

Scottish Criminal Cases and the UK Supreme Court

Introduction

This note sets out the basis of the jurisdiction of the UK Supreme Court for dealing with devolution issues in Scottish criminal cases, and the means by which such cases may be brought before the Court. It then provides a brief analysis of the number and types of such cases that it has dealt with.

Devolution issues under the Scotland Act 1998 can also arise within civil proceedings. The general rule is that civil appeals come to the Supreme Court from the Court of Session as of right¹, subject to certification by two counsel that the notice of appeal is reasonable². Devolution issues in civil cases where there is no appeal to the Supreme Court³ can be appealed to the Supreme Court, but only with leave of the Court of Session or, failing such leave, with special leave of the Supreme Court itself⁴. This note does not cover civil cases⁵. It focuses solely on the Supreme Court's jurisdiction in respect of Scottish criminal cases.

Scottish criminal cases and the Supreme Court

Scotland has a distinctive tradition of criminal law and procedure. The High Court of Justiciary, sitting as an Appeal Court, is the final court of appeal in Scottish criminal cases and its decisions are not subject to review by any court whatsoever⁶. The only exception to that rule is in relation to 'devolution issues' under the Scotland Act 1998⁷. The Scotland Act 1998 creates a limited right of review for the Supreme Court in relation to criminal cases in which a devolution issue arises because it is said that an act which is or would be incompatible with Community law or any of the Convention rights is proposed or is alleged to have occurred, or that legislation which the court is asked to apply is outside the legislative competence of the Scottish Parliament⁸.

Section 29(2) of the Scotland Act provides that a provision in an Act of the Scottish Parliament is outside the Parliament's legislative competence if it is incompatible with any of the Convention rights or with Community law. Section 57(2) of the Scotland Act provides that a member of the Scottish Executive has no power to do any act so far as it is incompatible with any of the Convention rights or with Community law.

By virtue of section 44(1)(c) of the Scotland Act, the Lord Advocate is a member of the Scottish Executive. He fulfils a dual role as both a member of the Scottish Executive

¹ Court of Session Act 1988, section 40, as amended by the Constitutional Reform Act 2005.

² Supreme Court Practice Direction 4, *Notice of Appeal*, para 4.2.2.

³ eg decisions of the Court of Session on appeals from the Scottish Land Court or under Part II of the Children Act 1995.

⁴ Scotland Act 1998, Schedule 6, para 13(b).

⁵ The only civil devolution case that has reached the JCPC/Supreme Court to date was one that did not require leave: *A v Scottish Ministers* 2002 S.C (P.C.) 63.

⁶ Criminal Procedure Scotland Act 1995, section 124(2).

⁷ See the list of devolution issues in the Scotland Act 1998, Schedule 6, para 1.

⁸ Scotland Act 1998, Schedule 6, para 13(a).

and head of the systems of criminal prosecution and investigation of deaths. As a consequence of section 57(2) he has no power to do any act in the course of a criminal prosecution that is incompatible with the Convention rights.

Section 57(2) has been construed widely to encompass all actions taken or avoided in the prosecution of offences⁹. This means that the Lord Advocate has no power to move the court to grant any remedy which would be incompatible with the Convention rights¹⁰. The effect is that, if an action of the Lord Advocate is deemed to breach any of the Convention rights such as the right to a fair trial, it is a nullity. It is not just unlawful, as would be the case if the challenge were brought under the Human Rights Act¹¹. That would be the case if the prosecution was brought in England, where the devolution jurisdiction does not apply. The court has a discretion under the Human Rights Act as to the appropriate judicial remedy in relation to an act which finds to be unlawful¹². A court has no discretion under the devolution system if, as the Scotland Act requires it to do, it holds that the act is a nullity. It is this aspect of the system provided for by the Scotland Act that has given rise to difficulty¹³.

A question whether an Act of the Scottish Parliament is within the legislative competence of the Parliament or any act or failure to act by the Lord Advocate is, or would be, incompatible with the Convention rights, is termed a 'devolution issue'¹⁴. The Judicial Committee of the Privy Council was granted jurisdiction in respect of devolution issues in May 1999. Its jurisdiction was transferred to the Supreme Court in October 2009¹⁵.

The jurisdiction of the Supreme Court

Schedule 6 of the Scotland Act 1998 provides for the various means by which a devolution issue may come before the Supreme Court.

Appeals:

- A party may appeal to the Supreme Court against a determination of a devolution issue by a court of two or more judges in the High Court of Justiciary¹⁶. Such an appeal requires the leave of that court, failing which special leave of the Supreme Court.

The general rule that applies to appeals to the Supreme Court in cases from England and Wales and Northern Ireland that the case must raise an arguable point of law of general public importance that ought to be considered by the

⁹ *HMA v Robb* 2000 JC 127.

¹⁰ *HMA v Scottish Media Newspapers Ltd*, 2000 SLT 331.

¹¹ Human Rights Act 1998, section 6(1).

¹² *Ibid*, section 8.

¹³ The decision in *Cadder v HM Advocate* [2010] UKSC 43, 2011 SC (UKSC) 13 and its consequences provide the prime example.

¹⁴ Scotland Act 1998 Schedule 6, para 1.

¹⁵ Constitutional Reform Act 2005, section 40(4)(b).

¹⁶ Scotland Act 1998 Schedule 6, para 13.

Supreme Court at that time¹⁷ does not apply to appeals in devolution cases, from whichever jurisdiction they may come. But they must raise a devolution issue that is seriously arguable and is sufficiently important to justify a hearing of the appeal by the Supreme Court¹⁸.

References:

- Any court consisting of two or more judges of the High Court of Justiciary may refer any devolution issue arising in proceedings before it to the Supreme Court¹⁹.
- The Lord Advocate, the Attorney General or the Advocate General may also require any court to refer to the Supreme Court any devolution issue which has arisen in proceedings before it to which he is a party²⁰.

The statistics

The statistics indicate that the number of cases in which the Supreme Court has dealt with devolution issues in Scottish criminal case is in fact comparatively low. Similarly, of the applications to appeal submitted to the Supreme Court, only a small number have been granted leave by that court. In the majority of the cases where leave was required leave was granted by the High Court of Justiciary in Edinburgh.

Leave to appeal to the Supreme Court

Since the transfer of jurisdiction to the Supreme Court in October 2009²¹, the Court has dealt with 31 applications to appeal from Scottish criminal cases. In 7 of those, leave to appeal was granted by the High Court of Justiciary. The Supreme Court granted leave in 4, and refused leave in 20.

Cases heard by the Supreme Court

In the period since devolution in 1999 a total of 29 Scottish criminal cases raising devolution issues have gone to a full hearing before the JCPC/Supreme Court. Of those, 14 were appeals with the leave of the High Court of Justiciary, 9 were appeals with leave given by the Supreme Court/JCPC, and 6 were references by the High Court of Justiciary or by Lord Advocate. In 4 of the 9 cases where leave was given by the Supreme Court, the appeal was refused.

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¹⁷ Supreme Court Practice Direction 3, *Applications for Permission to Appeal*, para 3.3.3. There is no counterpart to that direction in Supreme Court Practice Direction 10, *Devolution Jurisdiction*.

¹⁸ *Fraser v HM Advocate* [2011] UKSC 24, 2011 SLT 515, para 12. This is consistent with the approach of the European Court of Human Rights that the alleged violation should attain a minimum level of severity to warrant consideration by an international court: ECtHR Practical Guide on Admissibility Criteria, para 382.

¹⁹ Scotland Act 1998 Schedule 6, para 11.

²⁰ Scotland Act 1998 Schedule 6, para 33.

²¹ Full statistics are not available for applications for leave to appeal to the JCPC prior to 2009.