

Judicial politics in the Judicial Committee

by Aidan O'Neill QC

How a Scottish takeover of English law in matters of Convention rights has seen the House of Lords superseded as the final court of appeal.

Between October 2000 and February 2001 four decisions of the Judicial Committee of the Privy Council, acting for the first time under its devolution jurisdiction, were pronounced. All of these cases came from Scotland on appeal from decisions of the High Court of Justiciary sitting in Edinburgh as a court of criminal appeal. The Scottish criminal appeal court has, throughout its history, been a court of final instance with no possibility of further appeal against any of its decisions to the House of Lords. Paragraph 13(a) of Schedule 6 to the *Scotland Act 1998*, however, introduced for the first time the possibility of an appeal against decisions of the Scottish criminal appeal court to the Privy Council, either with leave of the Scottish court or, failing such leave, with special leave of the Judicial Committee. The four cases, which have now gone to the Judicial Committee from Scotland, are, chronologically:

- (i) *Montgomery and Coulter v Her Majesty's Advocate and the Advocate General for Scotland* JCPC 200 SLT 37 (accessible at www.privycouncil.org.uk/ and digested in [2000] *Times Law Reports* 867): an appeal by the two accused in the second *Surjit Singh Chhokar* murder trial against a decision by the High Court of Justiciary, acting as the Scottish criminal appeal court, to refuse their claim that the extent of their pre-trial publicity (resulting in part from a public dispute between Lord McCluskey the trial judge in the first *Chhokar Singh* trial and the then Lord Advocate, Lord Hardie of Blackford, over the propriety of the Crown deciding against putting all three suspects for the murder on trial together) was such as to deprive them of the possibility of a fair trial;
- (ii) *Hoekstra and others v Her Majesty's Advocate (No. 4)* [2000] 3 WLR 1817, JCPC (also accessible at www.privycouncil.org.uk/): an application by the accused for special leave to appeal to the Privy Council against the decision of the High Court in *Hoekstra and others v Her Majesty's Advocate (No. 3)*, HCJ, 2000 SCCR 676 (chaired by the Lord Justice General, Lord Rodger of

Earlsferry), to refuse their application to set aside as *ultra vires* that Court's earlier decision in *Hoekstra and others v Her Majesty's Advocate (No. 2)*, 2000 SLT 605, HCJ, to order the quashing of the interlocutors of a differently constituted High Court (chaired by Lord McCluskey in *Hoekstra and others v Her Majesty's Advocate (No. 1)*, 2000 SLT 602, HCJ). The second High Court had quashed the orders of the first High Court on the grounds that these had been pronounced by a court, which, by reason of Lord McCluskey's trenchantly expressed public views on the wisdom of the incorporation of the European Convention, could not be said to have been properly constituted by three impartial judges;

- (iii) *Brown v Stott (Procurator Fiscal, Dunfermline)*, 2000 SLT 59, JCPC (also accessible at www.privycouncil.org.uk/): an appeal by the Crown against the decision of the High Court of Justiciary (again acting under the chairmanship of the Lord Justice General in its appellate jurisdiction in *Brown v Stott (Procurator Fiscal, Dunfermline)*, 2000 SLT 379, HCJ), to uphold the accused's claim that the proposal by the Crown to lead and rely in court upon evidence of the admission which she was compelled to make to the police under section 172(2)(a) of the *Road Traffic Act 1988* contravened her Convention right against self-incrimination; and
- (iv) *HM Advocate v McIntosh*, JCPC, unreported, 5 February 2001 (accessible at www.privycouncil.org.uk/): again a Crown appeal against a decision of the Scottish criminal appeal court consisting of Lord Prosser, Lord Kirkwood and Lord Allanbridge in which a majority of the court (Lord Kirkwood dissenting) found that the assumptions set out in section 3(2) of the *Proceeds of Crime (Scotland) Act 1995*, relating to the recovery of the proceeds of drug trafficking, were incompatible with the presumption of innocence set out in Article 6(2) ECHR (see *McIntosh v HM Advocate*, 2000 SLT 1280, HCJ, also accessible at www.scotcourts.gov.uk/).

All of these appeals concerned aspects of the fair trial provision of the Convention, Article 6. The accused's appeal in *Montgomery v Coulter* was unsuccessful, it being held by the Judicial Committee that the High Court of Justiciary was correct in its assessment of the effect of the pre-trial publicity in this case as not being such as to prejudice the possibility of the two accused receiving a fair trial. The applicants for special leave in *Hoekstra (No. 4)* were also unsuccessful, with the Judicial Committee again agreeing with the High Court that the accused's applications raised no devolution issues properly so called, and that therefore there was no avenue of appeal to the Judicial Committee available under the *Scotland Act 1998*. By contrast, in *Brown v Stott*, the Crown appeal against the decision of the High Court of Justiciary was successful, it being held that any right against self-incrimination in the Convention was not an absolute one, but was instead a right which could lawfully be limited, provided that such limitation were proportionate and not such as to compromise an accused's right to a fair trial overall: in the context of road traffic prosecutions, the Judicial Committee held that considerations of the public interest could justify the Crown leading in evidence the accused's self-incriminating statement, notwithstanding that it was required of her by the police under threat of prosecution. And in *HM Advocate v McIntosh* the Crown appeal was again successful, with the Judicial Committee overruling the majority decision of the Scottish criminal appeal court and holding that the property confiscation proceedings did not constitute a separate criminal charge. Accordingly the Judicial Committee held that the presumption of innocence set out in Article 6(2) was neither applicable or relevant to the prosecutor's application for a confiscation order (overruling on this point also the decision of the Court of Appeal Criminal Division of England and Wales in *R v Karl Benjafield and others*, unreported, 21 December 2000 at paragraph 69 - also digested in [2000] *Times Law Reports* 902), albeit that the accused might still rely, in such proceedings, on the general fairness protections set out at common law and under Article 6(1). In any event, the Judicial Committee reiterated their view as set out in *Brown v Stott* and by the House of Lords in *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, to the effect that the presumption of innocence contained in Article 6(2) was not an absolute right but one which might properly be subject to a balancing test against the general interest of the community in suppressing crime.

The specific decisions of the Judicial Committee on the **merits** of each of these cases were unanimous: all are of interest and all raise important issues of law and legal interpretation, which deserve full consideration. It is particularly noteworthy that in all four of its decisions, the Judicial Committee found in favour of the narrower interpretation of Convention rights and against the arguments of each of the individual applicants. For a critical analysis of the reasoning and substantive decision

reached by the Privy Council in *Brown v Stott*, see S Di Rollo 'Brown v Stott: an unconventional approach' 2001 *Scots Law Times (News)* 22. More generally, however, the four decisions, and the manner in which they appear to have been reached, highlight some fundamental aspects of the new constitution of the United Kingdom which the *Human Rights Act 1998* and the Devolution Statutes, in particular the *Scotland Act 1998*, have created. It is on these general constitutional aspects that this present article will concentrate.

THE DEFINITION OF A 'DEVOLUTION ISSUE'

The first thing that should be noted is that the one constant factor in all of the decisions of the Privy Council to date, acting under its Devolution jurisdiction, has been the presence of the two Scots judges in the House of Lords, Lord Hope of Craighead and Lord Clyde, on the panel of judges considering these matters. This is perhaps unsurprising, given that all of these cases to date have emanated from Scotland, but it is suggested that this continuity of personnel is a factor of particular significance when coming to consider the impact of these decisions on the constitutional development of the United Kingdom, post-devolution.

In *Montgomery and Coulter v Her Majesty's Advocate and the Advocate General for Scotland*, the Judicial Committee was composed in the traditional manner one now expects of Scottish appeals to the House of Lords, namely by two Scottish judges (Lord Hope and Lord Clyde) together with three non-Scots (Lord Slynn of Hadley, Lord Nicholls of Birkenhead and Lord Hoffmann). However, a clear division of opinion arose among these judges as to whether or not a decision of the Lord Advocate to initiate criminal proceedings on indictment against the accused could properly be said to raise a devolution issue at all. The non-Scots judges, led by Lord Hoffmann, clearly were of the view that the matter of respect for and enforcement of an individual's Article 6 rights to a fair trial was **not** a matter for a prosecutor, but lay **wholly** with the court before which the trial was to be conducted. Accordingly, they tended to the view that one could not take the Article 6 fair trial point against the prosecutor, particularly before the trial has actually started.

The Scottish law lords by contrast, emphasised the peculiar role and history of the Lord Advocate, noting his status as 'master of the instance' in criminal trials and insisting that the approach which the *Scotland Act 1998* had taken was to make the right of the accused to receive a fair trial a responsibility of the Lord Advocate as well as of the court. Lord Hope relied in part on the following passage from Hume's *Commentaries on the Law of Scotland Respecting Crimes* (1844) vol II, 134:

'The Lord Advocate is master of his instance in this other sense, that even after he has brought his libel into court, it is a matter

of his direction, to what extent he will insist against the panel; and he may freely, at any period of the process, before return of the verdict, nay after it has been returned, restrict his libel to an arbitrary punishment, in the clearest case, even of a capital crime'.

In what appears to be an implicit rebuke to Lord Hoffmann, Lord Hope noted that this case was the first time in which an appeal on a matter of Scots criminal law and procedure had ever come before a court situated outside Scotland; he therefore stressed the need for all the judges of that court to think themselves into the history and modes of understanding of Scots criminal lawyers, rather than simply for the judges to assume that the Scottish criminal system mirrored English criminal and the English-derived criminal legal systems.

The matter at stake was clearly one of the highest general constitutional importance. If Lord Hoffmann's view were to prevail and questions regarding the proper protection of Article 6 did not raise devolution issues (since they concerned only the acts of the courts rather than the devolved Lord Advocate), then two consequences followed: firstly, it would appear that all of the Scottish jurisprudence on the Lord Advocate's duties under Article 6 – notably *HM Advocate v Little* 1999 SLT 1145 on the Lord Advocate's delays in bringing a case to trial; *Starrs and another v Ruxton (Procurator Fiscal, Linlithgow)*, 2000 JC 208, on temporary sheriffs; *Hoekstra and others v HM Advocate (No, 2)*, 2000 SLT 605, on the requirements of an impartial judiciary; *Buchanan (Procurator Fiscal, Fort William) v McLean* 2000 SLT 928, HCJ, on fixed fees, criminal legal aid and the equality of arms; *Procurator Fiscal, Kirkcaldy v Kelly*, HCJ, unreported, 18 August 2000, accessible at www.scotcourts.gov.uk/, on District Courts and the appearance of independence; and *McIntosh v HM Advocate*, 2000 SLT 1280, HCJ, on the incompatibility the presumption of innocence, set in Article 6(2) ECHR, of the procedures for the confiscation of the assets of convicted drug traffickers – which had developed since the coming into force of the Scotland Act and prior to the implementation of the Human Rights Act had been decided on the wrong statutory basis (see Angus Stewart QC 'Devolution Issues and Human Rights', 2000 *Scots Law Times (News)* 239 for a detailed argument to the effect that the legislation has indeed been misunderstood and misapplied by the judges and that the *Scotland Act* 1998 was never intended to be used to raise human rights points in the context of ordinary criminal procedure); secondly, and perhaps more importantly, there would effectively be no role for the Judicial Committee in deciding on the proper interpretation and application of Convention fair trial rights within the context of Scottish criminal procedure. There would be no space for the Judicial Committee to carry out its envisaged constitutional function of ensuring a uniform UK wide interpretation for Convention rights in matters of both criminal and civil law. The result of this

could well be the development of a peculiarly Scottish Convention rights jurisprudence in criminal matters, since there remains no appeal from the High Court of Justiciary to the House of Lords on 'pure' human rights challenges which might be brought in the Scottish criminal courts under the *Human Rights Act* 1998. The non-availability of appeals from the Scottish Criminal Courts to the House of Lords was confirmed by the House of Lords in *Mackintosh v Lord Advocate* (1876) 2 App Cas 41 and most recently statutorily re-affirmed by section 124(2) of the *Criminal Procedure (Scotland) Act* 1995 (as amended).

In the event, since all the judges in *Montgomery and Coulter* were agreed that the appeal should be dismissed on the basis that the facts did not show any potential breach of the accused's fair trial rights, the non-Scots judges did not find it was not necessary for them to reach any final decision to be reached on the point as to whether a devolution issue had properly been raised as regards the applicability of Article 6 to the acts and omissions of the Lord Advocate, leaving the point to be argued and resolved on another occasion.

In *Hoekstra (No. 4)* the three-judge screening committee of the Privy Council, composed of Lord Slynn, Lord Hope and Lord Clyde, had little difficulty in rejecting the accused's application for special leave to appeal, with Lord Hope, delivering the Judgment of the Board, noting that the Judicial Committee was **not** a constitutional court of general jurisdiction and re-affirming that it could only hear appeals from Scotland which raised a devolution issue as defined under the *Scotland Act* 1998. In all other issues, every interlocutor of the High Court of Justiciary is final and conclusive and is not subject to review by any court whatsoever. Thus, where it was alleged that the judges of the High Court of Justiciary had acted unlawfully, this did not give rise to an issue which the Judicial Committee could adjudicate on, since such an allegation, although raising a constitutional point, did **not** raise a *Scotland Act* 1998 point. The limits within which the powers of the High Court of Justiciary may be exercised were said by Lord Hope to be for determination by that court and had nothing to do with the functions of the Scottish Ministers, the First Minister or the Lord Advocate.

The composition of the Judicial Committee in *Brown v Stott* is of particular interest in the context of the split in approach between the Scots and non-Scots judges which was revealed in *Montgomery and Coulter*. Again the two Scottish Law Lords, Lord Hope and Lord Clyde, were included on the Committee, but they were joined by a third Scottish judge, Lord Kirkwood, who was eligible to sit on the Judicial Committee by virtue of the recent appointment of Inner House judges to the rank of Privy Councillor. Thus, for the first time, Scottish judges made up a majority of the Judicial Committee, being joined in *Brown v Stott* by Lord Bingham and Lord Steyn. This time, the Committee were unanimous in deciding that the

proposed acts of the Lord Advocate properly raised a devolution issue under reference to Article 6 fair trial rights.

Thus, in *Brown v Stott*, the disputed analysis of this issue by Lords Hope and Clyde in *Montgomery and Coulter* would seem to have prevailed over the approach of Lord Hoffmann, and the doubts expressed by Lord Slynn and Lord Nicholls in the earlier case. Had the Scots judges' analysis of what constitutes a devolution issue not been followed, and the Hoffmann approach preferred, the likely result would have been that Lord Justice-General Rodger's finding, backed as it was by an impressive citation and detailed critique of many Commonwealth and US authorities, as to the central and (almost) absolute nature of the right against enforced self-incrimination implicit in Article 6 of the Convention would have prevailed in the context of the Scots criminal law and procedure. By contrast, it seems likely that the House of Lords in any criminal appeal in England would have followed the approach favoured by the pressure group JUSTICE (who were permitted to intervene in the Judicial Committee proceedings in *Brown v Stott*) and allowed the right to be limited in a proportionate manner for legitimate reasons. One suspects that it was precisely the possibility of such a major disparity of approach between the two jurisdictions, which drove Lord Hope's insistence (in the face of Lord Hoffmann's scepticism) as to the fair trial responsibilities of the Lord Advocate.

In *HM Advocate v McIntosh* the Judicial Committee again included Lord Hope and Lord Clyde, but had a non-Scottish majority made up of Lord Bingham, Lord Hoffmann, and Lord Hutton. By this time, there was no dispute among any members of the Committee that the matter before it was properly to be characterised as a devolution issue. The leading speech was given by Lord Bingham and concurred with by the rest of the bench, with only Lord Hope adding some brief additional observations on their decision (remarks which were also specifically concurred with by Lord Hoffmann). Again the decision of the Judicial Committee to over-rule the majority decision of the Scottish criminal appeal court brought Scottish criminal jurisprudence on the extent and effect of Article 6(2) into line with England and Wales (as now seen in the judgment of the Court of Appeal Criminal Division in *R v Karl Benjafield and others*, CA unreported, 21 December 2000 at para. 69, also digested in [2000] *Times Law Reports* 902) and ensured a uniformity of approach throughout the United Kingdom on the question of the confiscation of the alleged proceeds of drug trafficking.

CONCLUSION

Section 103 of the *Scotland Act* 1998, section 82 of the *Northern Ireland Act* 1998 and paragraph 32, Schedule 8 to the *Government of Wales Act* 1998, all assert the binding nature of decisions of the Judicial Committee of the Privy

Council in proceedings under the Act in all other courts and legal proceedings, apart from later cases brought before the Committee. These provision would appear to be intended to alter the general rule that the House of Lords in its judicial capacity is not bound by decisions of the Judicial Committee of the Privy Council – see *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777 at 807. It would seem that the purpose of this provision was to ensure uniformity of approach across the United Kingdom on matters of Convention rights, among others. It is a provision the significance of which has apparently been little understood, because in effect it means that on questions of the effect and scope of Convention rights (which have been duly raised under the Devolution Statutes) the House of Lords has been superseded as the final court of appeal in the United Kingdom. This will come as a great shock to many English lawyers, who are currently engaged in litigation over Convention rights issues since the coming into force of the *Human Rights Act* 1998 in England at the beginning of October 2000. The final court of appeal in civil and criminal matters for England, Wales and Northern Ireland, the House of Lords, has itself been placed at level lower in the judicial hierarchy by another court, the Judicial Committee, which a developing constitutional convention seems to indicate will be a court composed substantially, (and at times by a majority) of Scots lawyers deciding cases brought primarily from Scotland.

The somewhat surprising (and surely unintended) result of this is an effective Scottish take-over of English law when matters of Convention rights are raised, and the exclusion of the vast majority of English lawyers and English judges from the constitutional process put in place to reach final and binding decisions on Convention points in the United Kingdom. Thus, while in December 2000, the Court of Appeal of England and Wales was, in the case of *R v Karl Benjafield and others*, CA unreported, 21 December 2000 (digested in [2000] *Times Law Reports* 902), considering the compatibility of property confiscation orders in drug trafficking cases with individuals' Convention rights, the final decision on this question of Convention compatibility was taken, not on any appeal by the parties to that case in the House of Lords, but by the decision of the Judicial Committee in the Scottish case of *HM Advocate v McIntosh*, JCPC, unreported, 5 February 2001 (accessible at www.privacy-council.org.uk/), which as we have seen reversed the majority finding of the High Court of Justiciary (sitting in Edinburgh as a court of criminal appeal) to the effect that the legal regime governing such confiscation was incompatible with the fair trial requirements of Article 6 (see *McIntosh v HM Advocate*, 2000 SLT 1280, HCJ).

Similarly, in a series of conjoined judicial review applications (collectively known as *Alconbury*) which were heard before the High Court of England and Wales in

December 2000 – (1) *R v Secretary of State for the Environment Transport and the Regions, ex parte Holding and Barnes plc*, (2) *R v Secretary for the Environment Transport and the Regions, ex parte Premier Leisure*, (3) *R v Secretary of State for the Environment Transport and the Regions, ex parte Alconbury Developments Limited*, and (4) *Secretary of State for the Environment Transport and the Regions v. Legal and General Assurance Limited*, QBD unreported, 12 December 2000 – the question before Tuckey LJ and Harrison J was whether or not the processes by which the Secretary of State for Environment, Transport and the Regions makes decisions under the *Town and Country Planning Act* and Orders, under the *Transport and Works Act 1992*, the *Highways Act 1980* and the *Acquisition of Land Act 1981*, were compatible with Article 6(1). Effectively the same issue arising under parallel Scottish planning legislation had already been raised and decided upon in October 2000 by Lord Macfadyen, sitting at first instance in the Scottish judicial review application *County Properties Limited v The Scottish Ministers*, 2000 SLT 965, OH.

The Divisional Court hearing the conjoined English and Welsh cases arrived at a similar conclusion to that which had already been reached in the Outer House in the Scottish case, namely that the existing planning procedures in relation to call-ins by the Secretary of State were incompatible with the Convention rights guaranteeing individuals access to an independent and impartial tribunal with full jurisdiction in the determination of their civil rights. The decision of Lord Macfadyen in *County Properties* was appealed against by the Scottish Ministers to three judges of the Inner House of the Court of Session. Meanwhile, however, the decision of the Division Court in the *Alconbury* application was allowed to leapfrog the Court of Appeal of England and Wales and be appealed directly to the House of Lords. But again, as a result of the new hierarchy of courts created by the Devolution Statutes, the final decision on this point cannot be made by the House of Lords judges in *Alconbury*: instead the House of Lords will have to defer on the Convention point issue to a decision of the Judicial Committee should an appeal against the decision of the Inner House in *County Properties v Scottish Ministers* be taken to the Privy Council. The Scottish Ministers have hedged their bets, however, in that they have applied for and been given leave to intervene to argue their case before the House of Lords in *Alconbury* and thereby have afforded themselves two bites of the cherry, once before the House of Lord and once before the Privy Council – a privilege not afforded to *County Properties Ltd.* who brought the original judicial review application which sparked off the whole argument as to the reach of Article 6 in planning matters.

One cannot but feel that this kind of *ad hoc* constitutional structure will not prove to be an inherently stable one, particularly given that there are at least stateable arguments (which might be raised should, for

example, the Privy Council decision in *Brown v Stott* be taken by the accused to the European Court of Human Rights in Strasbourg, or if *County Properties Ltd.* are themselves ultimately unsuccessful before the Privy Council and decide to take the matter further) to the effect that the Judicial Committee of the Privy Council does not **itself** conform to the requirements of the Convention, in particular Article 6(1), as regards having the appearance of being ‘an independent and impartial tribunal established by law’. On the requirements for an tribunal to have the **appearance** of independence and impartiality see the decision of the Scottish Criminal appeal court in *Starrs and another v Ruxton (Procurator Fiscal, Linlithgow)*, 2000 JC 208, HCJ (commented upon in Aidan O’Neill QC ‘The European Convention and the Independence of the Judiciary – the Scottish Experience’ (2000) 63 *Modern Law Review* 429).

The question must arise as to whether the Judicial Committee of the Privy Council (whose members *qua* Privy Councillors are appointed solely at the pleasure of the Crown, without formal grant or letters patents, who may be removed or dismissed from the Privy Council at the pleasure of the monarch – albeit on advice from the Prime Minister – simply by striking their names from the Privy Council book) do *themselves* satisfy the Article 6(1) requirements, as understood by the European Court of Human Rights, of the appearance of an independent and impartial tribunal established by law – see, amongst others, the decisions of the European Court of Human Rights in *McConnell v United Kingdom*, unreported, 8 February 2000 (accessible at www.dhcour.coe.fr/hudoc and digested in [2000] *Times Law Reports* 119) and *Wille v Liechtenstein*, unreported, 28 October 1999, (accessible at www.dhcour.coe.fr/hudoc).

Ultimately, it is suggested, the logic of the on-going constitutional change will require the setting up a properly established constitutional court for the United Kingdom, with properly identified, tenured and explicitly independent judges, perhaps appointed after parliamentary hearings along the lines of the US Supreme Court. The genie of constitutional reform is out of the bottle and has acquired its own dynamic. It would appear we have not completed the task of writing the constitution.

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Aidan O’Neill QC

Advocates Library, Parliament House, Edinburgh EH1 1RF