Human Rights Law: the Scottish Experience

INTRODUCTION

1 Scotland has had the Convention since 20 May 1999 for purposes connected with the devolution scheme that came into force on that day and 1 July 1999 (Human Rights Act 1998 c 46).

2 Scottish cases can be found on the web at **http://www.scotcourts.gov.uk**

ARTICLE 6

Legal Aid

3 In Procurator Fiscal, Fort William v McLean [2000] UKHRR 598 the accused challenged the regulation that fixed the fees payable to their solicitors at £550 up to the start of the trial. Article 6, it was said, required equality of arms between the parties and the rules gave rise to a conflict between the clients and the solicitors. Rejecting the challenge in the general way it was presented the Court of Criminal Appeal did acknowledge that there might be cases where the fixed fee was not enough. The case is on its way to the Privy Council but the Scottish Executive have announced an intention to provide for exceptional circumstances.

4 A Public Defender Solicitors Office has been set up in Edinburgh as a pilot project. The pilot originally involved requiring all those on summary charges and who were born in January or February to use the service. Exemption from this mandatory element was in the hands of the PDSO itself. It was dropped on the argument that while there is no absolute right to choose one's the interference was too wide to be justified (Croissant v Germany (1992) 16 EHRR 135 ECtHR).

5 A challenge to the unavailability of Legal Aid before Employment Tribunals due to be heard before the EAT on 11 and 12 December may now not proceed in light of draft regulations introducing Abwor in some circumstances with effect from 15 January 2001.

An independent and impartial tribunal

6 Starrs and Chalmers v Ruxton [2000] UKHRR 78 temporary sheriffs who had no security of tenure and who were dependent for their office on the Lord Advocate, Scotland's chief prosecutor, were held not to constitute an independent and impartial tribunal.

7 Clancy v Caird [2000] UKHRR 509 was the first attempt to follow Starrs – and our first experience of "reading down" under section 3 of the Human Rights Act 1998 (c 42):

8 "6. Subject to paragraph 7 below, a person appointed as a temporary judge under the said section 35(3) shall, while so acting, be treated for all purposes as, and accordingly may perform any of the functions of, a judge of the Court in which he is acting.

"7. Subject to paragraph 8 below, a person shall not, by virtue of paragraph 6 above, be treated as a judge of the Court of Session for the purposes of any other enactment or rule of law relating to:-

(a) the appointment, tenure of office, retirement, removal or disqualification of judges of that Court, including, without prejudice to the generality of the foregoing, any enactment or rule of law relating to the number of judges who may be appointed; and

(b) the remuneration, allowances or pensions of such judges."

9 In County Properties Limited v Scottish Ministers 25 July 2000 Lord Macfadyen was faced with concessions on the part of the respondents that neither they nor their reporter were independent and impartial tribunals in terms of Article 6-1 of the Convention in the circumstances of this case.

The respondents went on, however, after making those admissions, to aver *inter alia* that the petitioners' right of appeal to the Court of Session from their decision satisfies the requirements of Article 6-1. In this they relied heavily on Bryan v United Kingdom (1996) 21 EHRR 342 and, in particular, paragraph 47 where, holding that appeal from a reporter who had no tenure satisfied article 6 the ECtHR said:

"In the present case there is no dispute as to the primary facts. Nor was any challenge made at the hearing in the High Court to the factual inferences drawn by the inspector, following the abandonment of his objection to the inspector's reasoning under ground (b). The High Court had jurisdiction to entertain the remaining grounds of the applicant's appeal, and his submissions were adequately dealt with point by point."

At paragraph 25 Lord Macfadyen said:

> "1. While the proceedings before the reporter in the present case will no doubt be quasi-judicial in the same way as the proceedings before the inspector in *Bryan* v *United Kingdom* were noted to be ...the reporter in the present case will not in those proceedings "establish" the facts in the same sense as did the inspector, who was himself making a delegated decision; the decision in the present case will be made by the respondents.

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2. While in *Bryan* v *United Kingdom* the objection to the independence and impartiality of the inspector was the appearance of lack of independence created by the Secretary of State's power to revoke his appointment (see paragraph 38), in the present case the objection to the independence and impartiality of the tribunal of first instance is not merely the reporter's lack of tenure, but much more fundamentally the fact that the respondents will be deciding an issue between the petitioners and their own executive agency, Historic Scotland - they will be *judex in sua causa*.

"3 While Mr Steele in my view oversimplified the issue which the respondents will have to determine - it will not in my view be simply a matter of aesthetic preference for one or other of the replacement proposals - it is true that matters of aesthetic and planning judgement will form a major part of what has to be decided. The scope for this court in an appeal under section 58 to interfere with the respondents' planning judgment is even more restricted than the scope for review of matters of pure fact.

These circumstances combine, in my view, to constitute substantial ground for holding that the general observations made by the ECtHR in paragraph 47 of the Judgment in Bryan v United Kingdom do not apply in the present case."

10 This case is now back in the Outer House as the respondents attempt to withdraw the admission of non-compliance with article 6. Similar points in English cases being expedited into the House of Lords are expected to overtake it.

11 In Procurator Fiscal, Kirkcaldy v Christopher John Kelly 18 August 2000 the Court of Criminal Appeal rejected a challenge relating to District Courts. This included a challenge to the practice of the legally qualified clerk retiring with the lay Justice. At paragraph 24 of its opinion, the Court, having upheld the practice identified an "area of concern" relating to "ensuring that the following matters are raised in open court:-

(1) The content of any advice on the law given privately by the clerk to the justice which the clerk, or indeed the justice, perceives as possibly controversial;

(2) Observation by the clerk that some authority has been cited, or submission made, which is inaccurate as to the current position in law; and

(3) More generally, any matter which the clerk, or indeed the justice, perceives could be the object of relevant submission by one or other or both of the defence and the prosecution.

"We make these observations because we find nothing objectionable in the practice of private communications between

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clerk, as legal assessor, and justice provided that care is taken not only to confine such communication to the provision of legal advice but also to recognise and raise in open court any matter upon which the defence, or indeed the prosecution, might reasonably wish to make material comment. We regard it as fortunate and appropriate that there is no jurisprudence of the European Court of Human Rights supportive of the accused's position on this issue as we consider that the successive systems of use of lay justices in Scotland over many years, involving as they have a practice of advice on the law tendered privately for sound practical reasons, has served Scotland well."

12 A challenge to a part-time immigration adjudicator before he got his new 5 year contract is to be heard in March in the Outer House of the Court of Session. A challenge to the Children's Hearing system is also under way.

13 Scotland's Pinochet is Hoekstra v HMA [2000] UKHRR 578.

Waiver

14 Waiver raised its ugly head in the Clancy v Caird case where the Inner House of the Court of Session held that counsel had waived the right to object to the temporary judge in the week that Starrs was argued. Lord Sutherland said "Even prior to the decision in Starrs it was well-known to the legal profession that

the introduction of the Convention to the law of Scotland might well cause problems in relation to the appointment of temporary sheriffs and temporary judges." This case was not appealed.

15 In Millar, Stewart, Payne, Tracey and Marshall 3 August 2000 the Court of Criminal Appeal went one further: Lord Prosser at paragraph 25 said:

"...the agents in the present cases must in my opinion be deemed to have known, the enactment of the Scotland Act 1998 had radically altered the rights of accused persons, by providing in section 57(2) that the Lord Advocate had no power to do any act ... so far as it was incompatible with any of the Convention rights. They must be deemed in my opinion to have known that the rights conferred by Article 6(1) were such Convention rights, and that there were thus entirely new provisions giving accused persons a right to an independent and impartial tribunal. I can see no basis for holding that they were reasonably entitled to assume that such new provisions were somehow of no significance and that they could somehow carry on assuming that the previous and perhaps settled position was unaffected. They must be deemed, in my opinion, to know that there was a new legal landscape, and that there were new, unsettled, issues to be resolved."

Pre-trial publicity

16 The only case in which the Privy Council has actually delivered its decision is one of which you will not have heard namely HMA v Montgomery & Coulter 19 October 2000 which relates to pre-trial publicity and is subject to reporting restrictions until the trial is completed. The court held that the degree of publicity in that case did not make a fair trial impossible.

Delay

17 The area in which there has been most impact on individuals is in decisions on delay where a number of trials have been stopped because of delay in bringing the case to court although the accused cannot point to concrete prejudice arising out the delay. This may, however, come to an end in a case to be argued on 5 December where, on the basis of what happened in one of the leading ECtHR cases Eckle v Germany (1982) 5 EHRR 1 the Court of Criminal Appeal has asked parties to consider if a reduction in sentence is sufficient remedy for delay.

Presumption of Innocence

18 In Brown v PF Dunfermline [2000] UKHRR 239 the Court of Criminal Appeal held that the Crown could not lead evidence of the answer to the question which the accused was obliged give

as to who had been driving her car. This was argued in the Privy Council in the last fortnight.

19 In McIntosh v HMA 13 October 2000 the Court of Criminal Appeal, by a majority held that one of the key provisions of the Proceeds of Crime (Scotland) Act 1995 was contrary to article 6-2. The procedure involved the lodging of a statement by the Crown after conviction for drug dealing. The effect of this was to make the convicted person account for everything he had had in the six years prior to conviction. The first issue was accordingly whether the petitioner is a person charged with a criminal offence, by virtue of the application for a confiscation Of this issue Lord Prosser said:

20 "It did not eventually appear to me that there was any real significance in the dispute as to whether the confiscation proceedings were a part of the proceedings under the indictment or a separate proceeding. In my opinion they can be, and are, both part of the sentencing stage in the original process and a distinct exercise, initiated by the application."

21 Of the second question, Lord Allanbridge, concurring, said (at paragraph 5): "...there [is] nothing in the wording of section 3(2) of the 1995 Act, to suggest that it [is] necessary that the court should have some evidence, or ground of suspicion, that the

accused had profited from drugs dealing before it can make the confiscation order based on the assumptions outlined in section 3(2). Counsel for the appellant, correctly in my view, pointed out that the Crown did not require to prove anything at all, which even raised a suspicion, before the relevant assumptions would apply so as to shift the onus to the accused and thus require him to lead evidence to rebut these assumptions. ...I am satisfied that such a result demonstrates that the wording of section 3(2) has, on balance, gone so far as to violate the presumption of innocence without sufficient justification."

22 Lord Kirkwood, dissenting, held that the lodging of the statement was not equivalent to bringing a criminal charge and that even if it did, section 3(2) merely conferred a discretion on the Court and was justifiable. The case is rapidly on its way to the Privy Council.

23 The court was referred to The State v. Coetzee & Others [1997] 2 L.R.C. 593, in which the Constitutional Court of South Africa held certain sections of a statute unconstitutional. At page 677, Sachs J. said this:

"There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do

constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book...Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug smuggling, corruption...the list is unfortunately almost endless and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases".

ARTICLE 5

24 In Anderson v Scottish Ministers [2000] UKHRR 439 a challenge to the first Act of the Scottish Ministers narrowly survived challenge. It amended the Mental Health law to allow for the detention of psychopaths notwithstanding that they were untreatable. The Inner House of the Court of Session held that although the new Act set a different test for release from that for detention, this was not a breach of article 5.

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