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Human Rights and Temporary Sheriffs

A. HUMAN RIGHTS AND THE SCOTLAND ACT 1998

The *ad hoc* nature of the Labour Government's programme of constitution-building has resulted in a number of curious anomalies. Some of these were largely to be expected: for example, the regional disparities in terms of representation which necessarily attend asymmetrical devolution; the emergence of representative bodies with electoral systems which arguably possess greater democratic legitimacy than that of the Parliament from which they derived their existence but to which they remain subordinate; and the slowly emerging dilemmas inherent in attempting to situate the new political structures of the devolved regions within the United Kingdom's already sensitive relationship with the European Union. Less apparent perhaps was the extent to which the Scotland Act 1998 ("the Act"), with its requirement that the devolved institutions of government should act compatibly with "Convention rights", would provide a case study on the operation of the Human Rights Act 1998 ("the HRA") eighteen months before that Act came into force.

The task facing the Scottish courts in attempting to adjudicate on Convention rights is made more difficult without the interpretive guidelines offered by the parallel operation of an in-force HRA. The cases now being decided in this vacuum represent perhaps the most significant quirk to emerge from the *a la carte* constitutional reform process of the past three years. In October 2000 the Scottish Executive will become subject directly to the obligations contained in s 6 of the HRA, but until then its obligations in respect of "Convention rights" arise directly through s 129(2) of the Scotland Act as "devolution issues". Devolution issues in terms of s 98 and Sched 6 of the Act include *inter alia* the question of "whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights . . ." (Sched 6(1)(d)). The significance of this provision lies in s 57(2), whereby a member of the Scottish Executive has no power to do any act insofar as it is incompatible with any of the Convention rights¹ – "Convention rights" carrying the same meaning in the Scotland Act (s 126(1)) as in the HRA s 1(1).²

B. THE POSITION OF TEMPORARY SHERIFFS

The impact of these provisions has been felt particularly by the Justice Department of the Scottish Executive, most notably in *Starrs v Ruxton*.³ In that case, the High

1 A similar restriction on the legislative competence of the Scottish Parliament is imposed by s 29(2)(d).

2 Convention rights are defined by s 1(1) of the HRA as the rights and fundamental freedoms set out in arts 2 to 12 and 14 of the European Convention on Human Rights, arts 1 to 3 of the First Protocol, and arts 1 and 2 of the Sixth Protocol, as read with arts 16 to 18 of the Convention.

3 2000 SLT 42 (henceforth *Starrs*).

Court of Justiciary on appeal from the Sheriff Court held that a temporary sheriff appointed under the Sheriff Courts (Scotland) Act 1971 did not constitute an “independent and impartial tribunal” within the meaning of art 6(1) of the ECHR, and that the Lord Advocate, as a member of the Executive,⁴ by bringing a prosecution before a temporary sheriff through his representative the procurator fiscal, had acted incompatibly with the Convention rights of the accused contrary to s 57(2).

Starrs and his co-accused Chalmers appeared before Temporary Sheriff Crowe in Linlithgow Sheriff Court on 30 July 1999 in the latest stage of their trial, which had commenced on a summary complaint before the same sheriff on 5 May. At another hearing between these dates, the accused had raised Sheriff Crowe’s temporary status as a devolution issue; and so on 30 July they argued that Sheriff Crowe should decline to adjudicate on the devolution issue, a submission which the Sheriff repelled. He subsequently decided the issue against the accused. The diet of trial was adjourned, and before it was resumed, the accused sought to advocate Sheriff Crowe’s decision.

In addressing these Bills of Advocation, the Lord Justice-Clerk and Lords Prosser and Reed were unanimous in finding in favour of Starrs and Chalmers. The leading judgment was delivered by the Lord Justice-Clerk with another detailed judgment given by Lord Reed.⁵ Among several preliminary questions which the Lord Justice-Clerk addressed in exploring whether or not a devolution issue had arisen was whether or not a “purported . . . exercise of a function by a member of the Scottish Executive” had taken place per Sched 6(1)(d) and s 57(2) of the Act. The prosecution had been brought by the procurator fiscal who was not a member of the Scottish Executive, but the Lord Justice-Clerk wasted little time in concluding that, since the procurator fiscal represented the Lord Advocate in both solemn and summary proceedings, the act of the fiscal in continuing a prosecution constituted an act of the Lord Advocate.⁶

The central issue facing the court, therefore, was whether or not a criminal trial before a temporary sheriff constituted an “independent and impartial tribunal” in terms of art 6(1) of the ECHR. In answer to this question, both Lords Cullen and Reed set off on eclectic journeys visiting not only Strasbourg jurisprudence but also case-law from foreign jurisdictions, most prominently Canada.⁷ Between them, the two judges consulted a range of other sources, including international instruments such as the European Charter on the statute for Judges,⁸ UN General Assembly resolutions,⁹ and miscellaneous sources including the Claim of Right of 1689,¹⁰ seminar

4 Scotland Act 1998, s 44(1)(c).

5 Lord Prosser concurred with both of his fellow Lords in a more brief judgment.

6 This point was conceded by the Solicitor General in any event (see Lord Reed at 60).

7 Lord Reed (at 65) also made reference to the case-law of various European systems as discussed in a series of essays in S Shetreet and J Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985).

8 Adopted in Strasbourg in July 1998 under the auspices of the Council of Europe (DAJ/DOC (98) 23). This was referred to by Lord Reed (at 65), as was the Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice (UN DOC.E/CN.4/Subs.2/1985/18/Add.6 Annex IV).

9 Lord Justice-Clerk at 53 and Lord Reed at 67.

10 Lord Reed at 67.

papers presented by the Special Rapporteur on the Independence of the Judiciary appointed by the UN Commission on Human Rights, and the extra-judicial comments of Australian High Court judges.¹¹

This process is particularly interesting, because there is little articulation of how much weight is being accorded either to ECHR jurisprudence or to the various other sources referred to.¹² Most notably, almost no mention was made of ss 2 and 3 of the HRA, provisions which seek to guide courts and tribunals on how both existing domestic law and Strasbourg jurisprudence ought to be read in light of the obligation on public authorities contained in the HRA.¹³ The failure on the part of the court to engage with ss 2 and 3 is perhaps unsurprising given first, that the case involved a “devolution issue” under the Scotland Act; second, as Lord Reed noted, that the s 3 issue at least was not argued before the court; and third, that in any event the HRA is not yet in force. Nonetheless, the uncertainty with which the court treated the HRA highlights the difficulty the Scottish courts face in being required to enforce Convention rights without the interpretative pointers provided by an Act in force.

Despite these difficulties, both Lords Cullen and Reed analysed ECHR case-law in some detail. The Lord Justice-Clerk noted that the test of independence and impartiality used by the European Court was an objective one but one which should not be construed restrictively.¹⁴ Lord Reed took a similar position, referring to *De Cubber v Belgium*¹⁵ and *Bryan v United Kingdom*¹⁶ on the question of independence¹⁷ and emphasising the short period of appointment of temporary sheriffs which was in his opinion “a factor pointing strongly away from ‘independence’ within the meaning of Article 6”.¹⁸ Both judges stressed the particular importance of the *appearance* of

11 Papers by Kirby J and Sir Gerard Brennan, the former Australian Chief Justice, were referred to by Lord Reed at 66. Lord Reed also noted (at 67) the Latimer House Guidelines, *Parliamentary Supremacy and Judicial Independence* adopted by representatives of the Commonwealth Magistrates’ and Judges’ Association and other bodies in June 1998.

12 With reference to the Canadian jurisprudence the Lord Justice-Clerk (at 52) did remark that “[i]t should not be assumed that everything that is considered to be essential or important in the Canadian context has the same significance in the application of the Convention. However . . . so far as I have been able to determine, there is in this respect no essential difference of approach”. Lord Reed (at 69) was cautious about the use of Canadian case-law but felt that “the Canadian Charter of Rights and Freedoms is similar in some respects to the European Convention, and the Canadian courts have had regard to the Strasbourg jurisprudence in their interpretation of the Charter. In these circumstances, their decisions are potentially a useful source, albeit one which has to be treated with care”.

13 In one brief reference to s 3, Lord Reed (at 73) suggests the possibility that “although section 3 is not yet in force, section 129(2) of the Scotland Act might require it to be taken into account in applying section 57(3) of that Act”. However, he continued: “I do not wish to express any view on that issue . . . as it was not fully argued before us.”

14 He referred (at 51) to, *inter alia*, *Findlay v United Kingdom* (1997) 24 EHRR 221 at para 73; *Bryan v United Kingdom* (1995) 21 EHRR 342 at para 37; *Pullar v United Kingdom* (1996) 22 EHRR 391 at para 30, and *De Cubber v Belgium* (1984) 7 EHRR 326.

15 (1984) 7 EHRR 326.

16 (1995) 21 EHRR 342.

17 At 64.

18 Lord Reed at 66. In this respect he relied on the judgment of Le Dain J of the Supreme Court of Canada in *R v Valente* (1985) 34 DLR (4th) 161. Lord Reed did, however, conclude (at 64–65 and 66) that the *appointment* of temporary sheriffs did not *per se* breach the independence principle

independence, an issue which would play a significant part in their respective conclusions on incompatibility.¹⁹

The appellants' case was founded on a number of the conditions on which temporary sheriffs served which, they argued, compromised both independence and impartiality.²⁰ First they referred to the Lord Advocate's powers to recall the appointment of a temporary sheriff, or to decline to renew the appointment. They argued that both of these powers were particularly controversial as the Lord Advocate is the master of the instance in all criminal prosecutions in Scotland, which, as far as the appellants were concerned, meant in effect that the temporary sheriff occupied a role subordinate to one of the parties.²¹ Second, temporary sheriffs had no security of tenure, and the recall power was not subject to any formal control.²² Third, they pointed to the lack of financial security enjoyed by temporary sheriffs because they were paid for their work as a matter of "grace and favour" rather than by way of a salary and did not qualify for non-contributory pensions.²³ Finally, temporary sheriffs were permitted to continue in the practice of the law, and counsel for the appellants submitted that in this regard there were insufficient safeguards against conflict of interest.²⁴

Lord Cullen noted that, although the power of appointment was vested in the Secretary of State, "in practice a crucial role was played by the Lord Advocate".²⁵ He then turned to a number of counter-arguments raised by the Solicitor General. He had contended that, although there was no restriction on the work which a temporary sheriff could undertake, a temporary sheriff who was a solicitor was not permitted to sit in the area where he practised. The Solicitor General also argued that neither the Lord Advocate nor the procurator fiscal had any control over whether any given case was taken by a permanent sheriff or a temporary sheriff; neither did they have any say as to whether a temporary sheriff was allocated to a particular sheriffdom or sheriff court. The Solicitor General stressed further that the renewal of a temporary sheriff's commission was "virtually automatic", provided that the temporary sheriff served at least twenty days during the year, that he/she was under the age of sixty-five and that there were no adverse circumstances relating to his/her fitness for office.²⁶

The Lord Justice-Clerk was generally unconvinced by the Solicitor General's arguments, noting the following unanswered objections: that he had been unable to explain why appointments were for one year only;²⁷ that it would be possible not to

(see references to *Çiraklar v Turkey*, European Court of Human Rights, Reports of Judgments and Decisions 1998-VII, 28 October 1998, and *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165).

19 *Findlay v United Kingdom* (1997) 24 EHRR 221 at para 73, and *De Cubber v Belgium* (1984) 7 EHRR 236. Lord Reed (at 64) stated: "I accept that issues of perception are also important."

20 Discussed by the Lord Justice-Clerk at 52.

21 See the Lord Justice-Clerk and Lord Reed at 53 and 66 respectively.

22 Lord Reed at 66.

23 Lord Justice-Clerk at 53 and Lord Reed at 66.

24 Lord Justice-Clerk at 54.

25 See Lord Justice-Clerk at 48 and his general discussion of this issue from 48–51.

26 Lord Justice-Clerk at 50.

27 Lord Justice-Clerk at 54.

“use” a temporary sheriff as a matter of administrative practice; and that the Solicitor General had accepted that some temporary sheriffs (bearing in mind the different terms and conditions they enjoyed from permanent sheriffs) were dependent upon their shrieval earnings.²⁸ The Lord Justice-Clerk also noted that the guidelines issued by the Scottish Courts Administration to candidates for appointment as temporary sheriffs made clear that “there is no guarantee whatsoever that service as a temporary sheriff will eventually lead to a permanent appointment”.²⁹

Ultimately the opinions of both Lords Cullen and Reed turned on the power to recall shrieval appointments under s 11(4) of the 1971 Act. That this power had not been exercised in recent years was, for the Lord Justice-Clerk, irrelevant. The system whereby temporary sheriffs were appointed for renewable one-year periods had made the actual use of the recall power unimportant.³⁰ Furthermore, bearing in mind that the appearance of independence was crucial,³¹ the Lord Justice-Clerk declared “the power of recall under section 11(4) is incompatible with the independence and appearance of independence of the temporary sheriff”. Accordingly, he concluded, “I have reached the view that a temporary sheriff, such as Temporary Sheriff Crowe, was not an ‘independent and impartial tribunal’ within the meaning of Article 6(1) of the Convention”, and so “in proceeding with the trial the Lord Advocate, as represented by the procurator fiscal, acted incompatibly with the right of the accused under Article 6(1) to trial by ‘an independent and impartial tribunal’.”³²

Similarly for Lord Reed, of all the appellants’ arguments only the recall issue, centering around the one-year renewable appointment period and the absence of security of tenure, was fatal to judicial independence. “The fact that the power of recall or renewal of an appointment is vested in the Executive forms part of my reasoning in concluding that temporary sheriffs lack independence”,³³ and therefore, the absence of an objective guarantee of security of tenure was “fatal to the compatibility of the present system with Article 6”.³⁴ Notably Lord Reed’s decision is in this respect quite narrow. The power of the Scottish Executive to appoint temporary sheriffs, and even the involvement in the appointment process of the Lord Advocate as head of the system of criminal prosecution in Scotland, were not fatal to judicial independence if adequate safeguards were in place.³⁵ Similarly the lack of financial security was not an issue under art 6, “but it is one of the factors lending me to

28 Lord Justice-Clerk at 50-1. Lord Reed noted (at 66) that the temporary nature of the appointment and the relative financial insecurity of the office of temporary sheriffs led to “consequent pressure upon them to hope for a permanent appointment”.

29 Para 7 of the notes, cited by the Lord Justice-Clerk at 51. Lord Reed (at 62) similarly observed that “membership of the pool of temporary sheriffs has increasingly . . . come to be seen to some extent as, in effect, a probationary period during which potential candidates for a permanent appointment can be assessed”.

30 Lord Justice-Clerk at 56. See also Lord Reed at 63-64.

31 Emphasising this point Lord Cullen turned to Canadian case-law, *Valente v The Queen* (1985) 34 DLR (4th) 161, referred to at 57-58.

32 Lord Justice-Clerk at 58.

33 Lord Reed at 70.

34 Lord Reed at 69.

35 See Lord Reed at 65 and 70.

conclude that a renewable annual appointment, without security of tenure, is inconsistent with judicial independence".³⁶

One final point which could potentially have broadened the scope of this decision was the question of the legality of such appointments in terms of s 11 of the 1971 Act. The purpose of s 11(2) was arguably to permit temporary appointments to meet temporary needs, whereas the role played by temporary sheriffs in the Scottish justice system was considerably wider than this. The Lord Justice-Clerk raised the issue that the appointments were possibly *ultra vires* and considered that it was "perhaps unfortunate" that the question of construction of the scope of s 11(2) was not raised in the case. Lord Reed went further in declaring: "[i]t appears to me to be questionable in particular whether Parliament can have intended section 11(2)(c) to authorise the appointment of so-called temporary sheriffs who in reality hold office on annual commissions whose renewal is 'virtually automatic', and who are appointed not in order to deal with any particular problem of a temporary nature which has been identified in any particular sheriffdom, but so as to be available to supplement the work of the permanent sheriffs". The appointment of such sheriffs, he concluded, "would appear to me to be a constitutional innovation".³⁷ The High Court of Justiciary on Appeal has subsequently backed away from this position. In a decision issued shortly after *Starrs*, the court concluded that s 11(2)(c) can be construed fairly widely and does not limit the appointment of temporary sheriffs to temporary emergencies.³⁸

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³⁶ Lord Reed at 71. Similarly the Lord Justice-Clerk (at 58) did not consider the difference in pay between a temporary and a permanent sheriff to be critical.

³⁷ Lord Reed at 63.

³⁸ *Gibbs v Ruxton* 2000 SLT 310.