

## SUBMISSION BY THE JUDICIARY IN THE COURT OF SESSION

### **The operation of section 57(2) and Schedule 6 of the Scotland Act 1998 and related matters**

1. The operation of section 57(2) and Schedule 6 of the Scotland Act 1998 and related matters were the subject of discussion at a meeting of the judges of the Court of Session held on 30 June 2008. On that occasion, general agreement emerged that certain problems existed in relation to the foregoing matters, which ought to be addressed. In that situation, it was agreed that a written representation describing these problems should be submitted on behalf of the judiciary in the Court of Session to the Calman Commission. The present document constitutes that representation. At the meeting referred to, while there was agreement that problems existed, there was no general agreement as to a solution to these problems. In those circumstances, all that can be done in the present document is for an indication to be given of several possible ways of dealing with the problems, without commending any particular one.

### **The Statutory Background**

2. Section 57(2) of the Scotland Act 1998 provides:

“(2) A member of the Scottish Executive has no power...to do any other act, so far as the...act is incompatible with any of the Convention rights or with Community law.”

The membership of the Scottish Executive is defined by section 44(1) of the 1998 Act. It provides:

- “(1) There shall be a Scottish Executive, whose members shall be –
- (a) the First Minister
  - (b) such Ministers as the First Minister may appoint under section 47, and
  - (c) the Lord Advocate and the Solicitor General for Scotland.”

It is also relevant to note the provisions of section 48(5) of the 1998 Act, which deals with the position of the Lord Advocate. It provides:

“(5) Any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person.”

3. If it is contended that some particular act of the Lord Advocate, as a member of the Scottish Executive, is incompatible with any Convention right, then the provisions of Schedule 6 to the 1998 Act come into play. That Schedule deals with Devolution Issues. In paragraph 1 the expression “Devolution Issue” is defined as meaning any one of the several questions set out in the paragraph. For present purposes, only sub-paragraph (d) need be noted. It is in these terms:

“(d) A question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights or with Community law.”

The succeeding paragraphs of Schedule 6 in Part II apply in relation to Devolution Issues in proceedings in Scotland. They allow for the raising and the determination of Devolution Issues in proceedings before a court or tribunal, the reference of a Devolution Issue to a higher court, references from superior courts to the Judicial Committee of the Privy Council, and appeals against the determination of Devolution Issues by the Inner House of the Court of Session, or a court of two or more judges of the High Court of Justiciary, to the Judicial Committee. In terms of paragraph 12 of Schedule 6, such appeals lie to the Judicial Committee, only with leave of the court concerned, or, failing such leave, with special leave of the Judicial Committee. The effect of all of the foregoing statutory provisions is that the purported or proposed exercise of a function by the Lord Advocate in her capacity as head of the Scottish system of criminal prosecution may be the subject matter of a Devolution Issue, which may be the subject of appeal to the Judicial Committee of the Privy Council. Such an appeal may take place before the conclusion of the criminal proceedings in which the Devolution Issue is raised, which has the effect of holding up their progress until the determination of the appeal.

4. As regards procedure for the raising of Devolution Issues, and related matters, paragraph 37 of Schedule 6 confers power to make appropriate provisions upon the normal authority which has responsibility for regulating the procedure before any court or tribunal. In the case of the High Court of Justiciary, this power has been exercised, as a result of which Chapter 40 of the Act of Adjournment (Criminal Procedure Rules) 1996 has been enacted. As regards the timing of the raising of a Devolution Issue, Rules 40.2 and 40.5 have effect.

#### **Is there a problem?**

5. In relation to the question of whether the operation of the foregoing provisions is or is not satisfactory, it is appropriate to take account of several factors. First, a Devolution Issue is raised and then decided, not automatically, but only if some party to the proceedings takes appropriate and timely steps to do so. Frequently, of course, they do just that. However, sometimes, through neglect, inadvertence, or misjudgement, a Devolution Issue which could be raised is not raised. Sometimes a party may endeavour to raise a Devolution Issue outwith the time prescribed in Chapter 40 of the Act of Adjournment. If that occurs, it is for the court to decide whether cause has been shown as to why the issue should be allowed to be raised late. The decision of the court in that regard will inevitably depend upon the particular circumstances of the case. Thus, in short, in any particular case, whether a Devolution Issue is in fact raised will depend, not solely upon the inherent features of the case themselves, but partly on those features and also on the avoidance of the other factors to which reference has been made, that is to say, neglect, inadvertence, misjudgement or lateness in acting. Having regard to the important consequences that may attach to the proper raising of a Devolution Issue, that situation may not be regarded as satisfactory.
6. Second, when a Devolution Issue is properly raised, it will, in most cases be determined by a court in Scotland at first instance, or on appeal. Following determination on appeal, the issue of a further appeal to the Judicial Committee of the Privy Council arises under paragraphs 12 and 13 of Schedule 6. Whether such an appeal can be taken depends upon leave being granted, either by the court in Scotland, or in the form of special leave by the Judicial Committee itself.

7. Since the coming into force of the Human Rights Act 1998 and particularly section 6 thereof, both the court in Scotland and the Judicial Committee of the Privy Council, as public authorities, are bound to act compatibly with Convention rights. It might therefore be thought that there ought to be no serious difference in approach as between the court and the Judicial Committee in determining such issues and associated matters. Unfortunately, in practice, that has not proved to be the case. The perception is that the explanation for this state of affairs lies in the different responsibilities of the courts in Scotland and the Judicial Committee. The courts in Scotland must apply the common and statutory law of Scotland, as well as respecting the requirements of section 6 of the Human Rights Act 1998. The Judicial Committee, on the other hand, in the context under discussion, is concerned only with the narrower issue of the compliance or otherwise of an act, or contemplated act, of the Lord Advocate with Convention rights.
8. An example may illustrate the problem. Under section 106 of the Criminal Procedure (Scotland) Act 1995 a person convicted on indictment may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage based on:
  - “(a) Subject to subsection (3A)-(3D) below, the existence and significance of evidence which was not heard at the original proceedings.”

Section 106(3A) provides:

“Evidence such as is mentioned in subsection 3(a) above may found an appeal only where there is a reasonable explanation of why it was not so heard.”

As regards appeals based upon what may be called fresh evidence, there is a long line of authority going back at least to *Cameron v Her Majesty's Advocate* 1991 J.C. 251 (where the Court was presided over by Lord Justice General Emslie) and culminating in *Al Megrahi v Her Majesty's Advocate* 2002 J.C. 99 (a Court of five judges). In the latter case, Lord Justice General Cullen summarised the approach that had to be adopted in relation to fresh evidence, in six clearly expressed paragraphs set forth at paragraph [219] of the Opinion of the Court.

It is evident from the statutory structure which has been outlined above and the passage referred to that there are several requirements and qualifications that have to be observed before a conviction can be disturbed by the criminal appeal court upon the basis of fresh evidence. Where no devolution issue arises the decision of the High Court sitting as a court of appeal is final.

9. In a substantial number of appeals taken since 1999 appellants have contended that the Lord Advocate has failed to disclose material evidence and that that failure has resulted in an unfair trial in breach of Article 6 of the European Convention. That contention raises a devolution issue, which can be and, on a number of occasions, has been pursued as far as the Judicial Committee. Although it might be thought that there should be some relationship between the consequences of the emergence of fresh evidence, however that arises, and the consequences of the emergence of fresh evidence which the Lord Advocate has failed to disclose, there was no discussion in the Privy Council of the line of authority referred to in paragraph [8] above – see *Holland v Her Majesty's Advocate* 2005 S.C. (P.C.) 3 and *Sinclair v Her Majesty's Advocate* 2005 S.C. (P.C.) 28.
10. Assuredly there has developed a conflict between the statutory provisions of section 103(3) and (3A) of the 1995 Act and the approach to fresh evidence developed in the

foregoing authorities, on the one hand, and the approach of the Judicial Committee to evidence not disclosed by the Crown on the other. The latter have apparently developed a different test in relation to undisclosed material, as appears from, particularly, the observations of Lord Rodger of Earlsferry in paragraphs [82] and [83] of his Opinion in *Holland v Her Majesty's Advocate*.

11. The significance of this difference of approach is highlighted by the fact that, if the Judicial Committee conclude that there has been a denial of a fair trial under Article 6(1) of the Convention, they consider that they are empowered to quash the associated conviction themselves under Article 4(1)(a) of the Judicial Committee (Powers in Devolution Cases) Order 1999 (S.I. 1999/1320), in association with the provisions of section 118 of the 1995 Act, which defines the powers of the High Court of Justiciary in an appeal under section 106 of the 1995 Act. On that view the Judicial Committee do not themselves require to be concerned directly with the concept of "miscarriage of justice", the only criterion on which the High Court of Justiciary may quash a conviction.
12. In the light of what has been said, we would argue that there are therefore two jurisdictions, the exercise of either of which may result in the quashing of a conviction, in which different criteria may be applied, in particular, in relation to evidence not heard at a trial, yet one of those jurisdictions, that of the Judicial Committee, can be invoked only if certain procedural steps have been timeously taken, which they may not have been, for wholly arbitrary reasons. If the question is asked whether this is a satisfactory situation, one is driven to conclude that it is not. Accordingly, in summary, the present statutory arrangements, described above are not operating in a satisfactory manner.
13. But matters do not rest there. It is far from clear that the framers of the Scotland Act 1998 envisaged that devolution issues would be raised in prosecutions to anything like the extent to which they have. Speaking generally about the effect of human rights on the criminal law of Scotland a book reviewer has recently observed: "The constant churning of thousands of cases over long periods of time with a torrent of crucial debates, and all while waiting for some critical decision from a higher court elsewhere, remains an unrecorded history" (2008 SLT (News) 182). While the Human Rights Act 1998 may have been expected to raise a number of human rights issues, the facility provided by section 57(2) of the Scotland Act, to challenge by way of devolution minute virtually any act of a prosecutor has led to a plethora of disputed issues, with consequential delays to the holding of trials and to the hearing and completion of appeals against conviction. The jurisdiction of the Judicial Committee, while by no means the only factor, has arguably created, or at least has substantially contributed to, delay in the handling of criminal business.

### **What can be done about the problem?**

14. For the reasons already indicated, we are not in a position to suggest any particular solution to the problem. However, it may be helpful to indicate that there might be several solutions, some of which we describe below. It may be that there are others. First, the Lord Advocate's acts in her capacity as head of the system of criminal prosecution in Scotland could be expressly excluded from the operation of section 57(2) of the Scotland Act 1998. Such a change would require United Kingdom legislation. If that course were taken, the position in Scotland would be brought into line with what is understood to be the position in England, Wales and Northern Ireland, to the extent that the Lord Advocate would be placed in a position equivalent to that of the Director of

Public Prosecutions in England and Wales, whose decisions are not subjected to any counterpart of section 57(2) of the Scotland Act 1998. Of course, the Lord Advocate would still require to respect the provisions of section 6 of the Human Rights Act 1998, as would the court. In this connection it is interesting to note the comments of Sir Gerald Gordon on the situation, in his commentary on *Fraser v Her Majesty's Advocate* 2008 S.C.C.R. 407 at page 468E. Second, the position of the Lord Advocate could be changed, so that she might remain as a full member of the Scottish Executive, but her responsibilities as the public prosecutor could be transferred to an independent "Director of Public Prosecutions" in Scotland, who would be responsible for the prosecution system, but who would not be a member of the Scottish Executive. Such a change would rob the Lord Advocate of most of her functions, but would leave the Scottish Executive with a Lord Advocate who was a general legal advisor to the Executive. Again, such a change as that would render the position in Scotland more akin to that currently existing in England and Wales. The consequence of either of these possible changes would be that the particular kind of litigation to which reference has been made, under paragraph 13 of Schedule 6 to the Scotland Act 1998 would come to an end in criminal cases.

15. A third possibility might be that there could be introduced a general right of appeal in criminal matters from the criminal appeal court in Scotland, no doubt with leave, to the Judicial Committee, or, as it will soon be, the Supreme Court. That court would then be faced directly with the responsibility of reconciling the different approaches adopted hitherto in relation to, for example, fresh evidence. Legislation to that end would almost certainly require to be of the United Kingdom parliament. A change of such a radical nature would be likely to generate considerable controversy. However, it would put the criminal appeal court in Scotland on the same footing as the court of appeal in England and Wales in relation to criminal matters.
16. As was indicated at the outset of these representations, there is no agreement between members of the judiciary as to which of the possibilities mooted ought to be adopted and, accordingly, none of them can be commended by us.

Michael Anderson  
Legal Secretary to the Lord President  
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