Review of sections 34 to 37 of the Scotland Act 2012

Compatibility issues

Report

September 2018

Contents

Chapter 1. Introduction

1.1 The Secretary of State for Scotland invited the Lord Justice General to chair a review of sections 34 to 37 of the Scotland Act 2012 ("the 2012 Act").

1.2 The review is required by section 38 of the 2012 Act. This section requires the Secretary of State to arrange for a review to take place as soon as practicable, 3 years after the date on which the provisions came into force[1]. That was on 23 April 2013.

1.3 Sections 34 to 37 made a number of amendments to the Criminal Procedure (Scotland) Act 1995 and the Scotland Act 1998 ("the 1998 Act"). Significant changes included the introduction of "compatibility issues" and modifications to the right of appeal in criminal proceedings to the United Kingdom Supreme Court ("UKSC").

Compatibility issues

1.4 A compatibility issue is defined as a question, arising in criminal proceedings, as to—

- whether a 'public authority' has acted unlawfully under section 6(1) of the Human Rights Act or in a way which is incompatible with EU law[2]; or
- whether an Act of the Scottish Parliament, or a provision within such an Act, is incompatible with the European Convention on Human Rights or EU law[3].

A matter which is a compatibility issue cannot also be a devolution issue (a term which is defined by paragraph 1 of schedule 6 of the 1998 Act). The procedure for raising a compatibility issue is set out in Chapter 40 of the Criminal Procedure Rules 1996[4]. If an accused intends to raise a compatibility issue in proceedings at first instance, notice of the intention to do so must be given to the court. The notice must also be intimated to the Lord Advocate and any co-accused. Notice of a compatibility issue may also be given in grounds of appeal. Intimation to the Advocate General is not required, although a court may order intimation where considered appropriate.

Appeals to the UKSC

1.5 The Criminal Procedure (Scotland) Act 1995 was amended by the 2012 Act to make provision for the right of appeal on a compatibility issue from the High Court, when constituted as a court of criminal appeal, to the UKSC. An appeal can only be made

[1] Scotland Act 2012 ("the 2012 Act"), section 38(2).

[2] Criminal Procedure (Scotland) Act 1995, section 288ZA(2)(a).

[3] *Ibid*, section 288ZA(2)(b).

[4] The Criminal Procedure Rules 1996 are in schedule 2 of the Act of Adjournal (Criminal Procedure Rules) 1996.

with the permission of the High Court or, failing that, the permission of the UKSC. There is no requirement for certification before seeking permission from the UKSC.

Remit of the review

1.6 As provided by section 38(3) of the 2012 Act, the review is to consider:

- whether changes should be made to sections 34 to 37;
- whether any further provision should be made in relation to any matter dealt with by those sections; and
- in particular, whether an appeal to the UKSC on a compatibility issue should lie only if the High Court of Justiciary certifies that the issue raises a point of law of general public importance.

Review Group

1.7 For the purpose of carrying out the review, the Lord Justice General established a Review Group. The Review Group was comprised of: Lord Carloway (Lord Justice General); Lord Reed (Deputy President of the UKSC); Lady Dorrian (Lord Justice Clerk); David Harvie (Crown Agent); Roddy Dunlop Q.C. (Treasurer of the Faculty of Advocates); and John Scott Q.C. (President of the Society of Solicitor Advocates).

1.8 On 07 September 2018, the Review Group approved the conclusions and recommendations in this paper. The Lord Justice General is grateful to the Review Group for their time, expertise and assistance in conducting the review.

1.9 The Review Group would like to express its gratitude to the officials within the Office of the Secretary of State for Scotland, the UKSC and the Crown Office and Procurator Fiscal Service, who assisted the review and in the collation of data.

Submission to the Secretary of State for Scotland

1.10 In accordance with section 38(1)(b) of the 2012 Act, the Review Group submits the report detailing the conclusions of the review to the Secretary of State for Scotland.

Chapter 2. Consultation summary

2.1 A consultation paper prepared under the auspices of the Review Group was published on 09 January 2018. Responses were invited by 09 April 2018.

2.2 For brevity, the Review Group adopts the legal and policy background to the enactment of sections 34 to 37 set out in Chapters 2 and 3 of the consultation paper.

2.3 The questions in the consultation were:

- Should certification by the High Court be necessary?
- Should challenges to legislation be a compatibility issue or devolution issue?
- Is a specialised procedure necessary or desirable for all compatibility issues?
- Should appeals from decisions to refuse leave at sift and refusals of leave to appeal from the Sheriff Appeal Court be permitted?
- Are the current appeal time limits sufficient?

2.4 There were six responses to the consultation. The responses are published on the Judiciary of Scotland website. The Law Society of Scotland[5], the Scottish Human Rights Commission[6], the Scottish Ministers[7], Sheriff Charles Stoddart[8], the Sheriffs' Association[9], and the Society of Solicitor Advocates[10] responded to the consultation.

2.5 The Review Group is grateful to the individuals and organisations who responded to the consultation. All responses have been analysed and considered, along with other available evidence, to assist the Review Group prepare this report.

2.6 The purpose of this chapter is to provide a summary of consultation responses.

Should certification by the High Court be necessary?

2.7 There were six responses to this question. All but one of the respondents took the view that an appeal to the UKSC on a compatibility issue should not require certification by the High Court that the issue raises a point of law of general public importance.

[5] http://www.scotland-judiciary.org.uk/Upload/Documents/LawSocietyofScotland_ScotlandActReview_2018.pdf
[6] http://www.scotland-judiciary.org.uk/Upload/Documents/ScottishHumanRightsCommission_ScotlandActReview_2018.pdf
[7] http://www.scotland-judiciary.org.uk/Upload/Documents/ScottishMinisters_ScotlandActReview_2018.pdf
[8] http://www.scotland-judiciary.org.uk/Upload/Documents/SheriffCharlesStoddart_ScotlandActReviews_2018.pdf
[9] http://www.scotland-judiciary.org.uk/Upload/Documents/SheriffsAssociation_ScotlandActReview_2018.pdf
[10] http://www.scotland-judiciary.org.uk/Upload/Documents/SocietyofSolicitorAdvocates_ScotlandActReview_2018.pdf

2.8 Sheriff Charles Stoddart was a member of the Independent Review Group, chaired by the late Lord McCluskey, which proposed such a certification requirement. The reason for the proposal was due to a concern that, if certification was not required, the floodgates to the UKSC would remain open. Sheriff Stoddart expressed relief that the amendments made by sections 34 to 37 of the 2012 Act "*appear to have reduced significantly the burden which the previous law and practice placed on the Scottish criminal courts with its unwarranted emphasis on 'acts of the Lord Advocate'*". Sheriff Stoddart advised that he no longer sees the need for certification. He considered that the necessary filter appears to be in operation through the requirement, when applying for permission to appeal to the UKSC, to specify whether the grounds of appeal raise a point of law of general public importance. Sheriff Stoddart considered that it is unlikely that permission would be granted without such specification.

2.9 The Sheriffs' Association observed that the introduction of a certification requirement would be undesirable and unnecessary. The Association noted that there has been a reduction in the number of cases in which permission to appeal is sought and therefore any need for a certification requirement has abated.

2.10 The Law Society of Scotland noted that the UKSC has not been overwhelmed by unmeritorious applications for permission to appeal. The Law Society considered that imposing a certification requirement is unnecessary as there does not appear to have been any issue so far and all it would achieve is to continue the current practice.

2.11 The Scottish Human Rights Commission suggested that, as the criminal courts deal with charges against an individual, it is arguable that any alleged incompatibility would raise a point of law of general public importance. The Commission submitted that certification should not be required to seek permission to appeal to the UKSC. It considered that there is a real risk that matters may be poorly presented by an appellant and so a point of law of general public importance may be obscured.

2.12 The Society of Solicitor Advocates suggested that fears about floodgate issues have proven unfounded and thus certification should not be necessary. The Society observed that it appears that the right cases are being considered by the UKSC on the basis of demonstrating that a point of law of general public importance is raised.

2.13 The Scottish Ministers were the only respondent to support a certification requirement. Their submission reiterated agreement with the view expressed by the Independent Review Group that: "…*in order to preserve the position of the High Court, consideration of appeals by the [UKSC] should, as is the case for all the other UK jurisdictions, be limited to cases where the 'local' court has certified points of law of general*

public importance"[11]. The Scottish Ministers noted that the UKSC has hitherto exhibited restraint in the extent to which it has exercised its appellate jurisdiction; however, they were concerned that the existing arrangements are not based on a formal convention or required by primary legislation. The Scottish Ministers submitted that it is "*unacceptable for Scottish judges not to be able to decide on the need for guidance from the [UKSC] on human rights in criminal cases, when other judges in other parts of the UK make that decision*". The Scottish Ministers observed that the certification process in place for other parts of the United Kingdom does not appear to have frustrated the aim of consistent consideration of international obligations by the UKSC.

Should challenges to legislation be a compatibility issue or a devolution issue?

2.14 There were five responses to this question. The majority of respondents did not support re-defining certain challenges to legislation as a devolution issue.

2.15 The Scottish Ministers expressed a strong preference that challenges to legislation should continue to be categorised as a compatibility issue. The Scottish Ministers observed that Convention or EU law challenges may arise concurrently in relation to acts of public authorities and legislation. If challenges to legislation were to be re-defined as a devolution issue, the Scottish Ministers considered that there may be confusion as to what matters might be subject to each procedure. Issues would be raised using both compatibility issue and devolution issue procedures as a failsafe. The Scottish Ministers concluded that "*the process should allow for a coherent system in criminal proceedings for all ECHR matters. That process should not create confusion or scope for uncertainty about how to characterise an ECHR matter… the reforms effected by the 2012 Act are working well in this respect, and thus in all the circumstances they should remain in place, at least for the time being*".

2.16 The Sheriffs' Association noted that devolution issues are questions as to the limits of the devolution settlement and thus are properly questions of constitutional law. The Association observed that they are conceptually quite different from compatibility issues and should continue to be so treated. The Association also expressed concern about potential confusion that may arise if a Convention or EU related issue could be raised under two procedures. A single procedural route for such issues is preferred.

2.17 The Law Society of Scotland expressed the view that, as the current position appears to be working without problems, there is no over-riding need to amend.

[11] Independent Review Group, *Final Report: Examination of the Relationship Between the High Court of Justiciary and the Supreme Court in Criminal Cases*, September 2011, paragraph 43.

2.18 Sheriff Stoddart and the Society of Solicitor Advocates were in favour of re-defining challenges to legislation in criminal proceedings on Convention or EU grounds as a devolution issue. In support of such an amendment, Sheriff Stoddart noted that challenges to legislation had, in the past, been described as raising a "true devolution issue", emphasising the central role of legislation in the devolution settlement.

Is a specialised procedure necessary or desirable for all compatibility issues?

2.19 The Law Society of Scotland considered that a specialised procedure is not necessary in relation to the compatibility of more routine aspects of criminal procedure. However, the Law Society expressed the view that the intimation of a compatibility minute is useful and should continue, in order to give fair notice of the issue in dispute to the other parties and the court. The Law Society noted the Review Group's observation that compatibility minutes are often found to lack sufficient detail. To address this situation, the Law Society suggested that the High Court may wish to consider a Practice Note or an amendment to the Criminal Procedure Rules 1996 to set out the information required by the court.

2.20 The Scottish Ministers offered no view on whether a specialised procedure is necessary but noted that any issues with the way in which compatibility and devolution issues are dealt with is capable of being addressed in procedural rules.

2.21 The Sheriffs' Association supports a specialised procedure for compatibility issues.

2.22 The Society of Solicitor Advocates noted that there were benefits in having a specialised procedure for compatibility issues; however such a procedure may no longer be necessary. Subject to the proper specification of issues, the Society believes that the procedures for preliminary pleas can accommodate compatibility issues.

Should appeals from decisions to refuse leave at sift and refusals of leave to appeal from the Sheriff Appeal Court be permitted?

2.23 An appeal to the UKSC may be permitted against a determination by a court of two or more judges of the High Court of Justiciary[12]. Leave to appeal may also be sought from "sift" decisions on whether leave should be granted to the High Court and from decisions to refuse leave to appeal from the Sheriff Appeal Court[13].

2.24 There were three responses to this question. The majority of respondents were in favour of permitting appeals to the UKSC from decisions to refuse leave to appeal.

[12] Criminal Procedure (Scotland) Act 1995, section 288AA.

[13] *Ibid*, sections 194ZB and 194ZD-E.

2.25 The Law Society of Scotland noted that, if appeals against decision to refuse leave or permission were precluded, the UKSC would be deprived of its jurisdiction to consider an appeal arising in similar circumstances to *Cadder v HM Advocate*[14]. The Law Society's view was that the present practice should continue so that the UKSC would retain its jurisdiction should another case like *Cadder* arise in the future.

2.26 The Society of Solicitor Advocates considered that the *Cadder* case is a very useful illustration of a situation where there was a benefit in allowing appeals from a decision to refuse leave. The Society noted that a similar situation is unlikely to occur frequently, however it would be unfortunate if it were to be excluded entirely.

2.27 The Sheriffs' Association expressed the view that legislation should provide for the UKSC to grant leave to appeal to the High Court in such circumstances. This would mean that the final decision on leave to appeal would lie with the UKSC.

Are current appeal time limits sufficient?

2.28 Five respondents expressed a view on the sufficiency of appeal time limits. The majority of respondents did not support amending the period of time within which a party may make an application for permission to appeal to the UKSC.

2.29 The Sheriffs' Association support the current appeal time limits. Their submission noted that the time limits are sufficient, especially given the power of the High Court or the UKSC to allow a longer period as may be equitable in the circumstances.

2.30 The Scottish Human Rights Commission considered that any reduction in appeal time limits may impede access to legal aid. The Commission advised that there are practical difficulties in obtaining legal aid. Where the High Court does not grant permission to appeal to the UKSC, a fresh application for legal aid must be made. The Commission advised this takes time and, in their experience, obtaining legal aid in that period can be difficult, even with a supportive opinion from Counsel.

2.31 The Law Society of Scotland expressed the view that appeal time limits ought not to be reduced, unless amendments were made to the process of obtaining legal aid for an appeal to the UKSC. It noted that applying for legal aid can take some time and appellants must have sufficient time to take the required steps. Even where the High Court grants permission to appeal, an appellant must provide the Scottish Legal Aid Board with vouching that permission to appeal to the UKSC has been granted.

2.32 The Law Society suggested that an argument in favour of retaining current time limits is to ensure that the provision for Scottish proceedings in the UKSC is

[14] *Cadder v HM Advocate*, 2011 S.C. (UKSC) 13.

consistent with proceedings from other parts of the United Kingdom. The Law Society noted that, other than where special provision is made for a particular category of appeal, an application for permission to appeal to the UKSC must be made within 28 days from the date of the order of decision from the court below[15]. Any amendment to the appeal time limits set out in the Criminal Procedure (Scotland) Act 1995 would therefore mean that the Scottish provision would be inconsistent with the provision made for remainder of the United Kingdom.

2.33 The Society of Solicitor Advocates submitted that current procedures work satisfactorily and in a way which is not productive of excessive or unnecessary delay.

2.34 The Scottish Ministers do not support an increase to appeal time limits.

Miscellaneous matters

2.35 The consultation questions were not exhaustive. Respondents were invited to comment on any matter in relation to the practice and procedure relating to compatibility issues and appeals to the UKSC in Scottish criminal proceedings.

2.36 The Scottish Human Rights Commission asked whether the provision made by section 288AA(6) of the Criminal Procedure (Scotland) Act 1995 was fair. The effect of the subsection is that neither the Lord Advocate or Advocate General for Scotland require permission in order to appeal to the UKSC against a determination by the High Court of a compatibility issue referred under section 288ZB(2). The Commission suggested that the lack of a requirement to obtain permission creates an imbalance and the different levels of access raises clear questions of fairness.

2.37 Analysis of the issues raised in the consultation is set out in Chapter 3 of the report.

[15] Supreme Court Rules 2009, rule 11(1).

Chapter 3. Consideration

Certification by the High Court

3.1 The Review Group was required to consider whether an appeal to the UKSC on a compatibility issue should only be possible where the High Court of Justiciary has certified that the issue raised a point of law of general public importance.

3.2 As was observed by the respondents to the consultation, the purpose of certification was to assuage concerns about opening floodgates to the UKSC. Those concerns were, in part, attributable to the volume of devolution issues raised in criminal proceedings prior to the amendments by the 2012 Act. It followed that, if the floodgates were open, the UKSC might be inundated with compatibility issue appeals.

3.3 There is some support for the introduction of a certification requirement as a mechanism by which the traditional role of the High Court, as the final court of criminal appeal, may be restored. The background to the traditional role of the High Court is set out in Professor Neil Walker's report to the Scottish Government on *Final Appellate Jurisdiction in the Scottish Legal System*[16]. The Review Group did not, as part of the consultation, invite views on whether the UKSC should continue to have a role in criminal appeals. It accepts the principle that, under the current constitutional settlement, the UKSC should have a supervisory jurisdiction to ensure that treaty obligations are enforced in a uniform manner throughout the United Kingdom.

3.4 The Review Group has, with the assistance of the Crown Office and Procurator Fiscal Service and the UKSC, collated data on: (a) the number of compatibility issues intimated to the Crown Office; and (b) the number of applications for permission to appeal to the UKSC. The following data is accurate as of 08 December 2017:

All Scottish criminal courts	
Compatibility issues imitated to the Crown Office:	1402
High Court of Justiciary	
Applications for permission to appeal:	27
Permission to appeal refused:	26
Permission to appeal granted:	1

[16] Professor Neil Walker, *Final Appellate Jurisdiction in the Scottish Legal System*, published January 2010.

UKSC	
Applications for permission to appeal:	8
Permission to appeal refused:	8
Permission to appeal granted:	0

The Review Group notes that concerns about opening the floodgates, with the benefit of hindsight gleaned from the above data, appear unfounded. There have been few successful applications for permission to appeal. In the consultation paper, the Review Group recognised that the UKSC has exhibited an appropriate degree of restraint in the exercise of its appellate jurisdiction. That restraint may be evidenced by the fact that there has been no appeal on a compatibility issue in which the High Court refused permission only for the UKSC to grant permission subsequently.

3.5 The Review Group considers that there is no practical benefit to be gained from amending primary legislation to introduce a certification requirement. The proposed test for certification (i.e. that the issue raises a point of law of general public importance) forms part of the current law and practice. An applicant is required to set out how his or her appeal satisfies that test in the application for permission. A failure to do so is likely to be a key matter which the court will consider. In *Macklin v HM Advocate*[17], the application to the High Court for permission to appeal failed to refer to any point of law of general public importance. The High Court held that the omission was "*not without significance*" and refused permission to appeal[18].

3.6 The Scottish Ministers compared the position in Scotland with the position in other parts of the United Kingdom. An appeal to the UKSC in criminal proceedings from England, Wales or Northern Ireland, with certain exceptions[19], requires certification by the court below that a point of law of general public importance is involved in the decision of that court, and it appears that the point is one which ought to be considered by the UKSC[20]. The Review Group observes that a clear distinction may be drawn between the position in Scotland and that of other parts of the United Kingdom. In Scottish criminal proceedings, the UKSC's jurisdiction is limited to the determination of compatibility and devolution issues, whereas the UKSC has jurisdiction over all criminal law and procedure for the other parts of the United

[17] *Macklin v HM Advocate*, 2013 HCJAC 141.

[18] *Ibid,* paragraph 6.

[19] For instance, a certificate is not required where an appeal is on a criminal application for *habeas corpus*.

[20] UKSC Practice Direction 12 (Criminal Proceedings), paragraph 12.2.1.

Kingdom. It is reasonable to assume that, if certification were not required for appeals from England, Wales and Northern Ireland, the floodgates to the UKSC would be opened. As discussed earlier, those concerns do not hold true for Scotland.

3.7 An appeal to the UKSC should not require certification by the High Court of Justiciary that the issue raises a point of law of general public importance.

Definition of a compatibility issue

3.8 The consultation asked whether a challenge to an Act of the Scottish Parliament, or subordinate legislation, should continue to be categorised as a "compatibility issue".

3.9 In the consultation paper, the Review Group observed that it may be inept to treat a challenge to legislation on Convention or EU grounds as distinct from the devolution regime. It was noted that such a challenge relates to the legislative competence of the Scottish Parliament and may thus properly be described as a "devolution issue". It was also considered that the definition of a compatibility issue may constrain the ability of the High Court to amend the relevant court rules so as to deal effectively with non-legislative challenges through existing procedures for preliminary pleas.

3.10 Having regard to the consultation responses, the Review Group considers that there is merit in having a single avenue by which all Convention and EU law challenges may be pursued. That aim is achieved by the current definition of a compatibility issue. Altering that definition may give rise to confusion by an accused as to whether the point of law is to be categorised as a compatibility or devolution issue, with both procedures invoked as a failsafe. Conceptual discussions as to whether a point of law is properly a devolution issue (i.e. relates to the devolution settlement) or compatibility issue (i.e. relates to the compatibility with the Convention or EU law) should not be allowed to obfuscate procedure. The present procedure is satisfactory.

3.11 A question as to whether an Act of the Scottish Parliament, or a provision within such an Act, is incompatible with the Convention or EU law should continue to be defined as a compatibility issue and thus remain subject to that procedure.

Specialised procedure

3.12 The Expert Group, chaired by Sir David Edward, reported to the Advocate General for Scotland in November 2010. In the report, it was noted that much of the dissatisfaction with devolution issues in criminal proceedings was attributable to the fact that, in Scotland, issues of compatibility with Convention rights and EU law were dealt with by procedures designed for challenges to legislative or

administrative *vires*[21]. The position was, and is, unlike England, Wales and Northern Ireland in which such challenges are dealt with by the normal procedures of the criminal courts. For non-*vires* issues, devolution issue procedure was thought to be productive of delay. The Expert Group considered that there was no reason why issues of compatibility should not be treated in the same way as other issues of law arising in the course of proceedings and thus there would be no need for any specialised procedure.

3.13 The Review Group noted in its consultation paper that some aspects of specialised procedure are desirable. The Group remains of that view. The intimation of compatibility and devolution minutes, designed to give fair notice of the issue to the other parties and the court, is one aspect of this. However, minutes are often found to lack sufficient detail, in describing the nature and legal basis for any incompatibility and specifying the remedy sought, to be of material assistance to the court.

3.14 The Review Group recommends that the Criminal Courts Rules Council considers the extent to which amendment of Chapter 40 of the Criminal Procedure Rules, and accompanying forms, is required in order to specify clearly the matters that should be addressed in compatibility and devolution minutes. Such matters might include:

- a brief description of the facts and circumstances on the basis of which it is alleged that the issue arises;
- a concise summary of the submissions to be developed, including a numbered list of the points which the party wishes to make;
- where the party intends to refer to any document in support of a point, identification of the relevant passage in the document;
- a brief description of the relevant authorities upon which the party raising the issue intends to rely and the legal propositions which they demonstrate (more than one authority should not normally be cited in support of a proposition);
- where the issue arises in relation to an Act of the Scottish Parliament, a provision within such an Act or in subordinate legislation, a reference to, and a description of, the provision which the party alleges is incompatible;
- the remedy sought; and

[21] Report by the Expert Group appointed by the Advocate General for Scotland, *Section 57(2) and Schedule 6 of the Scotland Act 1998 and the Role of the Lord Advocate*, published 11 November 2010, paragraph 4.30.

- the identity of persons who have received intimation of the minute (including, for a devolution issue, the Advocate General for Scotland).

Decisions to refuse leave to appeal

3.15 The consultation asked whether appeals from refusals of leave to appeal should be permitted. All respondents to the consultation agreed some form of recourse to the UKSC should be permitted. That was also the prevailing view of the Review Group.

3.16 The Sheriffs' Association suggested that, in a case where there has been a refusal of leave at sift, the UKSC should be able to grant leave to appeal and remit the case to the High Court in order for the compatibility issue to be determined. An appeal to the UKSC may, with permission, follow against the determination on the merits. The benefit of this approach would be that, if an appeal to the UKSC proceeds on the merits, the UKSC would have a determination on the merits by the High Court to consider. On the other hand, if an appeal to the UKSC were to follow against that later determination, the suggestion by the Sheriffs' Association would make for a far less efficient process. There would be two applications to the High Court for permission to appeal (one against the determination at sift and one in relation to the determination on the merits) and two applications to the UKSC for permission.

3.17 The Review Group considers that the UKSC should continue to have the power to grant leave directly to itself where the appeal concerns a refusal, at second sift, of leave to appeal from a first instance decision. Preventing an appeal in similar circumstances to *Cadder* would frustrate the aim of the UKSC's constitutional jurisdiction. The Review Group does not consider that there should be a system whereby, on an appeal to the UKSC from a second sift decision, the UKSC could grant leave and remit the case for determination by the High Court. It is for the High Court to determine which cases meet the statutory test for the grant of leave to appeal at second sift.

3.18 An appeal to the UKSC against a decision to refuse leave to appeal to the High Court at second sift should remain possible. No amendment is required in that regard.

Appeal time limits

3.19 At present, a party seeking permission to appeal from the High Court must apply within 28 days from the date of the High Court's determination of the compatibility issue. Where the High Court refuses permission, an application to the UKSC for permission to appeal must be made within 28 days of the date on which the High Court refused permission[22]. The consultation questioned the appropriateness of

[22] The 1995 Act, section 288AA(7) and (8).

giving a party a period of eight weeks to prepare two applications for permission, as the grounds of appeal ought to have been specified properly in the first application.

3.20 The Review Group appreciates that there is strong concern within the profession that any reduction in the time limit within which permission to appeal from the UKSC may be sought may impede access to legal aid. It should be observed, however, that the *UKSC Practice Direction (Miscellaneous Matters)* makes provision for appeal time limits where public funding or legal aid is sought. An application by an appellant for legal aid will suspend the commencement of proceedings and the appeal time limit until 28 days after the determination of the legal aid application (including any appeal against a refusal)[23]. The Review Group accepts that the appeal time limit will often be suspended in this way and considers that the UKSC Practice Direction makes sufficient provision in that regard. There is consequently no need to extend the statutory appeal period for the purpose of giving an appellant more time to seek legal aid. Exceptionally, the High Court and the UKSC may extend the deadline, where it is considered equitable to do so in the circumstances of an appeal.

3.21 The Scottish Human Rights Commission recommended that the Review Group seeks evidence on the number of legal aid applications granted or refused, with a view to informing whether changes should be made to legal aid procedures. The Review Group has not sought such evidence as it considers that the extent to which any amendments to legal aid procedures are required is not within the review's remit.

3.22 The Review Group considers that the current appeal time limits are sufficient.

Appeals by the Lord Advocate and Advocate General

3.23 The Scottish Human Rights Commission asked whether, in pursuit of parity, the Lord Advocate and Advocate General should require permission to appeal to the UKSC against the determination of a compatibility issue by the High Court.

3.24 The Review Group considers that there is clear justification for permitting appeals by law officers without seeking permission. The test for permission to appeal to the UKSC is whether the compatibility issue raises a point of law of general public importance. Where a law officer intends to appeal, the test will be met. If a compatibility issue was determined against the Lord Advocate or Advocate General, it is likely a significant number of appeals on the same point of law would follow.

[23] UKSC Practice Direction 8 (Miscellaneous Matters), paragraph 8.12.3.

Chapter 4. Summary of conclusions

4.1 The amendments made by the 2012 Act have reduced the burden that was placed on the Scottish criminal courts by the previous law and practice.

4.2 An appeal to the UKSC on a compatibility issue should not require certification by the High Court that the issue raises a point of law of general public importance.

4.3 There is merit in a single procedure through which an individual may challenge legislation on Convention or EU grounds. Such challenges should continue to be defined as a 'compatibility issue' and be subject to compatibility issue procedure.

4.4 The Criminal Courts Rules Council should consider the extent to which amendment of Chapter 40 of the Criminal Procedure Rules is required in order to set out clearly the matters which must be specified in compatibility and devolution minutes.

4.5 Applications for permission to appeal against a decision to refuse leave to appeal to either the Sheriff Appeal Court or the High Court should remain possible.

4.6 The existing appeal time limits are appropriate and should not be amended.

4.7 Law officers should not be required to seek permission to appeal to the UKSC against the determination of a compatibility issue referred to the High Court under section 288ZB(2) of the Criminal Procedure (Scotland) Act 1995.

ON BEHALF OF THE REVIEW GROUP

Lord Carloway
Lord Justice General

20th September 2018