FIRST REPORT OF REVIEW GROUP
- APPENDIX AND SUPPLEMENT

EXAMINATION OF THE RELATIONSHIP BETWEEN THE HIGH COURT OF JUSTICIARY AND THE SUPREME COURT IN CRIMINAL CASES

Group members : Lord McCluskey (Chair), Sir Gerald Gordon, Sheriff Charles Stoddart and Professor Neil Walker.
APPENDIX

The following is a selective list of materials considered by the review group in producing their interim report:

Advocate General for Scotland, consultation paper *Devolution Issues and acts of the Lord Advocate* and the Expert Group


2. Advocate General's informal consultation - Consultation Responses
   - Aidan O’Neill Q.C.
   - Cabinet Secretary for Justice
   - Equality and Human Rights Commission
   - Faculty of Advocates
   - Iain Jamieson, former legal adviser to the Scottish Office and the Scottish Executive
   - Judiciary in the Court of Session and the High Court of Justiciary
   - Justice
   - Law Society of Scotland (Constitutional Law Sub-Committee)
   - Lord Advocate
   - Lord Hope of Craighead
   - Professor Alan Page, University of Dundee
   - Roy Martin Q.C.
   - Scottish Human Rights Commission
   - Scottish Law Commission
   - Sheriffs’ Association
   - Sheriff Kenneth Maciver
   - Tony Kelly, Solicitor and Visiting Professor of Human Rights, University of Strathclyde

3. First Minister's letter to the Advocate General concerning Cadder case - 9 October 2010

4. Report of Expert Group appointed by the Advocate General, *Section 57(2) and Schedule 6 of the Scotland Act 1998 and the Role of the Lord Advocate*

5. Advocate General's response to the Expert Group Report

2011 Scotland Bill material

6. Scotland Bill, [as amended in Committee], clause 16 [restating the time bar in section 100 of the Scotland Act 1998]


10. Scottish Parliament Committee on the Scotland Bill – Report, Extracts

11. Advocate General’s consultation on Draft clauses for Scotland Bill – 8 March 2011

12. Advocate General’s consultation on draft Clauses - Advocate General’s Press Release

13. Advocate General’s consultation on draft Clauses - Advocate General’s Summary of Responses

14. Scottish Government response to Advocate General’s consultation on draft Clauses

15. Lord Advocate response to Advocate General’s consultation on draft Clauses

16. Law Society response to Advocate General’s consultation on draft Clauses

17. Faculty of Advocates response to Advocate General’s consultation on draft Clauses

18. JUSTICE response to Advocate General’s consultation on draft Clauses

19. Scottish Human Rights Commission response to Advocate General’s consultation on draft Clauses

20. Richard Baker MSP response to Advocate General’s consultation on draft Clauses

21. Legislative Consent Motion passed by the Scottish Parliament on 10 March 2011

22. Scotland Bill as amended 16 March 2011

23. Amendments to Scotland Bill in relation to the Advocate General’s consultation

24. Scotland Bill as amended by the Commons and sent to the Lords 22 June 2011

Cadder: before and after


26. Salduz v Turkey, ECtHR, 27 November 2008 (Appl. 36391/02)


28. Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (asp 15)


Legislation, Court rules and Practice notes

30. Criminal Appeals Act 1968 (c.19), (E&W) Extracts

31. The Supreme Court Rules 2009 (SI 2009/1603)

32. Supreme Court Practice Directions, in particular Practice Directions 1, 3, 9, 10
Selected case law from outside Scotland

34. *R v Horncastle* [2009] UKSC 14
35. Gelberg v Miller [1961] 1 W.L.R. 45
36. Jones v DPP [1962] 2 WLR 575
41. *R (on appl. of M (a child) v Metropolitan Police Commissioner* [2002] Crim. LR 215
43. *Assanidze v Georgia*, 8 April 2002, Appl. 71403/01


44. Scotland Bill – relevant Hansard debates (also see Supplement)
   i: Extract from HL Deb 28 October 1998, vol. 593, col. 1963 et seq (re constitutional court proposal);
   ii: Extract from HL Deb 28 October 1998, vol. 593, col. 2040 et seq (origin of section 57(3)).

45. Constitutional Reform Act 2005 – relevant Hansard debates (also see Supplement)
   i: Lord Cullen’s remarks in HL Deb 8 March 2004, vol 658, col 1073;
   ii: Extract from Constitutional Reform Bill Committee, First Report (HL 2003–04, 125–I) chapter 3;

46. Constitutional Reform Act 2005 - Legislative Consent Memorandum
47. Constitutional Reform Act 2005 - Scottish Parliament Official Record
   i: *SP OR J2 9 March 2004, col 587 et seq* (Justice 2 Cmt takes evidence from Lord Cullen);
   ii: *SP OR J2 16 March 2004, col 607 et seq* (evidence from Law Society of Scotland, Professor Hector MacQueen and the Faculty of Advocates);
   iii: *Justice 2 Committee 4th Report, 2004, Constitutional Reform Bill (SPP 163)*;
iv: SP OR J2 14 December 2004, col 1235 et seq (evidence from Colin Boyd QC);
v: Justice 2 Committee 1st Report, 2005, Constitutional Reform Bill (SPP 265);
vi: SP OR 19 January 2005, cols 13629 to 13650 (chamber debate on LCM).

48. Scotland Act 1978 (c.51), Schedule 12, Commentary on Schedule 12 by Cabinet Office Constitution Unit and Hansard debates on Scottish Law Officers-
   
   HC Deb 08 February 1978 vol 943 c562W
   HL Deb 10 May 1978 vol 391 cc1081-145 (see e.g. at col. 1130)
   HL Deb 08 June 1978 vol 392 cc1387-463 (discussion of a “Legal Secretary”)
   HL Deb 20 July 1978 vol 395 cc467-81

Calman Commission on Scottish Devolution

49. Calman Commission on Scottish Devolution, Report, Serving Scotland Better, paragraphs 5.29 to 5.37

50. Submission by the Judiciary in the Court of Session, 10 October 2008

Walker Report

51. Final Appellate Jurisdiction in the Scottish Legal System, Professor Neil Walker, January 2010

52. Alan Page, Final Appellate jurisdiction in the Scottish legal system: the end of the anomaly? 2010 Edin. LR 269

Extrajudicial and academic comment

53. Lord Hope of Craighead, Do we really need a Supreme Court?, Newcastle Law School - 25 November 2010

54. Lord Hope of Craighead, Taking the case to London - maybe it’s not over after all?, Edinburgh Centre for Commercial Law, 12 March 2011

55. Lord Hoffmann, The Universality of Human Rights, Judicial Studies Board Annual Lecture, 19 March 2009

56. Lord Bingham of Cornhill, evidence to the Westminster Joint Committee on Human Rights, 26 March 2001

57. JUSTICE Press Release, The UK Supreme Court has a Proper Role in Scottish Appeals, 31 May 2011

58. Policy Exchange Think Tank Report Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK with Foreword from Lord Hoffmann, February 2011
59. JL Jamieson-
   - ‘Relationship between the Scotland Act and the Human Rights Act’ 2001 SLT 43
   - ‘Relationship between the Scotland Act and the Human Rights Act: recent developments’ 2002 SLT 33
   - ‘The Somerville Case’ 2007 SLT 111
   - ‘Remedies under the Scotland Act: implications of Somerville’ 2007 SLT 289

60. Scottish Parliament Information Centre Briefing, The Supreme Court, 29 September 2009


Scottish criminal cases heard by the UK Supreme Court

63. Cadder v HMA [2010] UKSC 43
64. Martin & Miller v HMA [2010] UKSC 10
65. Mcllnes v HMA [2010] UKSC 7
67. UKSCblog

JCPC and other Scottish case law

69. Murtagh v HMA 2009 UKPC 35, 2009 SCCR 790
70. Burns v HMA 2008 UKPC 63, 2009 SCCR 127
72. McDonald v HMA, Dixon v HMA, Blair v HMA [2008] UKPC 46
73. Somerville v the Scottish Ministers [2007] UKHL 44
74. Spiers v Ruddy [2007] UKPC D2, 2008 SCCR 131
75. DS v HMA 2007 UKPC 36; 2007 SCCR 222
76. Robertson v Frame et al/ Ruddy & Ors [2006] UKPC D2, 2006 SCCR 151
77. Kearney v HMA 2006 SCCR 130
78. Holland v HMA, Sinclair v HMA 2005 SCCR 417 & 446
80. R v HMA 2003 SC (PC) 21
81. Montgomery v HMA 2001 SC (PC) 1
82. Brown v Stott 2001 SC (PC) 43
83. Mills v HMA (No. 2) 2002 UKPC D2, 2001 SLT 1359
Other legislative provisions (web versions may not be fully up to date)
84. Scotland Act 1998, see sections 28-36, Pt II, ss 98-103, Schedules 4, 5 and 6]
86. Constitutional Reform Act 2005, [Parts 1, 3 and 4 and relative Schedules]
87. Criminal Procedure (Scotland) Act 1995 (c.46)
88. Convention Rights Proceedings (Amendment) (Scotland) Act 2009 (asp 11)
90. Northern Ireland Act 1998
91. Act of Adjournal (Criminal Procedure Rules) 1996

Sewel Convention
92. The Sewel Convention - Legislative Consent Motions
93. Legislative Consent Memorandums, Scottish Parliament website
94. Devolution Guidance notes, including DGN 10 on “Sewel Convention”, Ministry of Justice website
SUPPLEMENT

The Supplement contains a note from Lord McCluskey on the changed role of the Law Officers and further Briefing Notes and material provided by officials assigned to the Review Group to assist the Group in producing their first report.

1. The Changed Role of the Scottish Law Officers – note by Lord McCluskey
2. Process for assessing whether to certify a point of law of general public importance
3. *R v Horncastle* – Order on the application for Leave to Appeal – certificate of public importance
4. Criminal Appeals to the Supreme Court from other UK jurisdictions
6. Process for Preliminary References to the ECJ
7. Strasbourg and the Exhaustion of Domestic Remedies
8. Extent of Strasbourg Powers to direct National Courts
9. Retrospection and ECHR article 6
10. Parliamentary Debates, Scotland Act/Human Rights Act
THE CHANGED ROLE OF THE SCOTTISH LAW OFFICERS - NOTE BY LORD MCCLUSKEY

1. Until the Scotland Act 1998 came into effect, the Scottish Law Officers (the Lord Advocate and the Solicitor General for Scotland) were ministers in the UK Government: they were chosen from the Scottish Bar and, usually, from the ranks of supporters of the political party that formed the government of the day. If the political character of the Government changed, the incoming Government appointed its own Law Officers.

2. The Lord Advocate’s functions in relation to criminal prosecutions and the investigation of deaths were regarded in a wholly different light from the functions of other ministers. There was no ministerial collective responsibility for the decisions of the Lord Advocate (or of his/her deputies, or the Procurator-Fiscal service) in relation to these functions. The Lord Advocate did not discuss criminal cases with other ministers; and was wholly independent of them in exercising these functions. The expression commonly used was that the Lord Advocate acted as a minister of justice: the better way to express the truth might be to say that he acted quasi-judicially when exercising these functions. In dealing with criminal prosecutions and deaths, there was a complete separation of powers between the Lord Advocate and other government ministers: he did not answer or account to the Prime Minister or anyone else in the Government for his decisions in criminal cases, including his participation in appeals.

3. The decision to make the Scottish Law Officers members of the Scottish Executive was not an inevitable consequence of Devolution. In the earlier Scotland Act (1978) these offices and the related functions in criminal matters were not to be devolved: the Scottish Law Officers were to remain ministers in the UK Government. This decision reflected the traditional reality, that the Lord Advocate should be clearly distanced from political ministers who were to exercise normal ministerial functions in the devolved matters.

4. If the same decision had been taken in 1998, not to devolve the Scottish Law Officers, then the provisions of sections 52-58 would not have applied to “acts of the Lord Advocate”; and the ‘Devolution Minute’ procedure would not have applied. The Lord Advocate would have been subject to the provisions of the Human Rights Act when it came into force. Different procedures would have enabled alleged violations of Article 6 by the Lord Advocate, and the prosecution service generally. Any such violations that were established would have been found to be unlawful.

5. Quite separately, the status of the Scottish Law Officers has changed very materially since 1998. When the new Scottish Executive was first formed the Lord Advocate who had held office under the UK Government was transferred personally with his staff and his prosecution functions to the Scottish Executive as provided for in Part II of the Act. He remained a member of the political party that led the governing coalition. However, section 48 (5) preserved his traditional independence by providing, “Any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and
6. By the time that the political character of the Scottish Executive changed in 2007, further changes had developed. The then Lord Advocate had been, at the time of her earlier appointment as Solicitor General, not a member of the Faculty of Advocates but a full-time career member of the Procurator-fiscal service. When she became Lord Advocate another former career member of the Procurator-Fiscal service was appointed Solicitor General. (Both Law Officers were later admitted to the Faculty of Advocates). It was also announced that they were to be seen not as political members of the Scottish Executive, but as professionals serving the Scottish Executive in a non-political role).

7. These changes did not alter the vitally important tradition that the Lord Advocate acts judicially and independently when exercising prosecution etc. functions. However, it is seems to be very likely that, had the Scottish Law Officers enjoyed in 1998 the very different status and role that they had acquired by 2011, these office-holders would not have been included in the list of ministerial office-holders covered by section 57(2); and the acts of the Lord Advocate in prosecution etc. matters would not have been made subject, in the Scotland Act 1998, and Rules made under it, to Devolution Minute procedure.

8. This is a further reason for accepting that the effect of the Scotland Act 1998 in the bringing of prosecution etc. acts of the Lord Advocate within the ambit of section 57(2) needs to be radically re-considered. No other public prosecutor in the UK is subject to such scrutiny by any similar means: it is clearly anomalous that Scotland’s prosecutor, who has a long-standing tradition of acting judicially and independently, should be the sole public prosecutor subjected to the vires form of scrutiny contained in the Scotland Act.


BRIEFING NOTE - PROCESS FOR ASSESSING WHETHER TO CERTIFY A POINT OF LAW OF GENERAL PUBLIC IMPORTANCE

Certification procedure

1. Appeals to the Supreme Court in England can be made from the High Court or Court of Appeal. An application for certification of the point of law of general public importance is made together with the application for permission/leave. An oral application for both can be made to the Court immediately at the hearing where the prosecution is unsuccessful. Failing that, a written application can be made within the 28 day period allowed from the date of the decision for seeking permission to appeal.

2. The application for permission to appeal must identify the point of law of general public importance involved in the decision that the appellant wants the court to certify (Criminal Procedure Rules 2010 (SI 2010/260 as amended), rule 74, r.74.2(2)(a)). It must also give reasons why the point of law should be considered by the Supreme Court, and why the Court of Appeal ought to give permission to appeal. A written application must be in the form set out in the relevant Practice Direction (r.74.2(5))

Application of the test of general public importance

3. It is difficult to obtain reliable information on grounds for grant or refusal of certificates, save by consideration of the points considered by the courts above, because when the Court of Appeal refuses a certificate, it is not the practice of the Court to give reasons for refusal. However, where the trial judge has passed a sentence within his or her discretion, no point of law of general public importance can arise for the purposes of an appeal against such a sentence. The points of law in criminal appeals heard by the Supreme Court (or one under the other statutory rights of appeal previously noted) on the substance of the points or considered for permission to appeal must of course have been granted a certificate. Views are also given in various specific substantive comments in the higher courts.

Effect of the certificate - seeking Supreme Court permission to appeal

4. An application for permission to appeal from the Supreme Court may not be filed without the certificate, unless it falls within the 3 exemptions in Supreme Court Practice Direction 12.2 (Briefing Note on Criminal Appeals to the Supreme Court).

1 This note draws on Halsbury’s Laws, Vol 28 Criminal Procedure (2010), para 834 et seq.
2 See Consolidated Criminal PD Annex D (Notice of Application for Permission to appeal to the Supreme Court) [2002] 3 All ER 904, [2002] Cr App Rep 533, CA, as amended)
4 R v Ashdown [1974] 1 All ER 800, 58 Cr App Rep 330, CA
5 At random, e.g. R v. Lambert (On Appeal From the Court of Appeal (Criminal Division)) [2001] UKHL 37, Lord Hope, para 47. R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192 as part of the test in granting a Protected Costs Order in a judicial review case.
The registry cannot issue any application for permission to appeal which is not accompanied by a certificate\(^6\).

*Certified point of law if permission granted*

5. If the appeal is granted, the Supreme Court is not confined to considering the question certified and matters related to that question – if in order to dispose of the appeal, it ought to consider other matters it will do so\(^7\). Where a certificate is given in relation to a conviction, the Supreme Court will not hear argument as to sentence\(^8\).

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\(^6\) Supreme Court PD 12.4.3


\(^8\) Jones v DPP [1962] AC 635 at 648, [1962] 1 All ER 569 at 573, HL, Viscount Simonds.
IN THE COURT OF APPEAL CRIMINAL DIVISION

REGINA v Michael Christopher HORNCastle
Criminal Appeal Office Ref. No.: 200801011 C2
Index No.: W6022
D.O.B.: 14.3.68
Indictment No.: T20067201

REGINA v Abilah MARQUIS
Criminal Appeal Office Ref. No.: 20083683 D1
Index No.: WA5184
D.O.B.: 19.8.78
Indictment No.: T20087016

REGINA v Joseph David GRAHAM
Criminal Appeal Office Ref. No.: 200804330 D1
Index No.: GD7894
D.O.B.: 19.2.81
Indictment No.: T20077577

ORDER ON THE APPLICATION
FOR LEAVE TO APPEAL TO THE HOUSE OF LORDS

THE COURT OF APPEAL CRIMINAL DIVISION having dismissed the appeals against conviction on 22 May 2009

THE COURT CONSIDERED the applications of the appellants for:-
(i) A certificate that a point of law of general public importance was involved in the decision
(ii) Leave to appeal to the House of Lords
(iii) Representation Order

AND HAS

1) Certified that a point of law of general public importance was involved in the decision to dismiss the appeals namely:-
   i. Do Article 6(3) and Article 6(3)(d) of the ECHR have the consequence that a conviction, in which hearsay evidence admitted under the Criminal Justice Act 2003 is the sole or decisive evidence, is necessarily unsafe?
   ii. Under Article 6(3) and Article 6(3)(d), (e) is the only case where such a conviction is safe one in which the hearsay evidence was admitted because the witness was in fear and if so, (b) what is the ambit of fear for this purpose? In particular is it limited to the case where the fear is engendered by the defendant and/or on his behalf?

2) Granted leave to appeal to the House of Lords;

3) Granted a Representation Order for one Queen's Counsel and one Junior Counsel to represent both Horncastle and Blackmore and one Queen's Counsel and one Junior Counsel to represent both Marquis and Graham and one firm of solicitors to act for all four appellants, for the purpose of the appeal to the House of Lords.

Counsel for Appellants: Michael Horncastle: Mr J Gilborn; David Blackmore: Miss J Reaney; David Carter: Mr K Hadilfi; Abilah Marquis: Mr J Beck; Joseph Graham: Mr S Smith QC
Counsel for Crown: Horncastle and Blackmore: Mr T Penny-Jones, Mr D Penny and Mr L Mably; Carter: Mr B Evans, Mr D Penny and Mr L Mably, Marquis and Graham: Mr S Lowne, Mr D Penny and Mr L Mably

The Appellants were in custody and were not present

[Signature]
The Registrar
Date: 22 May 2009
Criminal Appeal Office, Royal Courts of Justice
Strand, London WC2A 2LL

[Form L318]
Background

1. From 1 October 2009 the jurisdiction of the Judicial Committee of the House of Lords in relation to criminal appeals in England & Wales has been exercised by the UK Supreme Court with the coming into force of paragraphs 13 and 16 of Schedule 9 to the Constitutional Reform Act 2005. Appeals to the Supreme Court can be made from the Court of Appeal or Administrative Court, and references to the House of Lords in the Administration of Justice Act 1960 and the Criminal Appeal Act 1968, and in other legislation which conferred a right of appeal to the House of Lords in criminal proceedings and related matters, have been amended to refer to the Supreme Court.

2. The general rights of appeal for the Crown and defendants are contained in section 1(1) of the Administration of Justice Act 1960 and section 33(1) of the Criminal Appeal Act 1968. No appeal lies except with the leave of the High Court/Court of Appeal or of the Supreme Court, and applications for leave can be made to the Administrative Court or Court of Appeal, as appropriate. If leave is refused, application can be made to the Supreme Court.

3. Leave to appeal cannot be granted unless the court from which the appeal lies certifies that a point of law of general public importance is involved in the decision and the court granting leave considers that the point is one that ought to be considered by the Supreme Court.

4. Other specific rights of appeal to the Supreme Court in criminal and related proceedings (e.g. court-martial, proceeds of crime, extradition) are conferred by the statutes listed in paragraph 12.1.3 of Supreme Court Practice Direction 12 (see Appendix 1 below). This includes criminal appeals from the court in Northern Ireland. The preconditions for leave to appeal are in each case in terms similar to those in the 1960 and 1968 Acts.

Supreme Court Practice Direction 12

5. The exception to the certification requirements in the 1960 and 1968 Acts is not set out expressly in statutory or procedural rules aside from the Practice Direction. However, it is clear that the exception only applies to appeals under section 5(4) of the Human Rights Act by a minister of the Crown, a person nominated by him, a member of the Scottish Executive, a Northern Ireland minister or a Northern Ireland department against a declaration of incompatibility under that section.
Act. That is confirmed by Halsbury’s Laws\textsuperscript{12} and Crown Prosecution Service published guidance\textsuperscript{13}.

6. The appeal rights in section 1(1) of the Administration of Justice Act 1960 and section 33(1) of the Criminal Appeal Act 1968 apply only to the defendant and the prosecutor. A Minister etc. who is joined as a party to criminal proceedings under section 5(2) of the Human Rights Act is neither, which is why section 5(4) confers a separate right of appeal on the persons listed in section 5(2). Since the appeal is not under the 1960 or 1968 Acts, the certification requirements in those Acts do not apply. Section 5(4) of the Human Rights Act does not require certification as a precondition of granting leave. That is consistent with 12.2.3 of Practice Direction 12.

Related issues

\textit{Is leave automatic following certification?}

7. The CPS Guidance extracts in Appendix 2 below set out the detailed English procedure in practice. It is possible to have a point certified but for the lower court to refuse leave to appeal, giving the lower court control over what can go to the Supreme Court as a matter of procedure.

\textit{Is there any appeal against refusal of permission to appeal?}

8. It appears this is not possible, save to go to the Supreme Court where the High Court or Court of Appeal refuses permission. There is also no appeal against refusal to certify an appeal\textsuperscript{14}. There may be a question as to whether any provision for Scotland should make that provision expressly.

\textit{Under the Scotland Act provision at present, does grant of permission by the High Court oblige the UK Supreme Court to hear the appeal?}

9. Under paragraph 13 of the Scotland Act, if permission is granted, the court will consider the appeal.

\textit{ECHR compatibility}

10. \textit{Halsbury}\textsuperscript{15} also confirms there is authority that section 33(2) of the Criminal Appeal Act 1968 is compliant with ECHR Article 6, \textit{R v Dunn} [2010] EWCA Crimn 1823 because in deciding whether to certify, the Court of Appeal was not sitting as an appeal against its own decision, nor determining any criminal charge; merely asserting whether its decision contained an important point of law.

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\textsuperscript{13}http://www.cps.gov.uk/legal/a_to_c/appeals_to_the_supreme_court/#a01, at 7.
\textsuperscript{14}Gelberg v Miller [1961] 1 W.L.R. 459.
Appendix 1

Supreme Court Practice Direction 12

“SECTION 1 GENERAL NOTE AND THE JURISDICTION OF THE SUPREME COURT IN CRIMINAL PROCEEDINGS

Right of appeal
12.1.3 The right of appeal to the Supreme Court is regulated by statute and subject to statutory restrictions. The principal statutes for criminal appeals (as amended in most cases by section 40 of, and Schedule 9 to, the Act) are:

- the Administration of Justice Act 1960;
- the Criminal Appeal Act 1968;
- the Courts-Martial (Appeals) Act 1968;
- the Administration of Justice Act 1969;
- the Judicature (Northern Ireland) Act 1978;
- the Criminal Appeal (Northern Ireland) Act 1980;
- the Proceeds of Crime Act 2002;
- the Extradition Act 2003;
- the Criminal Justice Act 2003;

Every applicant for permission to appeal must comply with the statutory requirements before the application can be considered by the Court. The Human Rights Act 1998 applies to the Court in its judicial capacity. But that Act does not confer any general right of appeal to the Court, or any right of appeal in addition to or superseding any right of appeal provided for in Acts passed before the coming into force of the Human Rights Act 1998.

SECTION 2 APPLICATIONS FOR PERMISSION
2. CERTIFICATE OF POINT OF LAW

12.2.1 Subject to paragraphs 12.2.2 – 12.2.4, permission to appeal to the Supreme Court in a criminal matter may only be granted if it is certified by the court below that a point of law of general public importance is involved in the decision of that court, and it appears to that court or to the Supreme Court that the point is one that ought to be considered by the Supreme Court.

An application for permission to appeal without the required certificate may not be filed (paragraph 12.4.3), except as provided by paragraphs 12.2.2 – 12.2.4.

12.2.2 A certificate is not required for an appeal from a decision of the High Court in England and Wales or of the High Court in Northern Ireland on a criminal application for habeas corpus.
12.2.3 A certificate is not required for an appeal by a minister of the Crown or a person nominated by him, a member of the Scottish Executive, a Northern Ireland minister or a Northern Ireland department when they have been joined as a party to any criminal proceedings, other than in Scotland, by a notice given under the Human Rights Act 1998 ss. 5(1) and 5(2) and they wish to appeal under section 5(4) of that Act against any declaration of incompatibility made in those proceedings.

12.2.4 A certificate is not required in contempt of court cases where the decision of the court below was not a decision on appeal\textsuperscript{10}.

12.2.5 In cases where the court below has not certified a point of law of general public importance, the Supreme Court has no jurisdiction (see Gelberg v Miller [1961] 1 WLR 459, Jones v DPP [1962] AC 635)."


9 Administration of Justice Act 1960 s15(3) (as amended); Judicature (Northern Ireland) Act 1978 s45(3)

10 Administration of Justice Act 1960 s13(4); Judicature (Northern Ireland) Act 1978 s44(4).

Supreme Court Practice Directions
Appendix 2

From Crown Prosecution Service Appeals Guidance

Procedure

Steps in the Appeal Process

2. If the prosecution is unsuccessful in the Court of Appeal.

There are 28 days in which to apply to the Court of Appeal or Administrative Court for permission to appeal to the Supreme Court. The decision against the Crown is usually at the close of the appeal, but could be the date when a reserved judgment is delivered. [Note: Day 1 is the date the decision against the Crown is given. Thus if the decision is on 1 October, time runs out on 27 October not 28 October.]

If the decision is to seek permission to appeal and it has not already been done, the Crown Prosecutor and either the advocate or counsel should agree and draft a question or questions to be answered by the Supreme Court which can pass the test of being a point of law of general public importance.

Make an application for permission to appeal, and for a point of law of general public importance to be certified.

4: Immediately at the end of the Court of Appeal hearing make an oral application.

The advocate or counsel makes an oral application to the Court of Appeal for permission to appeal and for a point of law of general public importance to be certified.

There are three possible outcomes of this application:

1. Permission is not granted and a point of law is not certified. No further action can be taken. There is no appeal from the refusal to certify a point of law. [Gelberg v Miller [1961] 1 WLR 459.]
2. Permission is not granted but a point of law is certified. See step 6 below.
3. Permission is granted and a point of law is certified. See step 7 below.
5: If more time is needed after the appeal to consider whether to seek to appeal further.

If after the appeal the Crown Prosecutor with the advocate or counsel need time to consider whether to appeal, this can be done in the next few days. It must be done quickly, bearing in mind there are 28 days to make the decision, draft the question(s) and get the case back into court. Day 1 is the date of the decision against the Crown at the Court of Appeal and not the following day. …

6: Permission is not granted but a point of law is certified.

The refusal of permission to appeal by the court below is not the final stage. If appealing is still considered correct [and it should be unless there are new facts to consider from the time the previous decision to appeal to the Supreme Court was made] then the application for permission can be made directly to the Supreme Court. (This is in fact the normal procedure because the Court of Appeal and Administrative Court rarely grant permission: for example there were only five grants of leave in 2007 by the Court of Appeal.)

There are 28 days from the date permission is refused by the Court of Appeal or Administrative Court to draft and lodge an application for permission to appeal to the Supreme Court. Section 34(1) Criminal Appeal Act 1968 says:

"an application to the Supreme Court for (permission) shall be made within 28 days beginning with the date on which (permission) was refused by the Court of Appeal".

There is a similar provision in s. 2(1) Administration of Justice Act 1960 for Administrative Court refusal of permission. Calculate the 28 days by counting Day 1 as the date of refusal. If the date of the order is later still use the date of refusal.

Note: The date substantive permission is refused is not necessarily the date when procedural matters such as the formal certification of the point of law occurs .

…

The case papers to be submitted are:

a. Indictment.

b. Order of the Court below certifying a point of law and refusing permission to appeal to the Supreme Court. (This is essential as the application for permission cannot be lodged without it.)

c. The Order which is being appealed, if separate.

d. Official transcript of the judgment of the Court of Appeal.
e. Order of the court of first instance; Crown Court Certificate of conviction or magistrates' court Memorandum of conviction.

f. Official transcript of the judgment of the court of first instance or of the case stated.

g. A chronology of the proceedings so far (perhaps from Custody Time Limit applications).

h. Sufficient papers (probably all or part of the trial brief) to allow counsel drafting the application for permission to appeal to give:

- The prosecution case at trial.
- Details of the matter complained of, e.g. if the issue is the admission of bad character evidence, say why the prosecution wished to rely on this.

Do not delay submission because any of the above is not immediately available; it can be sent when received.

The application for permission must be drafted and lodged at the Supreme Court ... within 28 days of the refusal of permission by the Court of Appeal or Administrative Court. For the procedure, see Applications for Permission below.

Note: Filing by electronic means is expected to come into force sometime early in 2010.

7: Permission is granted and a point of law is certified.

Although this happens rarely, the Court of Appeal may certify a question and grant permission to appeal to the Supreme Court. In this case no application for permission is needed and the case omits the first stage of proceedings in the Supreme Court.

Notice of Appeal together with 3 copies must be filed within 42 days of the date of the order or decision of the court below, except in extradition cases. The time limit for extradition appeals is 28 days. The appellant must also file a copy of the order which is being appealed and (if separate) a copy of the order granting permission to appeal. Before notice is filed at the Supreme Court, it must be served on each respondent and any intervener in the court below. ...

**Rules for the presentation of papers to the Supreme Court**

The overriding objective of the Supreme Court Rules is to ensure that the court is accessible, fair and efficient. The Supreme Court has indicated that it does not wish to be unduly prescriptive about the presentation of papers, but those familiar with the previous practice will not be surprised by the requirements that replace the former rules.

The Registry replaces the Judicial Office as the administrative office of the Supreme Court. Papers are "filed" at the Registry and "served" on the other side. ..
Applications for Permission

An application for permission is:

- Made on form SC00116, typed on A4 paper, double-sided and securely bound on the left. Where the prosecution appeals, the case title will be "Director of Public Prosecutions (on behalf of Her Majesty) v (the defendant)".
- Noted with neutral citations and a "head note" style summary for every law report cited in the courts below.
- Filed (lodged) at the Supreme Court Registry with three copies, a copy of the order appealed from and, if separate, a copy of the order of the court below certifying the point of law and refusing permission to appeal to the Supreme Court. No fee is payable for a criminal matter, but there is a fee on a civil case, e.g. confiscation. As at September 2009, £800 is payable in civil cases on filing the application for permission and the same again on filing the notice of intention to proceed with the appeal, once permission has been granted.
- Served on the defendant's solicitors in person, by fax, by DX or by first class post. The Supreme Court Rules do not mention fax, and refer to service by DX as to be only with the consent of the person served, but the Supreme Court guidance makes it clear that, unless the solicitors have stated, for example, "We do not accept service by fax" on their letterhead, service may be by fax or DX if the requisite numbers are listed on their notepaper, which will be taken as consent to service by this method.
- Endorsed and signed on the back by the Special Crime Division caseworker to show service on defence.

Within one week of filing the application, four copies of each of the following must also be lodged in accordance with rule 14(2):

- the application;
- the order appealed from;
- if separate, the order of the court below certifying the point of law and refusing permission to appeal to the Supreme Court;
- the official transcript of the judgment of the court below (or the court report);
- the final order(s) of all other courts below;
- the official transcript of the final judgment(s) of all other courts below;
- any unreported judgment cited in the application or judgment of a court below;
- a chronology of the proceedings (this is a new requirement).

If these papers are not lodged within 8 weeks of the filing of the application and no good reason is given for the delay the Registrar may refer the papers to the Appeal Panel without them, dismiss the application or give any other directions that appear appropriate.

Applications for permission to appeal to the Supreme Court are considered by an Appeal Panel consisting of at least three Justices and are generally decided on the papers without a hearing. The Panel will first decide if the application is admissible, that is, that the court has jurisdiction to entertain it. If so, the Panel will then:

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• refuse permission, or
• give permission, or
• give permission on terms, when the parties have the right to make
  representations on those terms within 14 days of the date of the proposal to
give such permission, or
• invite the parties to file written submissions as to the grant of permission, or
• direct an oral hearing.

Respondents may submit written objections stating why permission to appeal should be refused: see CPS as the Respondent below.

The decision is communicated by a letter sent from the Registry to Special Crime Division, usually to the caseworker in the Division. The period this may take is not fixed and can be many months later.

If permission is not granted there is no further action that can be taken.

‘Piggy-back’ Appeals

If one of a group of convicted defendants appeals alone and is successful, the others may also decide to appeal later, on the basis that they will almost certainly be successful. If the CPS is appealing the first, successful appeal to the Supreme Court it will also want to appeal the subsequent decisions.

If the first case is still awaiting permission, the second and subsequent cases will have to go through all the steps outlined above in order to be brought before the Supreme Court. There is no way to join appeals without this happening. ...

If permission has been granted in the first case, it would be sensible to advise the Court of Appeal of this and invite it not only to certify the same question(s) but also to grant immediate permission to appeal. This will enable the subsequent case to catch up with the first.

If permission has been refused in the first case, there is likely to be little point in pursuing the subsequent one to the Supreme Court.

CPS as the Respondent

As soon as … the Court of Appeal has granted the defence’s application to certify a point of law or has granted immediate permission to appeal, they should … enter an appearance. It is possible to file written objections stating why permission to appeal should be refused and this should be done within 14 days of service on CPS … of the application for permission to appeal. Should the Supreme Court invite objections, these should also be filed within 14 days.

Such objections will be drafted by counsel for Special Crime Division, served on the appellant and lodged with the Registry. It is however relatively rare for CPS to lodge objections on its own initiative; generally they will only be lodged if the Supreme Court requests us to do so. In that case, Special Crime Division will instruct counsel to draft the objections and will file them with the Registry.
If permission is granted, Special Crime Division will enter an appearance for a second time after receiving the Notice of Appeal. The procedure will then be as outlined above.

**CPS as an Interested Party**

Any person may make written submissions to the Supreme Court in support of an application for permission to appeal. Before being filed, these must be served on the appellant, all respondents and any interveners in the court below. An application to intervene as an interested party must be drafted as soon as the application for permission to appeal is served on the CPS.

If permission is granted the intervener must apply to the Supreme Court for permission to intervene in the proceedings, although no permission is required for an intervention by the Crown under s. 5 Human Rights Act 1998.

If permission to intervene is granted, then the procedure is as above.
BRIEFING NOTE - NEW SECTION 98A OF THE SCOTLAND ACT AND ILLUSTRATIVE CERTIFICATION AMENDMENTS IN PARAGRAPH 56 OF THE REPORT OF THE REVIEW GROUP

1. Under the amendments to the Scotland Bill made by the House of Commons on 21st June 2011, there will be 2 routes by which criminal appeals will lie to the Supreme Court from the High Court of Justiciary in its appellate capacity—

   • under the new section 98A of the Scotland Act 1998 in relation to the compatibility with Convention rights or Community law of an act or failure to act of the Lord Advocate
   • as a devolution issue under paragraph 13(a) of Schedule 6 to the Scotland Act in any other case (e.g. where the issue concerns the legislative competence of the Scottish Parliament to pass the legislation creating the offence being prosecuted in light of Schedule 5 to the Scotland Act, or the act of the Scottish Ministers in making a commencement order for such legislation).

2. The illustrative amendments in paragraph 56 of the Report restate the Advocate General’s new clause on the Lord Advocate: Convention rights and Community law with the new right of criminal appeal to the Supreme Court set out in the new section 98A of the Scotland Act 1998 is made subject to a certification requirement.

3. The changes to the Advocate General’s amendments are shown in italics.

4. New section 98A and paragraph 13 of Schedule 6 already require the permission of the High Court of Justiciary or the Supreme Court. (The references in paragraph 13 to leave and special leave were amended to references to permission by the Constitutional Reform Act 2005.) The Group’s proposals in paragraph 56 of the Report impose 2 pre-conditions for such permission being given—

   • the High Court must certify that the determination (in the case of section 98A) of the devolution issue raises a point of law of general public importance, and
   • the court giving permission must be of the view that the point is one that ought to be considered by the Supreme Court.

5. The proposals do not attempt to explain what is meant by “certifying” – it is suggested that the natural dictionary meaning will suffice.

6. The proposals refers to the court “giving” permission.

7. In the case of appeals under paragraph 13(a) of Schedule 6, that Schedule does not impose any time limit on applications for permission to appeal. Paragraph 37 extends existing powers to regulate procedure before courts and tribunals to include power to make provision for the purposes of that Schedule. If it is considered desirable to impose a time limit for applications for permission to appeal under paragraph 13(a), it will be necessary to consider whether existing powers to regulate procedure read together with paragraph 37 are sufficient to enable that.
8. The proposed amendment applies only to appeals against a determination from the High Court of Justiciary in its appellate capacity to the Supreme Court under section 98A. They do not apply to the other routes by which determinations in criminal proceedings may reach the Supreme Court, e.g.—

- a reference under paragraph 11 of Schedule 6 SA by the High Court of Justiciary sitting as an appeal court
- a direct reference under paragraph 33 of Schedule 6 by a court or tribunal when required to do so by the Lord Advocate, the Advocate General for Scotland, the Attorney General or the Attorney General for Northern Ireland in proceedings to which he is a party
- a direct reference under paragraph 34 of Schedule 6 by the Lord Advocate, the Advocate General for Scotland, the Attorney General or the Attorney General for Northern Ireland of any devolution issue which is not the subject of proceedings
- a reference by the Advocate General under subsection (2) or (2A) of section 288A of the Criminal Procedure (Scotland) Act 1995 inserted by the Advocate General’s amendments.

June 2011
BRIEFING NOTE - PROCESS FOR PRELIMINARY REFERENCES TO THE ECJ

Summary:
- Any national court may make a preliminary reference to the Court of Justice, and the highest national court is required to do so unless the answer to the question of law is clear.
- It is the national courts and tribunals (both the lower and higher), before which actions are brought, who are responsible for assessing whether a preliminary ruling is required.
- The ECJ has held that national appeal courts cannot amend or set aside orders for references made by lower courts.
- The UK is entitled to make written and oral representations in preliminary references to the Court of Justice.
- A determination in a preliminary reference is not a final judgment, and does not result in an order which closes the proceedings, it is for the national court which made the original reference to decide the case in the light of the Court’s ruling, and to make a costs order as appropriate.
- The ruling given by the Court in such proceedings will, in practice, frequently determine the outcome of the case.

The legal framework
1. The preliminary reference procedure plays a central role in ensuring that EU law is applied correctly and consistently across the European Union. A national court before which proceedings are brought may (and sometimes must) ask the ECJ to interpret EU law. The process is essentially a dialogue: the national court asks a question relating to the application of EU law (the preliminary reference), to which the ECJ replies (the preliminary ruling). The national court then draws on the preliminary ruling in reaching a decision in the proceedings giving rise to the reference.

2. Although the Court of Justice has emphasised that Article 267 proceedings are ‘non-contentious and are in the nature of a step in the action pending before a national court’, the ruling given by the Court in such proceedings will, in practice, frequently determine the outcome of the case. The UK, as a Member State, has the right to make observations in all cases referred to the Court of Justice and is sent copies of all the pleadings lodged in preliminary references.

Article 267 TFEU (ex Article 234 EC)
3. The vast majority of preliminary references are made under Article 267 TFEU, which provides that the Court of Justice has the jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaties, and (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Article 267 goes on to provide:

“Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court".

4. Where a reference for a preliminary ruling involves a person in custody, Article 267 TFEU requires the Court to act “with the minimum of delay”. In this regard, the Court has already established an urgent preliminary reference procedure which has been in place since March 2008.

5. Although Article 267 TFEU only refers to the Court of Justice, the General Court also has jurisdiction to hear and determine questions referred for a preliminary ruling “in specific areas laid down by the Statute [of the Court of Justice]”.18 Such provision has, however, been in place since the adoption of the Treaty of Nice and these areas are still to be determined.

When is there a question of EU law that warrants reference?

6. The highest court or tribunal (i.e. a court or tribunal against whose decisions there is no appeal) is obliged to make a reference, and a lower court or tribunal may make a reference to the Court of Justice, where a question concerning the interpretation of EU law or the validity of acts of Union institutions is raised, and the court or tribunal considers that a decision on the question is necessary to enable it to give judgment. The court or tribunal may make a reference of its own motion, or following a request by the parties in the dispute before it.

7. It is the national courts and tribunals (both the lower and higher), before which actions are brought, who are responsible for assessing whether a preliminary ruling is required.

8. However, a request from a national court may be dismissed by the Court of Justice in the following circumstances:

   - The question is not relevant in the sense that the answer to that question, regardless of what the answer may be, can in no way affect the outcome of the case.
   - The requested interpretation of EU law bears no relationship to the actual facts.
   - The problem is hypothetical.
   - The Court has not been provided with the factual or legal material necessary to give a useful answer on the questions submitted.19

9. The highest court or tribunal is not obliged to refer in the following circumstances:

   - The question that has arisen has already been answered in an earlier judgment of the Court of Justice.20

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18 Article 256(3) TFEU. The EC Treaty had previously been amended by the Treaty of Nice to allow preliminary references to be made to the General Court.
The question has not yet been answered in the case law of the Court of Justice, but the answer to that question is beyond all doubt ("acte claire"). Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious both to the courts of the other Member States and to the Court of Justice.

When giving judgment in interlocutory proceedings, even where there is no judicial remedy against the interlocutory order, provided that each of the parties is entitled to raise the question again in the context of substantive proceedings.21

Withdrawning a reference

10. The only bodies which are competent to withdraw a preliminary reference which has already been sent to the Court are the referring court itself and a national court seised of an appeal against the decision to refer in circumstances where the national appeal court determines the substance of the case in its entirety.22 Although the parties to the national proceedings and indeed the Court of Justice itself may take the initiative of suggesting that a case should be withdrawn, their concerns must be channelled through the referring court.23

Form of the reference

11. Although the reference is made by the presiding judge, its wording is frequently drafted by Counsel appearing in the case and agreed by the parties.24 However, in giving its ruling, the Court of Justice may recast the questions referred into a form which better corresponds to its view of the issues raised by the case. The following basic rules should be observed in drafting:

- avoid imprecise or ambiguous questions
- avoid referring questions which are not necessary for the determination of the case
- equally, ensure that all questions are referred which may be relevant to the outcome of the case.

12. The order for reference should contain a concise, but adequate, summary of the relevant factual and legal background.25

When the reference is made

13. In cases where a Government Department is a party to the domestic proceedings, any submission of written observations to the Court of Justice will be by the UK Government as a whole (although the Department, not the UK, remains named as the party to the proceedings). Where a devolved administration is a party

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23 The ECJ has stated that a request for a preliminary ruling made pursuant to Art 267 EC continues "so long as the request of the national court has not been withdrawn by the court from which it emanates or has not been quashed on appeal from a superior court" (Case 127/73 BRT [1974] ECR 51, paragraph 9; Case 106/77 Simmenthal [1978] ECR 629, paragraph 10).
24 See the Practice Direction on references to the European Court, supplementing the rules in CPR Part 68.
25 Cf. “Information Note on References from National Courts for a Preliminary Ruling” of 11 June 2005 and “Notes for the Guidance of Counsel in written and oral proceedings before the Court of Justice of the European Communities” issued by the ECJ in February 2009.
to the proceedings, it is entitled to put in observations as well as the UK as Member State. Where one of the parties is an officer of the crown, a non-Governmental agency or other public body, that officer or body also has the right to submit observations by virtue of being a party to the domestic proceedings.

Appealing a preliminary reference

14. In Cartesio, the ECJ reached the conclusion that it was contrary to Article 234 EC (now Article 267 TFEU) for national appeal courts to amend or set aside orders for references made by lower courts.26 In such circumstances, any decision by the appeal court cannot bind the lower court:

95. Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the autonomous jurisdiction which Article 234 EC confers on the referring court to make a reference to the Court would be called into question, if – by varying the order for reference, by setting it aside and by ordering the referring court to resume the proceedings – the appellate court could prevent the referring court from exercising the right, conferred on it by the EC Treaty, to make a reference to the Court.

96. In accordance with Article 234 EC, the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the Court…. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.

15. However, in Nationale Loterij the ECJ said that this principle does not apply when the national appeal court sets aside the lower court’s order for reference and resolves the entire case.27 In such circumstances, there are no longer any national proceedings in which the ECJ can consider the reference. But the Cartesio principle will apply if the national proceedings remain alive.

16. The judgment in Cartesio appears to overturn earlier cases in which the UK courts held that it was possible for a party to domestic litigation to appeal a court’s decision to refer a case to the Court of Justice.

17. In principle, it had been thought that the test was that referred to in Bulmer v Bollinger.28 The Court of Appeal held that it is the court’s duty to interfere with an

27 Case C-525/06 Nationale Loterij, Order of 24 March 2009, paragraph 7.
exercise of judicial discretion when and only when the judge’s decision “exceeds the generous ambit within which reasonable disagreement is possible and is, in fact, plainly wrong.” *Bulmer* was an appeal against a decision not to refer two questions to the European Court. In only a few cases has the Court of Appeal allowed an appeal against an order to refer.29

Effect of determination

18. As a determination in a preliminary reference is not a final judgment, and does not result in an order which closes the proceedings, it is for the national court which made the original reference to decide the case in the light of the Court’s ruling, and to make a costs order as appropriate.30

Time taken

19. Since their inception, the EU Courts have been subject to increasing criticism in relation to the length of time taken for proceedings to be completed before the Courts. In 2004, the Court of Justice managed to bring a halt to the trend of increasing length of proceedings and has in subsequent years managed to bring about significant decreases in the length of time taken.

20. In 2009 the average length of preliminary reference proceedings, from the date of an Article 267 reference to the date of judgment was 17.1 months.31

Procedure for preparing written observations

21. As has already been mentioned, the UK has the right to submit observations in all cases referred to the Court of Justice. The UK will automatically receive copies of all the pleadings lodged by other parties in such cases. In practice, the UK will usually submit observations in preliminary references arising from the UK courts so that the Court of Justice has the benefit of its views on the effect of the relevant domestic law and on the wider policy issues.

22. The Member States (as well as the Commission and, in certain circumstances, the Council and the Parliament) have the right to submit written and oral observations in any Article 267 reference.32

23. The key steps of the preliminary reference process are as follows:
   - The national court submits questions to the ECJ about the interpretation or validity of a provision of EU law, generally in the form of a judicial decision in accordance with national procedural rules.
   - When that request has been translated into all the languages of the Union by the Court’s translation service, the ECJ Registry notifies it to the parties to the national proceedings, as well as to all the Member States and the

29 The test in *Bulmer v Bollinger* has been considered in *R v International Stock Exchange ex p Else* [1993] QB 534; *HJ Banks v Coal Authority* [1998] EWCA Civ 1342; *Evans v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 32; *Customs and Excise v Federation of Technological Industries* [2004] EWCA Civ 1020; *R (Horvath) v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWCA Civ 620.

30 Article 104(6) of the ECJ Rules of Procedure


32 Cf *ECJ Statute*, Article 23; *ECJ Rules of Procedure* Article 104, by which anyone entitled to submit written observations also has the right to present oral argument at a hearing.
institutions. A notice is published in the Official Journal stating, inter alia, the names of the parties to the proceedings and the content of the questions. The parties, the Member States and the institutions have two months within which to submit written observations to the ECJ.

- The UK has two months (plus 10 days for distance) from receipt of notification of the reference in which to submit its observations. There is no possibility of extending this time limit which is set out in Article 23 of the ECJ statute, and the Court applies its time limits extremely strictly.

24. There are ways to speed up the time it takes for a preliminary reference to be heard by the ECJ, including applications for acceleration or priority treatment.

**Position in Scotland**

25. The ECJ website indicates that there have been 17 references in total. 10 from the Court of Session and 7 from the High Court. The last judgment from the EJC from a Court of Session reference was in 2010 and from the High Court in 1992.

**Style of reference**

26. All of the references seem to follow the same broad style in terms of setting out the detailed questions to be answered by the ECJ. For example - the most recent reference is:-

(1) Is Article 17(3)(a) of the [directive]... to be interpreted as entitling the United Kingdom tax authorities to refuse to allow the German subsidiary to deduct VAT which it paid in the United Kingdom in respect of the purchase of the cars?

(2) In determining the answer to the first question, is it necessary for the national court to extend its analysis to consider the possible application of the principle of prohibiting abusive practices?

(3) If the answer to Question 2 is yes, would the deduction of input tax on the purchase of the cars be contrary to the purpose of the relevant provisions of the [directive] and thus satisfy the first requirement for an abusive practice as described in paragraph 74 of the decision of the Court in [Case C-255/02 Halifax and Others [2006] ECR I1609] having regard among other principles to the principle of the neutrality of taxation?

(4) Again if the answer to Question 2 is yes, should the court consider that the essential aim of the transactions is to obtain a tax advantage, so that the second requirement for an abusive practice as described in paragraph 75 of the said decision of the Court [in Halifax and Others ] is satisfied, in circumstances where, in a commercial transaction between parties operating at arm's length, the choice of a German subsidiary to lease the cars to a United Kingdom customer, and of the terms of the

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33 Either in full, or in summary version.

34 The UK is granted an additional ten days within which to lodge its observations, by virtue of its distance from the Court.
leases, are made with a view to obtaining the tax advantage of no output tax being charged on the rental payments?'

**Scottish Interpretation of the test**

27. In an article in the Scots law Times 2009 Anna Poole discusses references within a Scottish context and notes that:-

"There are two differing strands of case law about the applicable test for a national court to exercise its discretion to refer. If a party is trying to persuade the court to refer, it may be helpful stressing the more relaxed test which has been applied by the Scottish courts in recent years. This test suggests that the court has to have “complete confidence” if deciding not to refer. If there is any real doubt about the issue it must refer. Relevant dicta are as follows: “If the facts have been found and the Community law issue is critical to the court’s final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the difference between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer.” This is a test derived from the English case of *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd Ex p Else* [1993] QB 534 at p 545. It has been applied in Scotland by the Inner House in *Booker Aquaculture Ltd (t/a Marine Harvest McConnell) v Secretary of State for Scotland*, 2000 SC 9 at p 27, and *Revenue and Customs Commissioners v Empowerment Enterprises Ltd*, 2007 SC 123; 2006 SLT 955, and by the Outer House in *Scotbeef v Palmero*, 2006 SC 1. It may be difficult for a court to resist making a reference when faced with this test, given the relatively low level of familiarity of the Scots courts with EU law"

June 2011
BRIEFING NOTE - STRASBOURG AND THE EXHAUSTION OF DOMESTIC REMEDIES

1. This note addresses the question: if a matter may be dealt with by the Supreme Court as a devolution issue, must it be dealt with by that court before it can be addressed by the European Court of Human Rights (“ECtHR”)? The short answer is that the matter ought to be addressed by the Supreme Court first. The ECtHR may however proceed to deal with the matter, without waiting for the Supreme Court to do so, if the Supreme Court's jurisdiction is not drawn to the ECtHR's attention or if it is not persuaded that there is any realistic prospect of the Supreme Court affording the applicant an effective remedy. In the context of Scottish criminal law the ECtHR is most likely to reach the latter conclusion where the Lord Advocate's actions are protected by section 57(3) of the Scotland Act 1998.

2. Article 35 § 1 of the Convention sets out the requirement that domestic remedies must be exhausted before a matter is brought before Strasbourg. It states—

“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.”

The rule reflects the ECtHR's role as a supra-national institution tasked with supervising the contracting parties' fulfilment of their obligations under the Convention. Moreover, the ECtHR has acknowledged the assistance it derives from having the views of a national court when considering a matter.

Raising the failure to exhaust domestic remedies at Strasbourg

3. Ordinarily it will be for the contracting party to challenge the admissibility of an application on the grounds that domestic remedies have not been exhausted. Article 35 § 4 of the Convention permits the ECtHR to declare an application inadmissible at any stage of the proceedings. However, rule 55 of the Rules of the ECtHR requires that the plea be raised in the contracting party's written or oral observations on admissibility, “in so far as its [the plea's] character and the circumstances permit.” Where a contracting party fails to raise a plea that domestic remedies have not been exhausted prior to the admissibility decision being taken it will typically be estopped from doing so at a later stage in the proceedings.

35 The principle that it is for the contracting parties, in the first instance, give effect to the Convention within their own territories is reflected in Articles 1 and 13 of the Convention, a point emphasised by the ECtHR’s judgment in Kudla v Poland (2002) 35 EHRR 198.

36 Handyside v UK App no 5493/72 (ECtHR, 7 December 1976), para 48.

37 It seems there is nothing to prevent the Strasbourg institutions from considering the point ex proprio motu. In Veenstra v UK App no 20946/92 (Commission Decision, 31 August 1994) the European Commission on Human Rights declared the application inadmissible having identified the possibility of judicial review by the Court of Session, seemingly without any prompting from the UK Government. By contrast, in Ergi v Turkey App no 23818/94 (Commission Decision, 2 March 1995) the Commission referred to its practice of not declaring applications inadmissible for failure to exhaust domestic remedies unless the point had been raised by the contracting party. The Commission’s position in Ergi is probably closer to the ECtHR’s current approach. In Kozacioglu v Turkey App no 2334/03 (ECtHR [GC], 19 February 2009) the Grand Chamber asserted, at para 40, that “the rule of exhaustion is neither absolute nor capable of being applied automatically”.

38 The Rules of the ECtHR are available online <http://www.echr.coe.int/ECHR/EN/Header/BasicTexts/OtherTexts/Rules+of+Court/> accessed 10 June 2011.

39 N.C. v Italy App no 24952/94 (ECtHR [GC], 18 December 2002).
4. It may be of assistance to briefly outline the ECtHR's process for considering an application's admissibility. When an application is received by the ECtHR it is assigned to a Section and the Section's president, in turn, assigns it to a judge rapporteur. Since Protocol No. 14 came into force on 1 June 2010, it has been competent for the single judge to declare the application inadmissible or strike it out of the ECtHR's list of cases; failure to exhaust domestic remedies is a point the single judge is unlikely to pick-up. If the single judge permits the application to proceed it may go either to a Committee of 3 judges or a Chamber of 7. The Committee, or the Chamber, will consider the application and may decide to declare it inadmissible or strike it out of the Court's list of cases immediately. Alternatively the Chamber or its President may decide to request information from the parties or will, at least, give notice of the application to the contracting party concerned and invite it to submit observations in writing. This will be the contracting party's first opportunity to comment on the application and indeed it may have been unaware of it until this point, thus it is only at this stage that the failure to exhaust domestic remedies is likely to be raised.

Strasbourg's approach to arguments about failure to exhaust domestic remedies

5. The ECtHR will only declare an application inadmissible due to a failure to exhaust domestic remedies if it is persuaded that the domestic remedy could have cured the alleged violation. In Selmouni v France, the Grand Chamber averred—"It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success."  

6. In the majority of cases one would expect the ECtHR should accept that raising a devolution issue before the Supreme Court holds out the prospect of affording an applicant an effective remedy. The ECtHR tends to take the view that if the domestic law recognises the Convention rights an applicant will generally be expected to raise any Convention arguments in the national courts, conforming to the appropriate procedures and time limits. Domestic proceedings need not be pursued if there is no realistic prospect of their succeeding, but in common law jurisdictions the European Commission on Human Rights has held that it is "generally incumbent" on the applicant to raise proceedings domestically in order to give the common law an opportunity to develop.

40 Article 27 § 1 of the Convention and rule 52A of the Rules of the ECtHR.
41 Article 26 § 3 of the Convention and rule 52A § 2 of the Rules of the ECtHR prohibit a judge from the contracting party to which the application relates being appointed as the single judge, thereby ensuring that the single judge will be ill-equipped to spot a failure to exhaust domestic remedies argument.
42 Rule 54 § 2 of the Rules of the ECtHR.
43 Selmouni v France App no 25803/94 (ECtHR [GC], 28 July 1999), para 76.
44 See e.g. Holland v Ireland App no 24827/94 (Commission Decision, 14 April 1998); Azinas v Cyprus App no 56679/00 (ECtHR [GC], 28 April 2004), para 39.
45 Cardot v France App no 11069/84 (ECtHR, 19 March 1991), para 34.
46 Mere doubts about the prospects of success are insufficient, but the ECtHR may be persuaded that there is no prospect of domestic success by an opinion from counsel which purports to express settled legal opinion (see Selvanayagam v UK App no 57981/00 (ECtHR, 12 December 2002)).
7. The one circumstance in which it seems likely that the ECtHR will refuse to accept that raising a devolution issue would be an effective remedy is where the protection afforded to the Lord Advocate by section 57(3) of the Scotland Act 1998 applies. If the offence the Lord Advocate is acting to enforce is contained in Westminster legislation, and cannot be read down under section 3 of the Human Rights Act 1998, the most the Supreme Court will be able to do is make a declaration of incompatibility under section 4 of that Act. To date, the ECtHR has been unimpressed by the declaration of incompatibility, taking the view that because it depends on ministerial discretion to take action it cannot be considered an effective remedy. That said, in some recent cases the ECtHR has hinted that it may change its mind about the efficacy of a declaration of incompatibility if and when it can be shown that ministerial action will inevitably follow such a declaration.

8. Two final points about the ECtHR's approach to the exhaustion of domestic remedies should be made. First, the ECtHR does not take a rigid approach to the issue and may be willing to overlook the failure to pursue a domestic remedy if insisting upon it would be inequitable; for example if the applicant was reasonably unaware of the domestic remedy until it was too late. Second, it may be that in some cases the ECtHR somewhat over-reaches its jurisdiction by too readily dismissing domestic remedies as inadequate. That was the view of the dissenting minority in McFarlane v Ireland. More recently Rosalind English has highlighted the ECtHR's seemingly inconsistent decision in O'Donoghue and others v UK, in which it rejected the Government's argument on admissibility but went on to find the applicant's allegation of a violation of Article 13 manifestly ill-founded. In a speech at a Council of Europe conference earlier this year, the UK Justice Secretary emphasised that “… it is individual States and their courts which have primary responsibility for implementing the Convention and granting effective remedies for any violation.” The UK will assume the presidency of the Council of Europe in November and is clearly anxious to continue the process of reform of the ECtHR.

49 The shift in attitude seems to have begun by 2006 in R and F v UK App no 35748/05 (ECtHR, 28 November 2006) and has since been confirmed by the Grand Chamber in Burden v UK App no 13378/05 (ECtHR [GC], 29 April 2008).
50 In Čonka v Belgium App no 51564/99 (ECtHR, 5 February 2002), the ECtHR rejected the Belgian Government's Article 35 § 1 argument on the basis that the applicants (Roma gypsies facing deportation) had been afforded no realistic prospect to appeal before they were deported given the lack of information about the appeal process and the very short period their lawyer was given in which to lodge an appeal.
51 McFarlane v Ireland App no 31333/06 (ECtHR [GC], 10 September 2010).
BRIEFING NOTE - EXTENT OF STRASBOURG POWERS TO DIRECT NATIONAL COURTS

1. Article 41 of the European Convention on Human Rights provides—

   “Just satisfaction

   If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

2. Article 46(1) provides—

   “Binding force and execution of judgments

   1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”

3. Article 1 requires the Contracting States to secure to everyone within their jurisdiction the substantive rights and freedoms defined in Section 1 of the Convention.

4. Generally, a legal obligation is imposed on the Contracting States by a finding of a violation by a judgment of the Court, but it is for the States to choose how to bring the domestic legal order into line and put an end to the violation, subject to the supervision of the Committee of Ministers under Article 46. The Court considers it does not have the power to overrule a domestic court judgment or declare it void and is confined to awarding monetary compensation and costs. As it is generally unwilling to speculate if the outcome of a criminal case would have been different, the Court has ruled that it will not quash a conviction.

5. The Court has however increasingly indicated to the Contracting States what measures it should adopt to end a violation. Notably in continuing unlawful detention cases, such as Assanidze v Georgia of detention in the Arjan autonomous province of Georgia 3 years after acquittal by the Georgian Supreme Court which ordered release. The Grand Chamber held that the detention was arbitrary and in violation of Articles 5(1) and 6(1). Exceptionally, and in view of the urgency, the Court ordered the respondent state to “secure the applicant’s release at the earliest possible date”. This was because there was no choice for the State in the measures required to remedy the breach. The Court held—

   “As regards the measures which the Georgian State must take…, subject to supervision by the Committee of Ministers, in order to put an end to the

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55 Brozerick v Italy (1989), para 47, 12 EHRR 371.
56 Schmutzer v Austria (1995) 21 EHRR 511 (paras 43, 44); Oberschlick v Austria (1991) 19 EHRR 389. E.g. in Gençel v. Turkey, 23 October 2003 (Appl. 53431/99) the Court considered that a finding of a violation was just satisfaction, also indicating a possible retrial, as in Salduz, and see para 8 below.
57 Assanidze v Georgia, 8 April 2002, Appl. 71403/01 See also Ilascu and others v Russia and Moldova 8 July 2004, Appl. 48787/99.
violation that has been found, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, Scozzari and Giunta, cited above, § 249; Brumărescu v. Romania (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; Akdivar and Others v. Turkey (Article 50), judgment of 1 April 1998, Reports 1998-II, pp. 723-24, § 47; and Marckx v. Belgium, judgment of 13 June 1979, Series A no. 31, p. 25, § 58). This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) (see, mutatis mutandis, Papamichalopoulos and Others v. Greece (Article 50), judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34).

However, by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it.

1. In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 5 § 1 and Article 6 § 1 of the Convention (see paragraphs 176 and 184 above), the Court considers that the respondent State must secure the applicant's release at the earliest possible date.”

Assessing the award of just satisfaction in fair trial criminal cases

6. In quantifying an award of just satisfaction in Article 6 fair trial criminal cases, the approach has varied. On a violation for structural reasons in the establishment of the tribunal, such as conviction by a court which was not independent and impartial, the Court has not generally awarded compensation, as unwilling to speculate if the outcome would have been different.58

7. For admission of evidence in breach of Article 6, the Court has also expressly declined to speculate on whether the applicant would be acquitted, in some cases finding a clear causal link between the outcome of the case and the breach of Article 659 leading to a substantial award of compensation, and in others that it would not award compensation: “The Court cannot speculate as to…whether the outcome of the trial would have been any different had use not been made of the transcripts by the prosecution and…underlines that the finding of a breach of the Convention is not to be taken to carry any implications as regards that question.”60 The same distinction applies to cases about defective legal representation61.

58 Schmautzer, ibid.
8. In both types of case, the Court has also indicated that a retrial or reopening of the case would be an appropriate way of addressing the violation\textsuperscript{62}.

*Domestic law*

9. The obligation on the courts in the UK as a matter of the legal systems of the UK to follow Strasbourg also depends on the domestic implementation of the international obligations arising under the Convention, given the dualist system of the application of international law within the UK.

10. As a matter of domestic law, sections 2 and 6 of the Human Rights Act 1998 impose an obligation on the courts to “take account of” and act compatibly with Strasbourg jurisprudence. In particular, the courts have ruled that they are, in the absence of special circumstances, bound to follow any clear and constant Strasbourg jurisprudence\textsuperscript{63}.

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\textsuperscript{62} Ocalan v Turkey, 12 May 1995, Appl. 46221/99, para 210 – structural; Salduz v Turkey, para 72 - admission.

\textsuperscript{63} R v Secretary of State for the Environment, ex p Holding and Barnes & Ors (Alconbury) [2001] UKHL 23, Lord Slynn, para 26. R v Secretary of State for the Home Department, ex parte Amin [2003] UKHL 31 at 24. Also R (Ullah) v Secretary of State for the Home Department [2004] 2 AC 232, Lord Bingham, para 20 and subsequent consideration of whether the domestic courts can go further in the protection of human rights under the HRA, but the domestic courts at least hold themselves bound to apply no less a standard than is clear and constant in the Strasbourg jurisprudence.
BRIEFING NOTE - RETROSPECTION AND ECHR ARTICLE 6 - LIMITING THE IMPACT OF ECHR DECISIONS ON SETTLED CASES

1. In considering the extent to which legislation can have an impact on existing criminal cases without infringing ECHR, the following well established propositions require to be considered in relation to Articles 6 and 13

(i) Article 6 does not require the state to set up courts of appeal, even in criminal matters.64

(ii) Where such courts do exist, the guarantees of Article 6 must be complied with (e.g. litigants are guaranteed an effective right of access to the courts for determination of any criminal charge).65

(iii) The conditions of admissibility of an appeal call for regulation by the state. The state enjoys a certain margin of appreciation in this regard.66

(iv) These limitations must not restrict or reduce a person’s access in such a way or to such an extent that the very essence of the right is impaired.67

(v) Such limitations will not be compatible with Article 6(1) if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.68

(vi) As a general rule, new rules on the admissibility of appeals which are otherwise justified may be applied to pending cases. But where the retroactive application of a rule of procedure would otherwise undermine the principle of legal certainty, this would be incompatible with Article 6.69

(vii) States have a greater latitude for imposing restriction in the civil than criminal context.70

(viii) If a limitation on access to an appeal court is compatible with Article 6 then no separate issue will normally arise under Article 13.71

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65 Monnel & Morris v UK 1988 10 EHRR 205
67 Ibid.
68 Ibid.
69 Ibid.
70 De Ponte Nascimento v UK 55331/00.
71 Kamasinski v Austria 9941/03.
2. In other words consideration requires to be given to the extent to which the provisions in any corrective legislation are largely procedural and in so far as Article 6 issues arise whether they all have a legitimate aim and are proportionate.

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BRIEFING NOTE - PARLIAMENTARY DEBATES: SCOTLAND ACT/HUMAN RIGHTS ACT

This is a note on parliamentary debates in 1997-98 about—

(a) the Lord Advocate’s place as a member of the Scottish Executive, including section 57(2) and (3); and
(b) the interaction between the Human Rights Bill and the Scotland Bill.

The Lord Advocate as a member of the Executive

Unlike the 1978 Scotland Bill, which would have left the Lord Advocate as a member of the UK Government, the 1997-98 Scotland Bill envisaged the Lord Advocate becoming a member of the Scottish Executive from the outset (Scotland Bill, as introduced 17 December 1997). The Bill, as introduced, provided for the Lord Advocate and the other members of the Scottish Executive to be prohibited from doing anything contrary to the Convention [clause 53(2)]. Clause 53(2) was enacted as section 57(2) and attracted little attention during the debates.

The decision to make the Lord Advocate a member of the Scottish Executive did not go uncontroverted. It was raised during the House of Lords Debate on the White Paper ‘Scotland’s Parliament’ (HL Deb 30 July 1997, vol 582, cols 185 to 278). When the Bill was considered by the Commons, Michael Ancram MP moved an amendment which would have provided for the Lord Advocate not to become a member of the Executive (HC Deb 10 February 1998, vol 306, col 160 et seq). The debate focussed largely on which Parliament the Lord Advocate should answer to, principally in his role as head of the prosecution service. However, opposing the amendment from the Government benches, Mr Henry McLeish MP did highlight that in addition to being a legal adviser to the Government and head of the prosecution service, the Lord Advocate also had certain statutory functions. On devolution it was intended that those functions would be transferred to the Scottish Executive as a collective, because they properly belonged to the devolved sphere, and it would then be for the First Minister to assign them to a member of the Executive, which in some cases would mean the Lord Advocate. The opposition continued to probe the decision to make the Lord Advocate a member of the Scottish Executive when the Bill reached the House of Lords (HL Deb 18 June 1998, Scotland Bill, col 1778), where the Government’s position was defended (col 1782) by the Lord Advocate (Lord Hardie) and see also HL Deb 28 July 1998, Scotland Bill.

The provision which was to be enacted as section 57(3) of the Scotland Act was inserted by Government amendment on 28 October 1998 (HL Deb 28 October 1998, vol, 593, col 2040). Lord Hope (col 2042) asked for clarification about the meaning of “in prosecuting”; specifically whether it was meant to mean the decision to prosecute or the manner of prosecution. His Lordship suggested the courts would feel more comfortable with the former interpretation. The Lord Advocate confirmed the amendment was directed to decisions not to prosecute and would not preclude challenges in respect of the manner in which a person was prosecuted.
Interaction between debates on the Human Rights Bill and the Scotland Bill (specifically in relation to Scottish criminal law)

The White Paper for the Scotland Bill was published in July 1997 (Scotland's Parliament, White Paper, July 1997). Paragraph 4.20 stated that Convention incorporation issues would be addressed in the White Paper for the Human Rights Bill. The White Paper for the Human Rights Bill was published on 24 October 1997 (Human Rights Bill White Paper (Rights Brought Home Cm 3782). Paragraph 2.21 stated that the Scottish Parliament was to have no power to contravene Convention rights. Notably paragraph 2.22 went on to state that the Welsh Assembly and Executive would be "similarly" constrained; which may indicate that the discussion was conceived to be about limitations on legislative and quasi-legislative powers and a failure to appreciate that the position of the Lord Advocate in the Scottish Executive was somewhat different to that of the members of the proposed Welsh Executive.

Whilst the White Paper for the Scotland Bill pre-dated the White Paper for the Human Rights Bill, the parliamentary introduction of the Human Rights Bill (on 23 October 1997) pre-dated the introduction of the Scotland Bill (on 17 December 1998) — indeed the introduction of the Human Rights Bill predated the publication of its own White Paper. The difficulty of scrutinising the Human Rights Bill, without having seen the Scotland Bill, was identified by Lord Mackay of Drumadoon on the first day of the House of Lords Committee stage (HL Deb 18 November 1997, col 537) and the point arose again at report stage (HL Deb 19 January 1998).

Later in the debate on 18 November (col 550) Lord Mackay moved an amendment to allow the High Court, not sitting as an appellate court, to make a declaration of incompatibility. Opposing the amendment, the Lord Chancellor urged that the policy was that trials should not be disrupted by the pursuit of a declaration of incompatibility going to the foundation of the prosecution. Arguably, this suggests that it was not foreseen at that stage that a devolution issue under the Scotland Act could have precisely such a disruptive effect. On the other hand, it might be said that pursuing a declaration of incompatibility would be a futile disruption given that it could not automatically result in a prosecution being terminated, whereas pursuing a devolution issue would be disruption with a purpose. Although unsuccessful, Lord Mackay’s amendment did lead the Government to reconsider the reference to the High Court sitting as an appeal court, which resulted in an amendment being made to allow the High Court to make a declaration of incompatibility on a petition to the nobile officium (HL Deb 19 January 1998 vol 584, col 1302).

In the next debate on the Human Rights Bill (HL Deb 24 November 1997, col 804), Lord Mackay moved an amendment to protect the Lord Advocate’s decisions to prosecute from being scrutinised. Lord Hope noted that whilst the Scottish courts would not entertain a challenge on whether or not to prosecute they would consider challenges to the manner in which a prosecution was brought; as mentioned above, this is a distinction his Lordship subsequently raised in the context of the Scotland Bill debate too (HL Deb 28 October 1998, vol, 593, col 2042). Resisting the amendment, the Lord Chancellor doubted whether there could be a Convention rights challenge to a decision whether or not to prosecute. In relation to challenges to the manner of prosecution, he said he saw no reason why public prosecutors should
be immune from Convention challenges on such grounds. The Lord Chancellor gave no indication in the course of the debate that the Lord Advocate’s prosecutorial functions would be subject to review on Convention grounds under the Scotland Act regime, which is perhaps unsurprising given that the Scotland Bill was still unpublished at this stage.

At report stage, Lord Mackay returned with another probing amendment seeking to protect the Lord Advocate’s prosecutorial decisions from review on Convention grounds (HL Deb 19 January 1998, col 1362). He emphasised that the human rights legislation’s application to prosecutorial acts had not been made clear by the Government. He noted that the Scotland Bill, which had been published by this stage, protected the Lord Advocate from having to explain prosecutorial decisions to the Parliament [this was a reference to clause 26(3), subsequently enacted as section 27(3)]. It should be noted that the Scotland Bill afforded the Lord Advocate no such protection in relation to judicial challenges to prosecutorial decisions. The Lord Chancellor resisted the amendment, again, on the basis that it was appropriate for prosecutorial decisions to be subject to the Convention. The Lord Chancellor also took the view that it was appropriate for any challenge arising from an alleged denial of Convention rights to proceed before the civil courts.

Lord Mackay returned to the topic at third reading (HL Deb 5 February 1998, col 813), noting that the Human Rights Bill and the Scotland Bill would seemingly create 2 different appellate routes for Convention challenges. The Lord Advocate responded that he did not consider it appropriate that his prosecutorial decisions should be put beyond review on Convention terms. Further, he asserted that the question of appeal routes would be addressed by the Secretary of State in subordinate legislation.

On 10 February 1998, the position of the Lord Advocate arises in the context of the Commons’ consideration of the Scotland Bill. As mentioned above, the debate was initiated by Michael Ancram MP moving an amendment which would have seen the Lord Advocate remain a member of the UK Government (HC Deb 10 February 1998, vol 306, col 160 et seq). The dispute about which Government the Lord Advocate should be a member of resumed in the House of Lords (HL Deb 18 June 1998, Scotland Bill, col 1778).

On 21 July, Lord Mackay proposed an amendment to clause 26 of the Scotland Bill (now section 27) which would have protected from judicial review any decision of a Law Officer to decline to answer a question in Parliament in relation to prosecutorial functions (HL Deb 21 July 1998, col 783). He takes the opportunity to further express his disquiet about the mechanisms being created for the courts to review decisions of the public prosecutor, as does Lord Fraser.

On 28 July, a further unavailing attempt was made by the opposition to preserve the Lord Advocate as a member of the UK Government (HL Deb 28 July 1998, Scotland Bill).

On 6 October, Lord Mackay queried what arrangements the Government would make to ensure the expeditious handling of devolution issues arising in the criminal context (HL Deb 6 October 1998, col 414). Notably, in discussing how he envisages
a devolution issue might challenge the manner in which a prosecution is brought, he speculates that “… it could well be raised that the charge upon which the accused is being prosecuted is based on legislation enacted by the Scottish parliament outwith its legislative competence, whether it is to the substance of the charge or the preliminary procedure by which an accused was arrested.” He went on to suggest that other challenges to the framing of a prosecution would proceed under the Human Rights Bill.

As mentioned above, the provision which was enacted as section 57(3) was inserted on 28 October under explanation that it was necessary to ensure the Lord Advocate would have the same protection from challenge as the Director of Public Prosecutions under the Human Rights Bill. Lord Mackay noted that the protection was somewhat at odds with the Lord Advocate’s statements during the debates on the Human Rights Bill that he was quite content to be subject to review and asked for examples of when the Lord Advocate envisaged the protection would apply. The Lord Advocate undertook to write.

The obligations to comply with Convention rights under the Scotland Act came fully into force on 20 May 1999. The Human Rights Act did not come fully into force until 2 October 2000. It may be thought that once the Human Rights Act came into force the need for the Convention rights protections under the Scotland Act came to an end and thus the Scotland Act’s Convention rights provisions could have ceased to apply on 2 October 2000.

The issue of the intended interaction between the two Acts was of course discussed at length in Somerville.

As enacted, section 129(2) of the Scotland Act addressed the possibility that it may come into force ahead of the Human Rights Act, by providing that the latter Act was to be treated as being in force insofar as necessary to make sense of the Scotland Act’s provisions. However, no equivalent to section 129(2) appeared in the Scotland Bill as introduced, suggesting that the initial expectation may have been that both Acts would come into force at the same time. Some limited support for this view may be drawn from Mr Dewar’s statement in the debate on the Scotland Bill White Paper that “The Scottish Parliament will not be here until 2000” (HC Deb 24 July 1997, col 1063).

There are some practical differences between the schemes. Specifically, the Scotland Act contained neither the Human Rights Act’s section 7(5) time-bar, nor its section 6(2) defence (save in relation to the Lord Advocate). Had the Scotland Act’s Convention rights protections flown-off on 2 October 2000 the Scottish Executive would suddenly have enjoyed a time-bar and section 6(2) defence, having subsisted without one for 17 months.

Rather than the Scotland Act’s Convention rights protections ceasing to apply when the Human Rights Act came into force, an alternative solution to the overlap between the two regimes, which would have avoided the issues outlined above, would have been for the devolved institutions to be excepted from the Human Rights Act. No doubt such an approach would have created numerous complications of its own though. It would essentially have meant treating the Scotland Act’s regime for
safeguarding Convention rights as the *lex specialis* to be applied in preference to the *lex generalis* enshrined in the Human Rights Act. This is precisely the interpretation of Parliament's intention that the First Division, and Lord Rodger, rejected in *Somerville*. 