



The Jurisdiction of the Supreme Court of the United Kingdom in Scottish Appeals: Human rights, the Scotland Act 2012 and the Courts Reform (Scotland) Act 2014

1. Introduction

The purpose of this document is to set out the jurisdiction of the Supreme Court of the United Kingdom ('the Supreme Court') to hear appeals in Scottish cases, with a particular focus on two aspects of that jurisdiction:

- The Supreme Court's power to hear civil and criminal cases in **which human rights issues** under the European Convention on Human Rights ('the Convention') arise. The Supreme Court serves as the final court of appeal in such matters (the European Court of Human Rights in Strasbourg will only consider such cases when applicants have exhausted all domestic remedies in their own state).
- The changes to the Supreme Court's jurisdiction, first, in Scottish **criminal cases** as a result of the Scotland Act 2012 ('the 2012 Act') which ensured that the High Court of Justiciary retained the power ultimately to resolve cases once the Supreme Court has determined the legal question at issue¹ and, second, by the Courts Reform (Scotland) Act 2014 which introduced a requirement to obtain permission to appeal in civil cases².

2. The Supreme Court's jurisdiction in civil appeals and criminal appeals

The Supreme Court is the highest court of appeal in relation to Scottish **civil cases**. Until 2015, civil appeals came to the Supreme Court as of right,³ subject to certification by two counsel that the notice of appeal is reasonable.⁴ Where the Court of Session pronounces judgment on or after 22 September 2015, an Appellant must obtain permission to appeal from that Court or in certain cases, if permission is refused, from the Supreme Court. Civil appeals may involve the determination of an issue of human rights law, which may be in the form of a 'devolution issue'.

In Scottish **criminal cases**, the High Court of Justiciary sitting as an appeal court is the final court of appeal. Its decisions are not subject to review by the Supreme

¹ The Scotland Act (Commencement No.3) Order 2013

² Court of Session Act 1988, section 40 as amended by, and section 40A inserted by, The Courts Reform (Scotland) Act 2014, section 117.

³ Court of Session Act 1988 section 40, as amended by the Constitutional Reform Act 2005.

⁴ Supreme Court Practice Direction 4, *Notice of Appeal*, para 4.2.2

Court,⁵ which reflects Scotland's distinctive tradition of criminal law and procedure. However, there is one limited exception to this rule: the Supreme Court may consider 'devolution issues' arising in Scottish criminal cases. Some devolution issues arising in criminal cases have now become 'compatibility issues' under the 2012 Act. However, it remains the case that the Supreme Court may not review the decisions of the High Court simply on matters of Scots criminal law.⁶

3. 'Devolution Issues' under the Scotland Act 1998

i. 'Devolution Issues'

The Scotland Act 1998 ('the 1998 Act') created a right of review for the Judicial Committee of the Privy Council in relation to 'devolution issues'. This jurisdiction was transferred to the Supreme Court upon the court's creation in 2009.⁷ 'Devolution issues' may arise in civil or criminal cases, though some of what were previously devolution issues in criminal cases have now become compatibility issues under the 2012 Act. The list of devolution issues in paragraph 1 of Schedule 6 to the 1998 Act includes the following:⁸

(i) a question whether an Act of the Scottish Parliament ('ASP') or a provision of an ASP is within the legislative competence of the Scottish Parliament.⁹ An ASP or a provision of an ASP will be outside that competence, and therefore not law, so far as it relates, among other things, to matters reserved for the UK Parliament, or where it is incompatible with any Convention right or with EU law.¹⁰

(ii) a question whether an act by a member of the Scottish Government is or would be within devolved competence.¹¹

(iii) a question whether an act or failure to act by a member of the Scottish Government is or would be incompatible with EU law or any of the Convention rights.¹²

In relation to (i), in so far as any court finds a provision of an ASP to be outside the legislative competence of the Scottish Parliament, that provision is 'not law'.¹³ In relation to (iii), a member of the Scottish Executive has 'no power' to do any act where to do so is incompatible with any of the Convention rights or with EU law.¹⁴

ii. The Supreme Court's jurisdiction

A party may appeal against a determination of a devolution issue by the Court of Session¹⁵ or the High Court of Justiciary¹⁶ sitting in their appellate capacities in civil and

⁵ s.124(2) Criminal Procedure (Scotland) Act 1995

⁶ Criminal Procedure (Scotland) Act 1995, section 124(2); *Fraser v HM Advocate* [2011] UKSC 24

⁷ Constitutional Reform Act 2005, section 40(4)(b)

⁸ Scotland Act 1998, Schedule 6 para 1

⁹ Scotland Act 1998, Schedule 6 para 1(a)

¹⁰ Scotland Act 1998, section 29(2)

¹¹ Scotland Act 1998, Schedule 6 para 1(c)

¹² Scotland Act 1998, Schedule 6 para 1(d)-(e)

¹³ Scotland Act 1998, section 29(1)

¹⁴ Scotland Act 1998, section 57(2)

¹⁵ Scotland Act 1998, schedule 6 paras 12, 13(b)

¹⁶ Scotland Act 1998, schedule 6 para 13(a)

criminal cases respectively. Such an appeal requires permission from those courts, failing which, permission of the Supreme Court.¹⁷ The devolution issue must be seriously arguable and sufficiently important to justify a hearing of the appeal by the Supreme Court.¹⁸

The Court of Session¹⁹ or the High Court of Justiciary²⁰ may also refer a devolution issue which arises in proceedings before them to the Supreme Court. Further, the Lord Advocate, the Attorney General or the Advocate General may require any court to refer to the Supreme Court any devolution issue which has arisen in proceedings before it to which he is a party.²¹

4. Human Rights – civil cases

The Supreme Court's jurisdiction in respect of devolution issues only partly accounts for its jurisdiction to hear Scottish civil cases concerning issues of human rights law. Cases appealed from the Court of Session to the Supreme Court may raise issues under the Human Rights Act 1998 ('HRA') as well as under the 1998 Act.

A human rights challenge to a provision of an ASP on the ground that it is outside the legislative competence of the Scottish Parliament would be an example of the latter and may be brought by way of judicial review, which is a civil procedure.²² On the other hand, a human rights challenge to the acts of the police, for example, would not be a devolution issue because the police are not part of the Scottish Government. Such a challenge would be made under the HRA rather than the 1998 Act,²³ and can be appealed to the Supreme Court.

Other civil cases involving constitutional matters or public administration may concern the common law or statutory rights of individuals as against central, devolved or local government, but may not raise issues under the Convention at all.²⁴

5. Human rights – criminal cases

i. The position under the 1998 Act – 'devolution issues'

Where devolution issues have arisen in criminal cases, this has most frequently been where an act or acts of the Lord Advocate, who is in charge of criminal prosecution and the investigation of deaths in Scotland, are said to have infringed Article 6(1) of the

¹⁷ Scotland Act 1998, schedule 6 para 13. However, where the Inner House of the Court of Session determines a devolution issue following a reference from a lower Scottish court, a party may appeal against that determination as of right: Scotland Act 1998, schedule 6 para 12.

¹⁸ *Fraser v HM Advocate* [2011] UKSC 24, para 12. This is consistent with the approach of the European Court of Human Rights that an alleged violation should attain a minimum level of severity to warrant consideration by an international court: ECtHR Practical Guide on Admissibility Criteria, para 82.

¹⁹ Scotland Act 1998, schedule 6 para 10

²⁰ Scotland Act 1998, schedule 6 para 11

²¹ Scotland Act 1998, schedule 6 para 33

²² E.g. *AXA General Insurance Ltd and others v The Lord Advocate and others* [2011] UKSC 46

²³ E.g. in *Ruddy v Chief Constable, Strathclyde Police and another*,²³ in which the Appellant brought a claim against the police under Article 3 of the Convention.

²⁴ E.g. in *RM v Scottish Ministers* [2012] UKSC 58, the appellant, who was detained under mental health legislation, asserted that the Scottish Ministers had breached a statutory duty by failing to enact regulations defining the class of detained patients who would gain a right of appeal against the level of security in which they were detained. The case was decided by established principles of public law which did not concern human rights.

Convention, which protects the right to a fair trial. Such complaints give rise to devolution issues because the Lord Advocate is a member of the Scottish Government.²⁵

Prior to its being amended by the 2012 Act, the 1998 Act provided that the Lord Advocate had no power to do any act that was incompatible with Convention rights, including in the course of a criminal prosecution.²⁶ An act of the Lord Advocate in breach of a Convention right, including Article 6(1), was a nullity and a court had no discretion as to the appropriate judicial remedy. It is this aspect of the system provided for by the 1998 Act that had given rise to difficulty.²⁷ The 2012 Act altered this position, effective from 22 April 2013.²⁸

ii. The position under the 2012 Act – ‘compatibility issues’

There is now a specific statutory right of appeal to the Supreme Court in Scottish criminal cases where a ‘compatibility issue’ arises.²⁹ A compatibility issue is either (1) a question whether a public authority has acted or proposes to act³⁰ in a way that is incompatible with any Convention right or EU law or (2) a question whether an ASP or a provision of an ASP is incompatible with any of the Convention rights or EU law.³¹ In relation to (1), the Lord Advocate is a public authority,³² and therefore his acts in the course of criminal prosecutions may be subject to the right of appeal. A court, too, is a public authority³³. So a complaint that it has acted in the course of criminal proceedings in a way that is incompatible with the Convention rights or EU law could also come before the Supreme Court as a compatibility issue.

A party requires the permission of the High Court of Justiciary to appeal the determination of a compatibility issue to the Supreme Court, failing which the permission of the Supreme Court.³⁴ Permission must be sought from the High Court of Justiciary within 28 days of its determination, and the Supreme Court’s permission must be sought within the same time period following refusal of permission by the High Court.³⁵ A compatibility issue can also be referred to the Supreme Court by the High Court of Justiciary sitting as an Appeal Court³⁶, or the Lord Advocate or Advocate General if they are party to criminal proceedings before the High Court of Justiciary sitting as an Appeal Court.³⁷

This right of appeal replaces the legal mechanism by which appeals before 22 April 2013 concerning devolution issues arose in criminal proceedings insofar as they concerned the compatibility with Convention rights or EU law of ASP provisions or executive acts.³⁸

²⁵ Scotland Act 1998 section 44(1)(c)

²⁶ Scotland Act 1998, section 57(2)

²⁷ The decision in *Cadder v HM Advocate* [2010] UKSC 43 and its consequences provide the prime example.

²⁸ The Scotland Act (Commencement No.3) Order 2013

²⁹ Criminal Procedure (Scotland) Act 1995, sections 288AA(1) and 288ZA(2), as inserted by the Scotland Act 2012, sections 36(6) and 34(3) respectively.

³⁰ References to acting include failing to act: Criminal Procedure (Scotland) Act 2012, section 288ZA(3)(b), as inserted by the Scotland Act 2012, section 34(3)

³¹ Criminal Procedure (Scotland) Act 1995, section 288ZA(2), as inserted by the Scotland Act 2012, section 34(3)

³² Criminal Procedure (Scotland) Act 1995, section 288ZA(3)(a) as inserted by the Scotland Act 2012 section 34(3); and the Human Rights Act 1998, section 6(3)(b)

³³ Human Rights Act 1998, section 6(3)(a)

³⁴ Criminal Procedure (Scotland) Act 1995, section 288AA(5) as inserted by the Scotland Act 2012, section 36(6).

³⁵ Criminal Procedure (Scotland) Act 1995, section 288AA(7)(a),(8)(a) as inserted by the Scotland Act 2012, section 36(6)

³⁶ Criminal Procedure (Scotland) Act 1995, section 288ZB(3)-(4), as inserted by the Scotland Act 2012, section 35

³⁷ Criminal Procedure (Scotland) Act 1995, section 288ZB(5), as inserted by the Scotland Act 2012, section 35

³⁸ Scotland Act 1998, Schedule 6 para 1 as amended by the Scotland Act 2012, section 36(4)

However, devolution issues can still arise in criminal proceedings after 22 April 2013 in relation to a question whether a provision of an ASP or an act of the Scottish Government relates to a reserved matter.³⁹ The time limit within which an application for permission must be made to the High Court or the Supreme Court in respect of appeals raising devolution issues has been reduced to 28 days from the date of the decision of the High Court that is in question or the date on which the High Court of Justiciary refused leave to appeal respectively.⁴⁰

iii. The position under the 2012 Act: the powers of the Supreme Court when determining a compatibility issue

The Supreme Court may only determine a compatibility issue (which it may reformulate as it feels is necessary in the interest of justice)⁴¹ and must subsequently remit proceedings to the High Court of Justiciary for the case to be concluded.⁴² This is relevant to two further changes made by the 2012 Act.

First, it is now provided that an act of the Lord Advocate which breaches Convention rights or EU law is no longer a nullity, allowing the High Court of Justiciary to make an appropriate order if a breach is found.⁴³ Secondly, where the Supreme Court decides in the course of determining a compatibility issue in a Scottish criminal case that a provision of an ASP is not within legislative competence, it will be for the High Court of Justiciary to make any order to remove or limit the retrospective effect of that decision or to suspend the effect of the decision to allow the defect to be corrected.⁴⁴ It was previously for the Supreme Court to decide whether to make such order and the content of that order.

However, it remains the case that a provision of an ASP will simply be ‘not law’ under section 29(1) of the 1998 Act, including in circumstances where it is successfully challenged by way of a compatibility issue in criminal proceedings.

6. Statistics as at 21 April 2013

i. Leave to Appeal to the Supreme Court

Between the transfer of jurisdiction to the Supreme Court in October 2009⁴⁵ and 21 April 2013, the Court dealt with 44 applications to appeal from Scottish criminal cases. In 11 of those, leave to appeal was granted by the High Court of Justiciary. The Supreme Court granted leave in 4, and refused leave in 29.

³⁹ This occurred in *Martin and Miller v HM Advocate* [2010] UKSC 10, where a provision stipulating the sentence for a road traffic offence was unsuccessfully challenged.

⁴⁰ Scotland Act 1998, Schedule 6 paras 13A and 13B as inserted by Scotland Act 2012, section 37

⁴¹ Criminal Procedure (Scotland) Act 1995, section 288AA(2), as inserted by the Scotland Act 2012, section 36(6)

⁴² Criminal Procedure (Scotland) Act 1995, section 288AA(3), as inserted by the Scotland Act 2012, section 36(6)

⁴³ Scotland Act 1998, section 57(3) as amended by the Scotland Act 2012, section 36(2)

⁴⁴ Scotland Act 1998, section 102(5A), as inserted by the Scotland Act 2012, section 3(b).

⁴⁵ Full statistics are not available for applications for leave to appeal to the JCPC prior to 2009.

ii. Cases heard by the Supreme Court

In the period between devolution in 1999 and 21 April 2013, a total of 36 Scottish criminal cases raising devolution issues have gone to a full hearing before the JCPC/Supreme Court. Of those, 18 were appeals with the leave of the High Court of Justiciary, 10 were appeals with leave given by the Supreme Court/JCPC, and 8 were references by the High Court of Justiciary or by a Law Officer. In 5 of the 10 cases where leave was given by the JCPC/Supreme Court, the appeal was refused.

The Supreme Court of the United Kingdom

May 2013

Appendix A: Flowchart of appeal route for criminal appeals from Scotland

