SUPPLEMENTARY SUBMISSION FROM LORD McCLUSKEY AND SHERIFF STODDART

Following the meeting of the Scotland Bill Committee on 1 November 2011, we undertook to respond to certain questions raised by members. We add a few comments that bear upon issues raised by members but were not fully dealt with by us.

Q. Is the comparison we make (for certification purposes) with the other UK jurisdictions valid, in the light of the representations by the Law Society of Scotland and the Faculty of Advocates on this point? (Several members).

As the Advocate General pointed out in his evidence there are authoritative voices on both sides of this issue. We suggest that the solution is to be arrived at not by counting heads or measuring wigs but by a strict and careful analysis of what is being compared with what.

Certification was introduced in England\(^1\) in 1907 at the same time as appeals to the House of Lords in criminal causes were allowed. It was necessary to avoid the risk that the House of Lords would be flooded with applications to the court to exercise its new jurisdiction. So a filter mechanism was created, viz certification: the Attorney General was given the right, in a criminal case in which a defendant sought to appeal to the House of Lords, to decide if the case raised a “point of law of general public importance”. He did so by granting, or refusing a certificate, without which no appeal could proceed. Although – as both we and the Advocate General acknowledged - the principal reason for introducing this filter was to avoid a plethora of applications for leave to appeal, it was also clear that new jurisdiction that was given to the Appellate Committee of the House of Lords in the criminal field was to consider only matters of real public importance. So it was decided not to allow appeals based on grounds that could be adequately dealt with by the apex criminal court, the Court of Criminal appeal. At that date, of course, there was no appeal at all from the High Court in Scotland to the House of Lords. So it is instantly obvious that, if it had been decided to add a right of appeal from the High Court in Scotland the case for making certification obligatory would have been even stronger: because the number of potential appeal applications would have been materially larger. Indeed, the history of appeals to the House of Lords in civil cases after 1707 shows that the number of civil appeals from Scotland to the House of Lords exceeded those from England in every single year from 1707 until the mid 19\(^{th}\) Century (much to the annoyance of the House of Lords and to the detriment of Scots Law). To put it another way, the only reason why the certification procedure was not applied to Scottish criminal cases was that there was no appeal in such cases from Scotland.

The right to make the certification judgment was transferred from the Attorney General to the ‘apex’ court – the Court of Appeal (Criminal Division) in 1960. There were specified exceptions (e.g. habeas corpus) to the requirement for a certificate. However, each time since then that additional rights of appeal to the House of

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1. ‘England’ will be used here as a shorthand for all the other UK jurisdictions
Lords/Supreme Court were introduced, the requirement for a certificate was extended to those new appeals. (A particularly striking example of a statute requiring such a certificate from an apex court is Section 31(2) of the Criminal Appeal (Northern Ireland) Act 1980. The same requirement for a certificate is enacted by the Extradition Act 2003\(^2\). So, by 1998, most cases required a certificate but there were a few specified statutory exceptions, and after 1998 a certificate seems to have been invariably required. Accordingly, when, in 1998, the Human Rights Act permitted a new and potentially fruitful right of appeal from the apex courts\(^3\) to the Supreme Court\(^4\) on the ground of *incompatibility with Convention rights*, Government and Parliament then had to decide if applications under this new ground of appeal should fall under the general rule (*no certificate, no appeal*) or should be added to the list of exceptions. The decision was obviously to subject the new Human Rights compatibility appeals to the general rule, making a certificate from the apex court essential. There is no record of which we are aware that Parliament positively and deliberately decided in 1997/8 that the certification filter should not be available in respect of the new source of appeals from Scotland while being retained for the other jurisdictions. There is no statement to that effect that we are aware of in the speeches of ministers in the debates on the Scotland Bill 1997/8.

The logic of the situation is clear: the more appeal applications to the Supreme Court that are made possible by new legislation, the more pressing is the need for a filter to prevent applications that can and should be disposed of by the traditional apex court. As Scotland was to be subject to the Human Rights Act after 1998, it was likely to generate a material number of such applications. So the unexplained failure to apply the filter in respect of the new Scottish appeal applications, while retaining it for the rest of the UK even in respect of the new Human Rights Act appeal applications, appears to be a case of absent-mindedness, rather than deliberate policy. If it had been *deliberate*, then ministers would surely have felt it necessary to explain why Scotland alone was to be singled out as a jurisdiction in which the apex court, the High Court of Justiciary, could not be trusted to recognise which cases raised a point of law of general public importance. Scots would rightly have seen such discrimination as a slight on a court that enjoyed the highest reputation for integrity and the quality of its jurisprudence. This conclusion (absent-mindedness rather than deliberate choice) is particularly evident given that the amending provisions in the Scotland Bill that led to this discriminatory change were treated as technical and/or provisional amendments in a statute designed to *devolve* power, not to restrict the powers of an institution (the High Court) deliberately preserved as ‘sovereign’ in criminal matters under the Treaty of Union.

While there are important differences between the Supreme Court and the European Court of Human Rights it is not irrelevant to take note of the experience of the Strasbourg Court. When the Court was reorganised in November 1998, member

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\(^2\) Section 32(4)

\(^3\) in the UK jurisdictions other than Scotland

\(^4\) The term “Supreme Court” is use although until 2009 the House of Lords or the JCPC exercised the new ‘incompatibility’ jurisdiction
States accepted a universal right of individual petition. The result is that the Court has been inundated with applications to appeal. In the absence of any effective ‘filter’ – and there are persuasive reasons for a ‘no filter’ rule in some of the member States –the number of outstanding cases has rapidly grown to over 150,000. One lesson appears to be that, when people are given ill-defined human rights, coupled with the right of appeal, they will exercise their right to appeal to the highest court available.

The separate argument, to the effect that “devolution issues” from Wales and Northern Ireland go to the Supreme Court without the need for a certificate has already been dealt with. But, in short, the answer is that “devolution issues’ in Wales and Northern Ireland are essentially vires issues and are defined as such. The mistake that the Scotland Act 1998 made was to include under the definition of “devolution issues” something that was not a real devolution issue at all, namely the exercise by the Lord Advocate of his “retained functions”. (That error is to be removed by Clause 17 of the current Bill). The drafting error was to equate the Lord Advocate with ministers exercising devolved functions. Had the government of the day carried out its originally declared intention of dealing with human rights compatibility issues in the Human Rights Act, not in the Scotland Act, that error would surely have been avoided.

Q. How would certification work if, in a criminal trial, there were raised both a human rights compatibility issue and a pure vires issue (based on incompatibility with the Convention? (Mr Kelly)

We had difficulty at Committee in thinking of an example of such a case. On reflection, and taking account of the Lord Advocate’s proposed amendments, notably the proposed amendment to paragraph 1 of Schedule 6, inserting a new paragraph 1A (see number (3) of the LA’s proposed amendments), and understanding the thinking behind it, we should like to consider this further. Clearly the LA and the Advocate General are both aware of the point raised by the Committee, through Mr Kelly. We understand that the Law Officers and their officials are discussing how to avoid problems that might arise in criminal proceedings if there were two possible alternative routes to the Supreme Court. Our aim is to achieve simplicity and clarity while preserving the distinction between true devolution/vires issues and human rights/compatibility issues. In the circumstances, we shall await the outcome of the Law Officers’ discussions before offering advice on what is, at least in part, a technical issue of drafting.

Whatever drafting solutions are proposed Lord McCluskey expects to use his right to put down probing amendments in the House of Lords to test the thinking and the drafting: we do not plan to try to re-convene the Review Group to write additions to the final Report.
Q. Committee asked for comments on the Lord Advocate’s proposed amendments: we queried 288ZA, drawing attention to the words “(or proposes to act)” in subsection 1(a) and the terms of subsection (3) which did not appear to be easily reconcilable.

Clearly these amendments echo the provision in Section 7(1) of the Human Rights Act. We are of the view that, in criminal proceedings, unless there are very powerful reasons for dealing with incompatibility points at some earlier stage, the normal rule and practice should be to allow the possibility of an appeal to the Supreme Court only after the final determination of the criminal proceedings. We think that this may resolve itself into a matter of drafting; that would include taking account of time limits, such as those in Section 7 (1)(a) of the Human Rights Act. Again, we are aware that those responsible for drafting proposed amendments are aware of this issue and we shall await the outcome of their deliberations.

Subsection (3) of the proposed Section 288ZA is also under consideration to make sure that the High Court does not lose the power to refer a ‘preliminary’ point to the Supreme Court. Again, this is likely to resolve itself into a drafting point; and we shall wait and see if the principles are achieved.

Q. Is it incongruous, on the one hand, to advocate the introduction of a certification procedure similar to that in use elsewhere in the UK yet, on the other hand, to accept that if certification were to be dropped in the other jurisdictions it should be dropped in Scotland too? (Mr. Rennie)

We do not believe that there is any incongruity here. If it were decided that the certification requirement should be dropped for the rest of the UK, that would presumably be because it was judged by the UK Parliament that the Supreme Court had the resources to handle the likely extra business, including the processing of both successful and unsuccessful applications to the Supreme Court for permission to appeal to that Court. In those circumstances it would surely follow that the need for certification in Scottish criminal cases would have to go too. If it did not, there would be an outcry in Scotland on the lines of, “Why do Scots have to get a certificate on human rights issues when the English, Welsh and Northern Irish don’t?” In other words, the situation would be the obverse of the present complaint that the rights to go to the Supreme Court are different and discriminatory north and south of the border.

The heart of the matter is that, in human rights disputes, given that the law has to be determined by a UK court, the conditions for access to that court to define the law of the Convention ought to be the same throughout the UK.

One other aspect of this issue: in 1907, it was decided to allow criminal appeals from England to be heard in the Supreme Court in certain limited circumstances. In such appeals (which clearly did not include ‘compatibility’ issues) the Supreme Court was to have powers like those of the Court of Appeal to deal with the whole case. (Of course, no one then thought of tailoring the powers of the Court to take account of the possibility that ninety years later the Supreme Court would be required to hear appeals on the human rights features of criminal cases determined in Scotland).
When the new human rights jurisdiction was added in 1998, there was no occasion to change the powers of the Supreme Court for that one class of case, namely the Convention compatibility cases arising in criminal cases in England: when any such case came to the Supreme Court it would arrive already certified as one raising a point of law of general public importance. The Court's task would then be to rule on that point of law: that did not render it necessary or appropriate to embark in 1998 on the task of re-defining the powers of the Supreme Court in English cases when the point at issue was one of incompatibility with the Convention. So the fact that the Supreme Court has since 1907 been furnished with full appeal powers in a small number of English criminal cases has no bearing on the extent of the powers required to deal with this newly created, but very limited, jurisdiction in some Scottish cases.

A number of commentators have suggested that ALL human rights/compatibility issues are of such public importance that they warrant an uncertificated appeal to the Supreme Court. That is plainly not so elsewhere in the United Kingdom because no Convention compatibility point can go to the Supreme Court in criminal proceedings without a certificate. It is also to be remembered that the issue must raise a "point of law". We believe that the High Court of Justiciary is at least as capable as any other UK apex court to know whether or not the Supreme Court should be brought into the proceedings. If any alleged incompatibility could be the basis of an application to the Supreme Court for permission, regardless of its intrinsic merits or importance that court would continue to have to deal with such applications.

Q. Would the best solution not be to transfer the Lord Advocate’s retained functions to a newly created Director of Public Prosecutions type of figure who was not a minister and was clearly independent of the political administration? (Mr McLetchie).

While there may be some in this idea, which attracted some judges, it was not within our Terms of Reference and the Review Group did not address it.

Though it is clearly a matter for the Committee to decide if it arises in the context of their remit, the view of Sheriff Stoddart and Lord McCluskey it is not really an issue that is properly relevant to the proposals in the Scotland Bill. To remove the retained functions from the Lord Advocate after 500 years is not, we respectfully suggest, an operation to be undertaken without widespread consultation. There has been no such consultation. There are huge resource implications; and the revision of the Statute Book on both sides of the border could be a on a scale comparable to that which emerged when the hasty, unheralded and notoriously ill-thought-through decision was taken in 2003 to abolish the office of Lord Chancellor. That was an object lesson in how not to reform ancient Offices of State; there had been no consultation before the change was announced. it quickly emerged that more than 500 statutes had to be reconsidered carefully and potentially amended because the office of Lord Chancellor was referred to in them. Numerous other consequences had to be dealt with. Just as was the case with the office of Lord Chancellor, the exercise by the Lord Advocate of his retained functions is materially governed not just by statute but also by conventions, case law and hallowed practices. These would all need to be studied with the greatest of care to see which of them would
have to be replaced by statutory provisions to govern the exercise by the new DPP (Scotland) of the transferred “retained” functions; because the new DPP (Scotland), being a creature of statute, would have only such powers as the statute conferred upon him/her. The whole character of the Crown Office and the Fiscal service would have to be looked at.

In the circumstances we can offer no other opinion on this matter.

Lord McCluskey and Sheriff Stoddart
November 2011