



**Scotland Bill:
Devolution issues and acts of the Lord Advocate**

Report Stage

June 2011

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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. On Scottish matters it is assisted by the JUSTICE Advisory Group, Scotland. It is also the British section of the International Commission of Jurists.
2. The Secretary of State for Scotland has introduced amendments to the Scotland Bill following a review conducted by the Advocate General at the end of last year. The amendments 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 Convention rights or Community law has occurred through an act of the Lord Advocate.
3. The Advocate General convened an expert group on the role of the Lord Advocate as it pertains to devolution matters in criminal proceedings in Scotland. We responded to the Expert Group's consultation in October 2010, concluding that we did not believe any reform of the system was appropriate or necessary, at least in the way proposed by the Consultation Paper.¹
4. However, the recommendation of the Expert Group to remove the acts of the Lord Advocate (in her capacity as head of the systems of criminal prosecution and investigation of deaths) from the devolution minute procedure *but* create a distinct mechanism for challenge seems sensible. This is to resolve any existing anomaly and to reduce delay, where any is caused, by the raising of devolution minutes in Scotland. Most importantly, 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.

¹ The response is available here: http://www.justice.org.uk/data/files/resources/280/JUSTICE-Response-to-the-AGs-consultation-on-s57_2_.pdf

Amendments

5. The amendments seek to retain the role of the Supreme Court as final arbiter on Convention and EU law compatibility questions. They simply remove the jurisdiction from the operation of devolution minutes, which it is anomalous to continue for this power. **We welcome the amendments and think that they should be passed.**

View of the Scottish Government

6. However, the UK Supreme Court held in June that the conviction of Nat Fraser should be quashed.² *Fraser* follows the seminal case of Peter Cadder³ where the Supreme Court also overturned the decision of the Scottish High Court. As a result, 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.**
7. 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 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, 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.
8. The recent 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 Supreme Court ruling), and the latter, withholding evidence which would have crucially affected the way the case was decided by the jury. 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

² *Fraser v HM Advocate* [2011] UKSC 24

³ *Cadder v HM Advocate* [2010] UKSC 43

both cases, no bars were put on re-hearings: the issues were remitted to be reconsidered by Scottish Courts.

9. Furthermore, the Court 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 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*. Of these cases, fourteen were dismissed, limiting the ability of bringing similar points back before the Court. Only nine appeals were allowed, four of which were in favour of the Crown.⁴ There is no evidence from these appeals and the judgments handed down that the Supreme Court has extended its jurisdiction or heard cases it ought not to. Indeed it appears to us that the Supreme Court 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 Convention 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*⁵ their Lordships made clear that its remit and treatment of Scottish matters is very narrowly defined.
11. Lord Hope made plain in his recent speech to the Scottish Young Lawyers Association⁶ 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

⁴ Information gained from the Privy Council and Supreme Court websites and online case search resources. Correct to June 2011.

⁵ 2010 SCCR 286.

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

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.

12. As a result of the heated debate and rhetoric that the Scottish Government's disapproval has generated, we issued a press release⁷ which set out what we thought were the myths being circulated about the role of the Supreme Court. We include these below to ensure no further confusion is raised:

MYTHS SURROUNDING THE UK SUPREME COURT

1. The Supreme Court is interfering in Scottish criminal law

13. The Supreme Court 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.
14. Convention rights under article 6 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 how we define crimes. The Convention is only breached and the Court will only intervene where basic procedural rights are infringed.
15. *Cadder* was a failure in statutory procedures concerning interviewing of suspects – a failure shared by many member states of the EU 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 Convention. In both cases the Supreme Court had to intervene and remedy the breach of a fair trial.

⁷ Which can be accessed here: <http://www.justice.org.uk/resources.php/272/the-uk-supreme-court-has-a-proper-role-in-scottish-appeals>

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

16. It was always the intention of the Scotland Act 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. The Scotland Act deliberately included the Lord Advocate as a Scottish minister and hence incompatible acts in the conduct of prosecutions.

3. The Supreme Court does not know or understand Scots criminal law

17. The best Scottish judges are appointed to the court. 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 the concern is really about needing 'Scottish' judges to determine 'Scottish' appeals, a solution would be to appoint one further Scottish judge to the Supreme Court and thereby produce a majority in Scottish appeals.

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

18. Upon devolution, the function of the Appellate Committee of the House of Lords and Judicial Committee of the Privy Council were '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 Supreme Court ensures a harmonised approach throughout the UK in the different jurisdictions.
19. If Scotland separated from the jurisdiction of the Court that harmonisation would be lost. Scots would only have one right of appeal restricted to the Scottish court, whereas the rest of the UK would continue to appeal to an appellate court and then the Supreme Court. Scottish appellants would clearly be treated less favourably.
20. 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.

5. Scotland can look after its own

- 21. 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.
- 22. Because there is no right of appeal under the Scotland Act to complain that Scottish *courts* are not being fair (which is possible under the Human Rights Act), where the Scottish appeal court refuses to apply Convention rights, Scots will have no remedy without the review by the Supreme Court of acts of the Lord Advocate. Given recent decisions of the Scottish courts 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, Wales and Northern Ireland will be at a considerable advantage.

6. The issue has been raised for valid reasons

- 23. The complaint appears to have come largely from senior members of the legal profession. Some Scottish judges raised concerns about the Supreme Court in submissions to the Calman Commission.⁸ 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.

⁸ Commission on Scottish Devolution (Chaired by Sir Kenneth Calman), *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (2009) available at <http://www.commissiononscottishdevolution.org.uk/uploads/2009-06-12-csd-final-report-2009fbookmarked.pdf>, pp 164 and 165.

24. The previous Lord Advocate also raised the issue of the role of the Supreme Court. Her concerns, as expressed to the Scotland Bill committee,⁹ do 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 small number of cases heard.
25. The reality is that most criminal practitioners, both for the Crown and defence, find the role of the Supreme Court 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 has suggested.
26. As such, we commend the amendments to Parliament in order to cement the role of the Supreme Court in safeguarding the application of Convention rights and EU law throughout the UK.

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⁹ Scotland Bill Committee, *Report on the Scotland Bill and relevant legislative consent memoranda*, 3rd March 2011, available at http://www.scottish.parliament.uk/s3/committees/scotBill/reports-11/sbr11-01-1.htm#_ftn511, para 934.