The Right Honourable Elish Angiolini QC

LORD ADVOCATE'S CHAMBERS
25 CHAMBERS STREET
EDINBURGH EH1 1LA

Telephone: 0844 561 2000
Fax (GP3): 0844 561 4076

The Rt Hon the Lord Wallace of Tankerness QC
Advocate General
Dover House
Whitehall
London
SW1A 2AU

27 October 2010

Dear Jim,

I welcome the reconsideration of the operation of Section 57(2) of the Scotland Act 1998 as it applies to the role of the Lord Advocate and, in particular, in my capacity as head of the system of criminal prosecution in Scotland.

It is clear that one of the original purposes of Section 57(2), namely to ensure that the actions of the Lord Advocate (as one of the Scottish Ministers) should be subject to a human rights check, has resulted in unintended consequences due in part to the broad interpretation which has evolved over time as to what constitutes a "devolution issue". Further, since McDonald v HMA 2008 SCCR 954, a devolution issue with a consequent right of appeal to the Supreme Court can arise in a case regardless of whether a devolution minute raising a devolution issue was lodged by the appellant in the lower court or if lodged, received by the court.

When Schedule 6 to the Scotland Act 1998 was enacted, and certainly when the Act of Adjournal (Criminal Procedure Rules) 1996 Chapter 40 was put in place, it was envisaged that to have a right of appeal to the Supreme Court (and formerly the Judicial Committee of the Privy Council) a party wishing to take a devolution issue required to comply with the procedures contained within the Act of Adjournal, including timeously lodging and intimating a devolution minute to the court after due service upon the Lord Advocate and Advocate General.

As commented above, since the decision in *McDonald v HMA* this is no longer the case. Further, although only exercised once, the Supreme Court's powers include the right to quash a conviction. (See Sinclair v HMA 205 SCCR 446).

While the Human Rights Act 1998 may have been expected to enable a number of human rights issues to be raised, the consequence of section 57(2) of the Scotland Act has been a trend to characterise virtually any occurrence within a criminal trial as an "act" of the prosecutor and thereafter to channel the challenge to that occurrence through the prism of section 57(2). This has had the effect that virtually any objection, challenge or point of law can be characterised as a 'devolution issue' potentially giving rise to a right of appeal to the Supreme Court. It is difficult to see that the subject matter of the vast majority of applications to the Supreme Court, and indeed the majority of the Scottish cases decided by the JCPC and Supreme Court since May 1999, truly raise matters of constitutional significance.

Such appeals may take place before the conclusion of the criminal proceedings in which the devolution minute has been raised, and can have the effect of delaying proceedings and causing anxiety for victims and other persons involved in the criminal process. (See for example the procedural history of DS v HMA 2007 SCCR 222).

The wide interpretation of what constitutes a devolution issue coupled with the interaction between the Scotland Act and the Human Rights Act has created unique difficulties for Scots law and inadvertently resulted in the Supreme Court becoming, in effect, an additional criminal appellate court for Scotland.

The unintended consequence of devolution issues being interpreted to include a wide range of "acts of the prosecutor" has resulted in significant financial cost as well as a practical cost in the form of delays to court proceedings in Scotland. While unquantifiable, the industry that has developed around the creation, lodging and then arguing of 'devolution minutes' in the Scottish domestic criminal courts is considerable and incurs substantial costs, not only to the Crown and courts in dealing with these minutes but also in legal aid costs. In 2009/10 Crown records indicate that 1263 devolution minutes were served on the Lord Advocate. Since Cadder v HMA was argued in the Supreme Court in May 2010 that number has surged substantially. For example in the two months between 18.8.10 and 12.10.10 652 'Salduz' devolution minutes alone were served on the Crown.

The cost of each Supreme Court Appeal is significant. The Crown costs in outlays alone (e.g. case preparation, accommodation, travel to London and counsel's fees) incurred between April 2009 and October 2010 in relation to the five cases appealed to the Supreme Court in that period was £168,526. The above figure excludes printing and office costs, the salary costs of 'in-house' COPFS lawyers and counsel dealing with these appeals and the figure would rise considerably if that was taken into account (At a very conservative estimate the 'in-house' salary costs incurred in these cases are in the region of £90,500).

The legal aid costs of these appeals must also be substantial.

A further concern is that whilst the courts in Scotland and the Supreme Court are all bound to act compatibly with Convention rights, the courts in Scotland will apply law against the background of the common or statutory law of Scotland and the particular unique features of Scots Law when taking into account the compatibility of any provision or act in terms of the Human Rights Act. The focus of the Supreme Court is restricted to the narrower issue of compliance and in some cases this has led to a divergence of view between the Scottish courts and the Supreme Court with a concern that the decisions of the Supreme Court may to some extent have diluted some of the jurisprudence and distinctive elements of the Scottish legal system. This is somewhat ironic given that the purpose of devolution was to provide greater autonomy to Scotland in areas which are devolved including, for the most part, Scots criminal law. Prior to the devolution settlement such issues as the impact and effect of ECHR on Scottish criminal law would, of course, simply have been dealt with domestically by the Scottish courts guided by decisions of the European Court of Human Rights (including in Scottish cases).

It is worthy of note that in their response to the Calman Commission, the judges of the High Court of Justiciary highlighted similar difficulties with the current arrangements.

A possible solution in my view would be to decouple the Lord Advocate from Section 57(2) when acting in the prosecutorial capacity and to amend the devolution scheme to prevent acts of the prosecutor being categorised as devolution issues for the purposes of a reference to the Supreme Court. If it is thought unduly restrictive to cut off the flow altogether, it would be possible to provide the High Court of Justiciary in Scotland with a dispensing power to refer to the Supreme Court any case which truly raised a matter of constitutional importance and/or on which it wished that court's guidance.

It is important to recognise that amendment of Section 57(2) and Schedule 6 would not in anyway diminish the Lord Advocate's obligation to adhere to ECHR, as both the prosecutor and the courts would continue to be bound by the Human Rights Act. It would, however, alleviate another potential difficulty with the current arrangements, namely that the Lord Advocate "has no power" in the context of a criminal prosecution to do any act that is found to be incompatible. By contrast an equivalent 'act' of the CPS in England and Wales in a criminal trial would not attract the same competence and vires issues and all the consequences that potentially flow from that decision. Whether or not there is any real distinction between an act which is ultra vires (section 57(2)) and one which is unlawful (section 6 of the Human Rights Act) it seems to me desirable to ensure that prosecutors are placed on the same footing in each jurisdiction.

Wider but connected issues arise in relation to Acts of the Scottish Parliament. The difficulty with the current constitutional settlement for Scottish legislation is that a finding that an ASP is outwith legislative competence means, other than it being possible to read it down, that the ASP or a particular provision of it is ultra vires and thus of no effect, despite the fact that public authorities and others may in good faith have acted (and in the Lord Advocate's case prosecuted) on the basis of it for many years. If a similar decision was reached in other parts of the UK, the consequences of a successful challenge would be significantly reduced. A declaration of incompatibility does not deprive the provision of effect and provides an opportunity for a legislative solution to be developed. It is clearly undesirable that the consequences are so different in different parts of the UK.

A practical examination of the 'saving' provisions within the Scotland Act (orders under section 102) has suggested that there may be very real ECHR compatibility questions with utilising them in any meaningful way - particularly in relation to criminal ASPs. This has the effect of denuding public authorities and the Lord Advocate of any protection where provisions of an ASP are subsequently found to be incompatible with ECHR in a way which has potentially far reaching consequences, in particular for past convictions. Insofar as such orders may be considered by a court to be appropriate, there is in my view a significant gap in that they are expressly available only in respect of legislative acts. The court is not empowered to limit the retrospective effects of its decision, or suspend it, where it has found an "act" of the Lord Advocate to be ultra vires.

Lord Hope at paragraph 57 of Cadder v HMA observed

"Section 102 does not give the court power to remove or limit the effect of the decision that an act of the Lord Advocate was one that, in terms of section 57(2) she had no power to make. The absence of such a power in the statute, at the very least, is a considerable obstacle, on the *inclusion unius est exclusio alterius* principle. The legislation could have included such a power, but it did not do so. In its absence, the statutory declaration that the Lord Advocate had no power to do what she did must be given effect. Her act, whenever it occurred, must simply be held to have been invalid. It is hard to see how, under this statutory regime, there can be any room for limiting the effect of that decision by holding that it is not to have retrospective effect".

To place Scotland on an equal footing, I strongly support any measures that result in the Lord Advocate's role as a prosecutor being removed from Section 57(2) and that, by restricting what is a devolution issue for the purposes of a reference to the Supreme Court, enables the High Court of Justiciary to operate as the appropriate gatekeeper for relevant and constitutional issues to be referred to the Supreme Court where appropriate.

It also seems to me to be desirable either to limit the effect of Scottish legislation being ultra vires, to a declaration of incompatibility or at the very least to ensure that the court has the power to make s102 orders both in relation to legislation and in relation to non-legislative "acts".

Since it was referred to in the consultation document, I should add that I do not see any particular difficulties arising in relation to the other "retained" functions of the Lord Advocate and do not at this stage see any need to make particular provision for them. Nor do I see any need to distinguish between Convention rights and EU law in disapplying Section 57.

Yours sincerely,

ELISH ANGIOLINI