminal Procedure (Scotland) Act 1995 for determination by the High Court of Justiciary. As it is its practice not to quash a conviction until consideration has been given to the question whether there should be a retrial, I would remit the case to a differently constituted appeal court to determine that question and, having done so, to quash the conviction.

25. The Supreme Court has rarely exercised its power to finally determine the consequences of an appeal. In the recent cases of *Ambrose*[21], *Jude*[22] and prior to that, *Cadder* directions were given to remit to the High Court for determination, save

[20] Note 12 above

[21] Ambrose v HM Advocate *et al,* [2011] UKSC 43

[22] Jude v HM Advocate *et al,* [2011] UKSC 55

for the clear case where, following the Strasbourg jurisprudence, it was certain that the right of access to a lawyer should have been afforded.[23]

26. Furthermore, given that an important aspect of the review of devolution minutes in criminal appeals is the apparent delay the raising of a minute brings to the system, were the Supreme Court required to remit the case back to the High Court for determination in cases as clear as these, this would add further delay and uncertainty to the process. Again, in the absence of evidence supporting the need to limit the Supreme Court's jurisdiction, we would not support the amendment.

References

17A Compatibility questions: references to High Court and Supreme Court

(1) A court, other than any court of two or more judges of the High Court, may refer any compatibility question that arises in criminal proceedings before it to the High Court for determination.

(2) The Lord Advocate or the Advocate General for Scotland for Scotland may require any court other than a court of two or more judges of the High Court to refer any compatibility question that arises in criminal proceedings before it to the High Court for determination.

(3) The High Court need not determine a compatibility question on a reference under subsection (1) or in pursuance of subsection (2) unless it considers that determination of the question by it is appropriate to enable the proceedings before the court making the reference to be finally determined.

(4) Subsection (5) applies where the Lord Advocate or the Advocate General for Scotland for Scotland considers that the determination of a compatibility question by a court of two or more judges of the High Court raises a point of general public importance that ought to be considered by the Supreme Court.

(5) The Lord Advocate or the Advocate General for Scotland for Scotland may require the High Court to refer the question to the Supreme Court for determination.

27. Lord McCluskey proposes a new clause which will allow references to be made by a lower court on the application of the Lord Advocate or the Advocate General. Whilst we do not object to the prospect of references being made on points of Convention and EU law, any decision to refer a point of compatibility to either the High Court or Supreme Court is a matter for the courts to decide rather than the Lord Advocate or Advocate General alone. As such, the Lord Advocate or Advocate General must surely be entitled only to 'request' that a court refer a compatibility question, whether to the High Court or to the Supreme Court, but it may not 'require' the court to pursue it. It is quite a remarkable suggestion that the Lord Advocate or Advocate General could circumvent any leave requirements of the court, let alone the more stringent certification process suggested by the earlier amendments as necessary, and make their own decisions. Furthermore, this procedure could add to the apparent delay, not alleviate it, without judicial oversight.

[23] The case of *G* heard with *Ambrose* being such a case, which was in any event a reference raised by the Lord Advocate and heard prior to trial.