SCOTTISH INDEPENDENCE REFERENDUM BILL

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To support oral evidence to the Referendum (Scotland) Bill Committee on 16 May 2013

Challenges to the Outcome of the Referendum

Section 31 of the Bill provides as follows:

“31 Restriction on legal challenge to referendum result
(1) No court may entertain any proceedings for questioning the number of ballot papers counted or votes cast as certified by a counting officer or by the Chief Counting Officer under section 6(2)(b) or (as the case may be) (4) unless—
   (a) the proceedings are brought by way of a petition for judicial review, and
   (b) the petition is lodged before the end of the permitted period.
(2) In subsection (1)(b) “the permitted period” means the period of 6 weeks beginning with—
   (a) the day on which the officer in question makes the certification as to the number of ballot papers counted and votes cast in the referendum, or
   (b) if the officer makes more than one such certification, the day on which the last is made.
(3) In subsection (1), references to a petition for judicial review are references to an application to the supervisory jurisdiction of the Court of Session.”

Thus, any challenge in court must be brought by a petition for judicial review and must be made within 6 weeks of completion of the count. This provision is similar to those in earlier referendum legislation e.g. the Parliamentary Voting System and Constituencies Act 2011 (AV referendum) and the Government of Wales Act 2006 (extension of powers of Welsh Assembly) and is designed to ensure any doubts about the referendum result are resolved swiftly.

It should be noted that the limitation of access to the courts applies only to proceedings which seek to question the number of ballot papers counted or votes cast. The provision does mention challenges on other grounds. This raises four questions:

- Could a challenge to the outcome be brought otherwise than under section 31?
- On what grounds might such other challenges be brought?
- Within what time should such challenges be brought?
- Who might bring such a challenge?
Could a challenge to the outcome be brought otherwise than under section 31?

It can be argued that a challenge could be made at common law. Section 31 excludes applications to the supervisory jurisdiction of the Court of Session outwith the time limit only in respect of the matters specified (the number of ballot papers counted and votes cast). Therefore, it remains possible to apply to the supervisory jurisdiction in relation to other matters. However, it is not clear whether a challenge to the outcome of the referendum would fall within the scope of the supervisory jurisdiction.

According to the leading case, West v Secretary of State for Scotland 1992 SC 385, the Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or other instrument. The sole purpose for which the supervisory jurisdiction might be exercised is to ensure that the person or body does not exceed or abuse its jurisdiction, power or authority or fail to do what is required. Moreover, for a case to be appropriate for the exercise of the supervisory jurisdiction, there must be a tri-partite relationship, between the person or body to whom the jurisdiction has been delegated, the person or body by whom it was delegated, and the persons in respect of whom the jurisdiction is to be exercised.

A person challenging the referendum outcome would have to specify the person to whom the challenge was addressed, and the decision, action or inaction of that person s/he was challenging. There would be some uncertainty as to both of these requisites so we cannot be sure whether or not a challenge to the outcome of the referendum would fall within the scope of the supervisory jurisdiction.

If, however, the challenger could convince the court that the case did fall within the scope of the supervisory jurisdiction, the three further questions listed above would arise.

On what grounds might such other challenges be brought?

The competence of holding the referendum has been settled by the Scotland Act 1998 (Modification of Schedule 5) Order, SI 2013/242. Apart from the integrity of the count itself, there might conceivably be concerns about the conduct of the election campaign, for example, breaches of the rules on donations and expenditure rules or irregularities in relation to voting.

Election petitions in parliamentary elections have been brought on a variety of grounds including the incurring of unauthorised election expenditure (Grieve v Douglas-Home 1965 SC 186), improper conduct of the election by officials (Re Kensington North Parliamentary Election [1960] 2 All ER150) and a candidate’s making false statements in relation to another candidate’s personal character or conduct (Watkins v Woolas [2010] EWHC 2702 (QB); R. (Woolas) v Parliamentary Election Court [2010] EWHC 3169 (Admin);
Election petitions under the Representation of the People Act 1983 are available only to challenge the election of a candidate and not the outcome of a general election.

However, although in theory a person might bring a challenge on the grounds that there had been such widespread irregularities as to call into question the fairness of the outcome, the likelihood of a successful challenge is remote. A few isolated examples of unauthorised expenditure or minor irregularities at a few polling stations would not suffice. There would have to be something so substantial as to raise genuine doubts about the fairness of the outcome, in order to persuade the court to intervene.

**Within what time should such challenges be brought?**

There is no fixed time limit for raising proceedings for judicial review, however, the court does have a discretion to refuse a remedy on grounds of *mora* (delay), taciturnity and acquiescence (see e.g. *Portobello Park Action Group Association v City of Edinburgh Council* 2012 SLT 1137)

**Who might bring such a challenge?**

In order to raise a petition for judicial review, a person must have standing to sue. Until recently, there might have been doubt about the range of persons who might have been able to raise a legal action to challenge the outcome of the referendum. However, the test for standing was recently reformulated in two Supreme Court cases (*AXA General Insurance Ltd, Petitioners* [2011] UKSC 46; 2012] 1 AC 868 and *Walton v Scottish Ministers* [2-12] UKSC 44; 2012 SLT 211)

The person raising the petition must have sufficient interest in the matter to which the application for judicial review relates, but this is to be broadly interpreted and does not necessarily mean that the person must have a greater interest than any other person. The dicta in both cases made clear that in appropriate cases a petitioner can represent the general public interest. Accordingly, whilst both the official campaigns would clearly have sufficient interest to challenge the outcome, a broader range of individuals and groups might also have standing.

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