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means that more extensive use of section 118(7) can be expected in future remains to be seen.

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Delay, Expediency and Judicial Disputes: *Spiers v Ruddy*

The recent decision of the Judicial Committee of the Privy Council in *Spiers v Ruddy*¹ harmonises the position across the UK where the Crown has failed to bring a person accused of a criminal charge to trial within a reasonable time, and this breach of the reasonable time guarantee is established prior to the conclusion of proceedings.

Previously, the legal response to such cases had diverged between Scotland and the rest of the UK.² In *R v HM Advocate*,³ the Judicial Committee had held that there was no alternative to halting the prosecution in such circumstances. Proceeding further, it was said, would be in breach of section 57(2) of the Scotland Act 1998, which bars the Lord Advocate from doing any act incompatible with Convention rights. That decision was reached by a majority, with the three Scottish members of the Judicial Committee – Lords Clyde, Hope of Craighead and Rodger of Earlsferry – prevailing over Lords Steyn and Walker of Gestingthorpe.

Shortly afterwards, the issue arose again, but this time in respect of proceedings in England. Given the split of opinion in *R*, a decision was taken that the issue should go before a nine-judge court, including two of the majority in *R* (Lords Hope and Rodger).⁴ This second case was *Attorney-General's Reference (No 2 of 2001)*,⁵ where seven of the judges declined to adopt the approach of the *R* majority. For those judges, a breach of the reasonable time guarantee was itself a violation of the Convention and required a remedy, but it did not make further proceedings unlawful in terms of section 6(1) of the Human Rights Act 1998. Furthermore, the majority concluded, a stay of proceedings was not the appropriate remedy unless “(a) there [could] no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant”.⁶

1 [2007] UKPC D2, 2008 SLT 39.

2 For discussion, see C Himsworth, “Jurisdictional divergences over the reasonable time guarantee in criminal trials” (2004) 8 EdinLR 255.

3 [2002] UKPC D3, 2003 SC (PC) 21.

4 See Himsworth (n 2) at 256.

5 [2003] UKHL 68, [2004] 2 AC 72.

6 *Attorney-General's Reference* at para 24 per Lord Bingham.

Lords Hope and Rodger disagreed with this approach, but reached differing results. Both considered that a trial which did not take place within a reasonable time had to be regarded as unlawful, but that the Human Rights Act did not have the same absolutist consequences as section 57(2) of the Scotland Act. In Lord Rodger's view, it was therefore possible to reach the same result as the majority, but Lord Hope said that the matter was one for the discretion of the court, and it was "arguable that a stay of the proceedings is the ordinary and appropriate remedy".⁷

A. THE DECISION

The most remarkable thing about *Spiers v Ruddy* is the brevity of the judgments. There were a total of 168 paragraphs in *R* and 179 in *Attorney-General's Reference*: in *Spiers v Ruddy*, there are 29. Lord Hope, whose speeches in those two cases were 62 and 66 paragraphs long respectively, takes five paragraphs to depart from his previously expressed views. Lord Rodger takes just four to depart from arguments that previously required 51 and 39 paragraphs.

The appeal centres on a number of Strasbourg decisions, dating from 2000 onwards, which were not considered in either *R* or *Attorney-General's Reference*. The Strasbourg cases, which are concerned with the appropriate remedy for a breach of the reasonable time guarantee, refer to such a remedy preventing either "the alleged violation or its continuation".⁸ It is this phrase which forms the basis for the change of heart by Lords Hope and Rodger in *Spiers v Ruddy*, but they do not adopt exactly the same approach. Instead, their earlier divergence in *Attorney-General's Reference* leaves them treading different paths.

For Lord Hope, the recent Strasbourg cases require a new interpretation of article 6(1), because "[i]t is plain that there can be no incompatibility between the Convention right and that which is regarded as appropriate for the purposes of article 13 as an appropriate remedy".⁹ But that approach is not easily available to Lord Rodger, who was prepared to countenance an incompatibility between rights and remedies in *Attorney-General's Reference*.¹⁰ Instead, his conclusion is that the reference to a remedy preventing a "continuation" of a breach of the guarantee means it can no longer be said that "the prosecutor is, inevitably, in continuing breach of article 6(1) once he has delayed unduly".¹¹

Whether this is actually new law given earlier Strasbourg jurisprudence is doubtful,¹² but leaving that aside, it is clear that on either approach the decision in *R* can no longer stand. This significantly weakens the protection offered by the reasonable time guarantee. It returns Scots law to a position broadly similar to that

⁷ *Attorney-General's Reference* at para 110.

⁸ *Kudla v Poland* (2002) 35 EHRR 11 at para 158 (emphasis added).

⁹ *Spiers v Ruddy* at para 23.

¹⁰ At least those remedies available under the Human Rights Act 1998.

¹¹ *Spiers v Ruddy* at para 26.

¹² See the cases noted by Lord Bingham in *Attorney-General's Reference* at para 23.

applying prior to the Scotland Act 1998, where the accused could (as he still can) plead oppression in bar of trial in such circumstances, but only if it could be shown that he could no longer receive a fair trial.¹³ Because of this requirement, the plea rarely succeeded.¹⁴

Lords Hope and Rodger do not seem to contemplate arguing that the language used in the more recent Strasbourg cases is wrong or misleading: in Lord Hope's words, "[i]n this matter, of course, the last word must lie with Strasbourg".¹⁵ It is, of course, established that domestic courts should not "outpace" the Strasbourg jurisprudence,¹⁶ but it does not follow from this that they should give quite this much weight to three words on which no Strasbourg decision cited in *Spiers v Ruddy* appears to have itself turned.

B. MANAGING JUDICIAL DISPUTES

But it may be wrong to treat *Spiers v Ruddy* as a decision turning on legal principle. Instead, perhaps, it is a pragmatic resolution to a messy divergence of views amongst members of the United Kingdom's highest courts. The recent Strasbourg jurisprudence, whether or not it radically changed the nature of the article 6(1) right, allows Lords Hope and Rodger to recant with honour.

While it may be perfectly acceptable to have different interpretations of the law applying in the different United Kingdom jurisdictions, it is unsatisfactory for such divergences to arise and be perpetuated purely because of the manner in which the highest appellate court happens to be constituted in a particular case. Nor would it be appropriate to operate as if the Scottish law lords (or members of the Judicial Committee) themselves formed a Scottish supreme court to which their non-Scottish colleagues were required to defer in respect of devolution issues.¹⁷

The decision in *Attorney-General's Reference*, it was accepted, did not affect the validity of the decision in *R*.¹⁸ But that result obtains only because of a specific statutory provision,¹⁹ and it has since been held that it is at least possible for the Judicial Committee to overrule a decision of the Appellate Committee. In *Attorney-General for Jersey v Holley*,²⁰ the Judicial Committee revisited the vexed question of the appropriate definition of the defence of provocation under English law,

13 *McFadyen v Annan* 1992 JC 53.

14 See *HM Advocate v H* 2000 JC 552 at 553 per Lord Bonomy.

15 *Spiers v Ruddy* at para 21.

16 *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at para 20 per Lord Bingham; *Whaley v Lord Advocate* [2007] UKHL 53, 2007 SLT 1209 at para 18 per Lord Hope.

17 On these points, see generally J Chalmers, "Scottish appeals and the proposed Supreme Court" (2004) 8 EdinLR 4. See also *Davidson v Scottish Ministers* 2006 SC (HL) 41 at para 38 per Lord Hope.

18 See *Attorney-General's Reference* at para 102 per Lord Hope.

19 Section 103(1) of the Scotland Act 1998, which provides that "[a]ny decision of the Judicial Committee in proceedings under this Act... shall be binding in all legal proceedings (other than proceedings before the Committee)".

20 [2005] UKPC 23, [2005] 2 AC 580. See J Elvin, "The doctrine of precedent and the provocation defence" (2006) 69 MLR 819.

something which had already troubled the Appellate Committee in a number of cases culminating in the heavily criticised *R v Smith (Morgan)*.²¹

It was expressly acknowledged in *Holley* that “an enlarged board of nine members” had been convened “to resolve this conflict and clarify definitively the present state of English law, and hence Jersey law, on this important subject” – something which was possible because the two were accepted as being the same.²² The Court of Appeal has since accepted that *Holley* should be treated by the English courts as having overruled *Smith*.²³

This issue of cross-court precedent will not be a live one for much longer within the UK given the provisions of the Constitutional Reform Act 2005, which will create a Supreme Court for the United Kingdom. That court will assume both the existing jurisdiction of the Appellate Committee and of the Judicial Committee in respect of devolution matters.²⁴ At present, it is expected that the court will be operational from early 2009.²⁵ Section 41 of the Act provides that:

- (2) A decision of the Supreme Court on appeal from a court of any part of the United Kingdom, other than a decision on a devolution matter, is to be regarded as the decision of a court of that part of the United Kingdom.
- (3) A decision of the Supreme Court on a devolution matter –
 - (a) is not binding on that Court when making such a decision;
 - (b) otherwise, is binding in all legal proceedings.²⁶

This seems intended to maintain the jurisdictional demarcation which currently exists between the Judicial Committee (in respect of devolution issues) and the Appellate Committee, but it is an awkward provision, particularly in the context of a unified court. On one reading, section 41 might suggest that if a decision such as *R* turned purely on the proper construction of the Convention and not on section 57(2) of the Scotland Act 1998, then it would be binding in “all legal proceedings” and it would not be open to the court to depart from that construction in a case such as *Attorney-General’s Reference*. But it is difficult to see any principled reason for that conclusion, which would represent a move towards non-reviewable binding precedent of the type repudiated by the 1966 Practice Statement.²⁷

21 [2001] 1 AC 146. The most damning critique is J Gardner and T Macklem, “Compassion without respect? Nine fallacies in *R v Smith*” [2001] Crim LR 623.

22 *Holley* at para 1 per Lord Nicholls of Birkenhead. See also para 68 per Lord Bingham of Cornhill and Lord Hoffmann.

23 *R v James* [2006] EWCA Crim 14, [2006] QB 588.

24 Constitutional Reform Act 2005 s 40.

25 Subject, it seems, to construction of the new premises: see HL Deb 14 Jul 2007, col WS119.

26 A devolution matter is defined in s 41(4) as “(a) a question referred to the Supreme Court under section 33 of the Scotland Act 1998 (c 46) or section 11 of the Northern Ireland Act 1998 (c 47); (b) a devolution issue as defined in Schedule 8 to the Government of Wales Act 1998 (c 38), Schedule 6 to the Scotland Act 1998 or Schedule 10 to the Northern Ireland Act 1998”.

27 *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

Perhaps, then, “a decision on a devolution matter” in a case such as *R* means only the narrow question of (for example) “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 or with Community law”.²⁸ That, however, could – for example – lead the Supreme Court to handing down a (binding) decision that X was compatible with Convention rights while maintaining a (still binding) position that it would be incompatible with Convention rights for the Lord Advocate to do X.

C. CONCLUSION

Perhaps the two most important consequences of the Scotland Act 1998 were the ruling that proceedings before temporary sheriffs were invalid,²⁹ along with the newly strict approach taken to the prevention of delay in trials.³⁰ Within a very short period, however, it has been held that proceedings before temporary sheriffs were not actually invalid after all (although the point is now largely academic),³¹ and now, in *Spiers v Ruddy*, that the enhanced protection against delay was merely a temporary illusion.

Beyond that, *Spiers v Ruddy* highlights the tensions which arise from the overlapping jurisdiction of the Appellate and Judicial Committees over different jurisdictions, tensions which are unlikely to disappear with the creation of a Supreme Court. The consequences of section 41(3) of the Constitutional Reform Act 2005 are less than clear, meaning that the law of cross-border precedent will, as before, be largely left to the court to develop.

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“A Stitch in Time”? Repairs and Rejection in Sale of Goods

Section 35(6)(a) of the Sale of Goods Act 1979 provides that:

The buyer is not by virtue of this section deemed to have accepted the goods merely because –

(a) he asks for, or agrees to, their repair by or under an arrangement with the seller . . .

²⁸ Scotland Act 1998 Sch 6 para 1(d).

²⁹ *Starrs v Ruxton* 2000 JC 208.

³⁰ Outside of cases where the accused is remanded in custody pending trial, where the Scottish rules were and remain remarkably strict by comparative standards. See generally J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) ch 16.

³¹ *Dickson v HM Advocate* [2007] HCJAC 65, 2008 SLT 12 (holding that such proceedings, while incompatible with the Convention, were saved by s 6(2) of the Human Rights Act 1998).