

Scotland Act 2012 – commencement of provisions relating to Supreme Court appeals

Following the coming into force of the Scotland Act 1998, the UK Supreme Court and its predecessors were given a role in determining “devolution issues” arising in court proceedings. Devolution issues under the 1998 Act include questions whether an Act of the Scottish Parliament is within its legislative competence, and whether the purported or proposed exercise of a function by a member of the Scottish Executive would be incompatible with any of the rights under the European Convention on Human Rights or with the law of the European Union. This included the exercise of functions by the Lord Advocate as prosecutor, with the effect that the Supreme Court was given a role defined in statute in relation to Scottish criminal cases for the first time.

The Scotland Act 2012 makes substantial amendments to this aspect of the 1998 Act and creates a new scheme of appeals in relation to “compatibility issues”. “Compatibility issues” are questions arising in criminal proceedings about EU law and ECHR issues, or challenges to Acts of the Scottish Parliament on ECHR or EU law compatibility grounds. These issues would currently be dealt with as devolution issues under the regime created by the 1998 Act. Under the 2012 Act provisions, the remit of the UK Supreme Court is to determine the compatibility issue and then remit to the High Court for such further action as that court should see fit.

The 2012 Act also imposes time limits in appeals to the Supreme Court in the new system and introduces the same time limit in appeals to the Supreme Court in relation to devolution issues arising in criminal proceedings.

The provisions in the 2012 Act are based on reviews by two eminent groups. The Advocate General commissioned an expert group, chaired by Sir David Edward, to examine the position¹. The Expert Group recommended that there should be a new mechanism for dealing with EU and ECHR issues in criminal proceedings and that this systems should not operate by focussing on acts of the Lord Advocate but instead “*the new statutory formulation should be such as to concentrate attention on the compatibility with Convention rights of the criminal proceedings as a whole*”.

The Scottish Government also commissioned an expert group, led by Lord McCluskey, to examine the position². It agreed with the Advocate General’s group views on the need for a new procedure specifically examining compatibility:-

“[The Advocate General’s group] added that ‘the new statutory formulation should be such as to concentrate attention on the compatibility with Convention rights of the criminal proceedings as a whole’... We have already made it plain that we agree completely with the foregoing recommendations of the Expert Group.”

Commencement

The UK Government and the Scottish Government have, in recent months, been considering our approach to commencement of these provisions. The conclusion was that we should be

¹ <http://www.oag.gov.uk/oag/225.html>

² <http://www.scotland.gov.uk/Resource/Doc/254431/0120938.pdf>

seeking to move cases as speedily as possible to the new regime established by the 2012 Act to avoid the practical difficulties and potential confusion of having a long period in which two different procedures co-exist.

The UK Government and the Scottish Government have therefore agreed that in order to achieve a smooth and speedy transition, existing devolution issues which fall within the definition of a compatibility issue should be treated as compatibility issues and subject to the new procedures.

It is intended that the provisions will be commenced on 22nd April 2013. On that date, any new ECHR or EU issues arising in criminal proceedings will be a compatibility issue under the new provisions. A separate transitional order will make provision in relation to existing cases and set out how the new law will be applied and adapted. This order converts existing devolution issues that relate to ECHR and EU law into compatibility issues which will then be subject to the new law. An existing devolution issue will generally be converted into a compatibility issue from the date of commencement. In some cases conversion will happen at a later date depending upon the particular stage that the devolution issue has reached – notably those cases that are midway through being heard by the courts at the point when the new provisions are commenced. The draft transitional order sets out the detail of how this will happen in practice and is accompanied by an explanatory note which explains the purpose and effect of the individual provisions of the order.

It is important that the practical implications of implementation are fully worked through with relevant stakeholders. The purpose of this consultation is to seek the views of those who will be involved in operating the provisions on whether or not the draft transitional order and the commencement order achieve the policy on which the Governments are agreed. The consultation will also provide an opportunity to consider whether there are any further issues that need to be dealt with in the transitional order to allow existing cases to be dealt with under the new system.

The draft transitional order and commencement order have been prepared by the Office of the Advocate General and the Scottish Government.

Please could comments be sent by 19th November 2012.

Please send your comments to:

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Commentary on the draft Scotland Act 2012 (Transitional Provisions) Order 2012

Background

1. In this note:

“1995 Act” means the Criminal Procedure (Scotland) Act 1995;

“1998 Act” means the Scotland Act 1998;

“2012 Act” means the Scotland Act 2012;

“relevant date” means the date that sections 34 to 38 of the Scotland Act 2012 come into force;

Transitional Order

2. As set out in the consultation document, the policy intention is that once sections 34 to 38 of the 2012 Act come into force then all new EU and ECHR issues raised in criminal proceedings on or after that date will be compatibility issues. In addition on that date devolution issues will also become compatibility issues if they have been raised in criminal proceedings and would have been compatibility issues if they had been raised after the commencement of sections 34 to 38. This is subject to some exceptions as set out in the transitional Order.
3. Below is an explanation of what each of the different provisions of the draft order do in order to achieve the policy intention. Annex A sets out the draft transitional order.

Article 2 – Definition of convertible devolution issue

4. Article 2 sets out the general definition of a convertible devolution issue as being a question arising in criminal proceedings before the relevant date which would have been a compatibility issues if it had arisen after the relevant date. For example, a question arising in criminal proceedings before the relevant date as to whether the admission of certain evidence would result in trial proceedings breaching Article 6 of the ECHR would be a convertible devolution issue.
5. The exception to this is devolution issues which the Supreme Court have started hearing, whether as an appeal or on a reference, before the relevant date. The Supreme Court will continue to deal with these issues as devolution issues. Once the Supreme Court have determined such a devolution issue and remitted it to the courts in Scotland there would be no benefit in converting the devolution issue.
6. In addition, devolution issues that have been finally determined before the relevant date will not be converted into compatibility issues.

Articles 3 and 4 – convertible devolution issue to become compatibility issue

7. Article 3 provides for convertible devolution issues to be treated as compatibility issues and sets out when this conversion will take place. A convertible devolution issue will be treated “for all purposes” as a compatibility issue. Given this, it is not considered

that provision is required providing that anything done in respect of a convertible devolution issue that is treated a compatibility issue is deemed to have been done in respect of the compatibility issue. Views are sought as to whether article 3(1) is sufficient.

8. Most convertible devolution issues will be treated as compatibility issues from the relevant date. However, it isn't considered practical to treat devolution issues as compatibility issues from the relevant date if:
 - the issue is being considered in a hearing that started before the relevant date but the hearing had not concluded by the relevant date;
 - the issue has been considered by a court at a hearing before the relevant date but the court hasn't issued it's judgment before the relevant date;
 - the issue has been raised in trial proceedings which have commenced before the relevant date but the verdict hasn't been delivered by that date.
9. Reference to a hearing or trial having commenced means the court has begun hearing the case. In those cases, the convertible devolution issue will become a compatibility issue at the time of the court's decision or verdict as set out in article 3(2) to (4). Article 5 as read with article 4(1) then provides that the court's determination will be treated as a determination of a compatibility issue from that time. Views are sought as to how to define when an appeal hearing is commenced and how to define when trial proceedings are commenced.
10. Articles 5 to 8 set out the consequences of a convertible devolution issue becoming a compatibility issue and how the new law will be applied. Article 4(2) makes it clear that, other than in relation to determinations, this applies from the date on which the issue becomes a compatibility issue under article 3 – namely the relevant date.

Article 5 - Determinations

11. When a convertible devolution issue becomes a compatibility issue then a determination of that devolution issue is to be treated as a determination of a compatibility issue.
12. For example, if a month before the relevant date the High Court have determined a convertible devolution issue then from the relevant date that determination is to be treated as a determination of a compatibility issue and so any further proceedings in relation to that issue will be dealt with in accordance with the compatibility issue regime. Alternatively, as set out in paragraph 8 above, if a convertible devolution issue is treated as a compatibility issue immediately after the verdict is returned in a trial then any determination of a devolution issue in those proceedings will be treated as a determination of a compatibility issue immediately after the verdict is returned.

Article 6 - References

13. The new law will be applied to existing references in the following way:

- a reference of a convertible devolution issue under paragraph 9 of Schedule 6 to the 1998 Act to the High Court will be treated as a reference of a compatibility issue to the High Court under section 288ZB(1) of the 1995 Act;
 - a reference of a convertible devolution issue under paragraph 11 of Schedule 6 to the 1998 Act to the Supreme Court will be treated as a reference of a compatibility issue to the Supreme Court by the High Court under section 288ZB(4) of the 1995 Act;
 - a reference of a convertible devolution issue under paragraph 33 of Schedule 6 to the 1998 Act to the Supreme Court will be treated as a reference of a compatibility issue to the Supreme Court by the High Court under section 288ZB(5) of the 1995 Act. This is subject to the modification that where the reference is from a lower court, section 288ZB(7) is modified so as to require the Supreme Court to remit the proceedings to that court rather than the High Court which has had no previous involvement in the reference.
14. Where the High Court determines a reference of a convertible devolution issue after the relevant date then that determination will become a determination of a compatibility issue by virtue of article 5 and so any appeal against that determination will be an appeal of a compatibility issue.

Article 7 – Appeals to the Supreme Court

15. Under article 7(1) any outstanding application for permission to appeal a convertible devolution issue under paragraph 13(a) of Schedule 6 to the 1998 Act will be treated as an application for permission to appeal against a determination of a compatibility issue under section 288AA(5).
16. Where permission to appeal to the Supreme Court against a determination of convertible devolution issue has been granted before the relevant date but the hearing hasn't commenced before that date, then the appeal will be treated as an appeal of a compatibility issue under section 288AA(1) under article 7(2). In such a case, article 7(2) provides that permission to appeal is to be treated as granted under section 288AA(5).
17. Article 7(4) makes it clear that if the High Court and the Supreme Court have already refused permission to appeal a convertible devolution issue to the Supreme Court, then that is regarded as a refusal under section 288AA(5) and there is no further right of appeal to the Supreme Court under section 288AA(1) of the 1995 Act.

Article 8 – Right of the Advocate General to take part in proceedings

18. By virtue of paragraph 6 of Schedule 6 to the 1998 Act the Advocate General for Scotland may take part as a party in criminal proceedings so far as they relate to devolution issues. Equivalent provision allowing the Advocate General for Scotland to take part as a party in criminal proceedings so far as they relate to compatibility issue is made in section 288ZA(1) of the 1995 Act. Where a convertible devolution issue is treated as compatibility issue and the Advocate General for Scotland was a party to

proceedings relating to that convertible devolution issue then the Advocate General is to be treated as a party to the proceedings that the compatibility issue relates to.

Articles 9 and 10 – Time limits for appeals to the Supreme Court of devolution issues and compatibility issues

19. The 2012 Act makes provision imposing time limits for seeking permission to appeal to the Supreme Court against determinations of compatibility issues or devolution issues raised in criminal proceedings. These time limits will apply where permission to appeal is being sought in respect of determinations of the High Court made on or after the relevant date.
20. Transitional provision is to be made in respect of applications for permission to appeal to the Supreme Court against determinations by the High Court of devolution issues in criminal proceedings where these determination were made before the relevant date and applications for permission to appeal have not been made to the High Court and the Supreme Court.
21. If no application to the High Court has been made for permission to appeal to the Supreme Court against the determination of a devolution issue by the High Court arising in criminal proceedings, where the High Court made the determination before the relevant date, then for the purpose of the time limits for making an application to appeal to the Supreme Court, the High Court's determination will be treated as if it were made on the relevant date. In these cases it will mean that applications to the High Court for permission to appeal to the Supreme Court will need to be made within 28 days of the relevant date. If the High Court refuse such an application then an application to the Supreme Court for permission to appeal will need to be made within 28 days of the High Court's refusal. These time limits can be extended by the court in accordance with section 288AA(7)(b) and (8)(b) of the 1995 Act and paragraphs 13A(b) and 13B(b) of Schedule 6 to the 1998 Act.
22. If before the relevant date the High Court has refused permission to appeal to the Supreme Court against a determination of a devolution issue arising in criminal proceedings but no application has been made to the Supreme Court for permission to appeal then the High Court is treated as having refused permission to appeal on the relevant date. This will mean that the refusal is deemed to have been made on the relevant date and so an application to the Supreme Court for permission to appeal will need to be made within 28 days of the relevant date. The Supreme Court can extend this time limit in accordance with section 288AA(8)(b) of the 1995 Act and paragraph 13B(b) of Schedule 6 to the 1998 Act.

Articles 11 and 12 - General

23. Section 112(6) of the 1995 Act makes provision for a person to be admitted to bail pending the determination of an appeal to the Supreme Court in respect of a devolution issue or a compatibility issue. Article 11 provides that where a person is admitted to bail pending the determination of a devolution issue and that devolution issue is converted to a compatibility issue then from the time of conversion the person is treated as being admitted to bail pending the determination of the compatibility issue.

This means that the conversion of the devolution issue should not affect the person's bail.

24. Section 121 of the 1995 Act makes provision in respect of disqualification, forfeiture and disability attaching to a person as a result of a conviction. Where provision is made in respect of an appeal under paragraph 13(a) of Schedule 6 to the 1998 Act and the devolution issue that the appeal relates to is treated as a compatibility issue then for the purposes of section 121 the appeal is to be treated as an appeal under section 288AA of the 1995 Act. This will ensure that the conversion of the devolution issue does not have any effect on the application of section 121.

Commencement Order

25. Annex B sets out a draft commencement order that provides for the commencement of sections 34 to 38 of the Scotland Act 2012. The order provides for these sections to be commenced on 22nd April 2013.

Consequential Provisions

26. Commencing the Supreme Court appeal provisions will require consequential amendments to be made to other legislation. The affirmative resolution procedure applies to amendments to an Act of the UK Parliament and an Act of the Scottish Parliament. The legislation requiring consequential amendments is:
 - Legal Aid (Scotland) Act 1986;
 - Criminal Justice and Licensing (Scotland) Act 2010;
 - Criminal Legal Aid (Scotland) Regulations 1996;
 - Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999;
 - Criminal Legal Aid (Scotland) (Fees) Regs 1989.

Act of Adjournment

27. Commencing the Supreme Court appeal provisions will also require provision to be made by way of Act of Adjournment.

In summary comments are sought on the draft transitional order and commencement order with particular reference to whether the draft achieves the desired policy and whether it is sufficiently clear as to what will happen to existing cases at different stages. Views are also sought on whether there are any further issues that need to be dealt with to allow a smooth transfer of existing cases.

STATUTORY INSTRUMENTS

2012 No.

CONSTITUTIONAL LAW

DEVOLUTION, SCOTLAND

The Scotland Act 2012 (Transitional Provisions) Order 2012

Made - - - - *****
Laid *****
Coming into force - - *22nd April 2013*

The Secretary of State makes the following Order in exercise of the power conferred by [section 42(2)] of the Scotland Act 2012⁽³⁾.

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Scotland Act 2012 (Transitional Provisions) Order 2012 and comes into force on [22nd April 2013].

(2) In this Order—

“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995⁽⁴⁾;

“the 1998 Act” means the Scotland Act 1998⁽⁵⁾;

“the 2012 Act” means the Scotland Act 2012;

“compatibility issue” has the meaning given by section 288ZA(2) of the 1995 Act;

“convertible devolution issue” has the meaning given by article 2;

“devolution issue” has the meaning given by paragraph 1 of Schedule 6 to the 1998 Act as if the amendments made by section 36(4) of the 2012 Act were not in force;

“relevant date” means [22nd April 2013].

Definition of convertible devolution issue

2.—(1) A convertible devolution issue is a question arising in criminal proceedings before the relevant date which—

(a) is a devolution issue;

(b) would have been a compatibility issue had it arisen on or after that date; [and

(c) has not been finally determined immediately before the relevant date].

⁽³⁾ 2012 c.11.

⁽⁴⁾ 1995 c.46.

⁽⁵⁾ 1998 c.46.

(2) But a devolution issue arising in criminal proceedings before the relevant date is not a convertible devolution issue if—

- (a) the issue has been referred, or a determination of the issue has been appealed, to the Supreme Court under Schedule 6 to the 1998 Act; and
- (b) the hearing of the reference or appeal commences before the relevant date.

Convertible devolution issue to become compatibility issue

3.—(1) Subject to paragraphs (2) to (4), a convertible devolution issue becomes a compatibility issue for all purposes on the relevant date.

(2) Where a hearing to determine a convertible devolution issue (whether at first instance or on a reference from a lower court) commences before the relevant date but the court has not determined the issue by that date, the issue becomes a compatibility issue immediately after the court determines it.

(3) Where the hearing of an appeal against a determination of a convertible devolution issue commences before the relevant date but the court has not determined the appeal by that date, the issue becomes a compatibility issue immediately after the court disposes of the appeal.

(4) Where a convertible devolution issue arises in a trial commencing before the relevant date but the trial verdict has not been returned by that date, the issue becomes a compatibility issue immediately after the verdict is returned.

4.—(1) Article 5 has effect in relation to a convertible devolution issue from the time at which it becomes a compatibility issue under article 3.

(2) Articles 6, 7 and 8 have effect in relation to a convertible devolution issue from the relevant date.

Determinations

5. A determination of a convertible devolution issue is to be treated as a determination of a compatibility issue.

References

6.—(1) A reference of a convertible devolution issue under paragraph 9 of Schedule 6 to the 1998 Act is to be treated as a reference of a compatibility issue under section 288ZB(1) of the 1995 Act.

(2) A reference of a convertible devolution issue under paragraph 11 of that Schedule is to be treated as a reference of a compatibility issue under section 288ZB(4) of the 1995 Act.

(3) A reference of a convertible devolution issue under paragraph 33 of that Schedule is to be treated as a reference of a compatibility issue under section 288ZB(5) of the 1995 Act.

(4) Where a reference to which paragraph (3) applies is from a court other than a court consisting of two or more judges of the High Court of Justiciary, section 288ZB(7) of the 1995 Act is to be read as requiring the Supreme Court to remit the proceedings to the court which made the reference.

Appeals to the Supreme Court

7.—(1) An application to a court of two or more judges of the High Court of Justiciary or to the Supreme Court for permission to appeal under paragraph 13(a) of Schedule 6 to the 1998 Act against a determination of a convertible devolution issue is to be treated as an application to that court for permission to appeal against a determination of a compatibility issue under section 288AA(5) of the 1995 Act.

(2) An appeal under paragraph 13(a) of that Schedule against a determination of a convertible devolution issue is to be treated as an appeal under section 288AA(1) of the 1995 Act if, before the relevant date, the High Court of Justiciary or the Supreme Court has granted permission to appeal.

(3) In such a case the permission to appeal is to be treated as granted under section 288AA(5) of the 1995 Act.

(4) A refusal by the High Court of Justiciary or the Supreme Court, before the relevant date, of permission to appeal under paragraph 13(a) of that Schedule is to be treated as made by that Court under section 288AA(5) of the 1995 Act.

Right of the Advocate General to take part in proceedings

8. Where, before the relevant date, the Advocate General was a party to criminal proceedings so far as they related to a convertible devolution issue by virtue of paragraph 6 of Schedule 6 to the 1998 Act, the Advocate General is to be treated as being a party to criminal proceedings in pursuance of section 288ZA(1) of the 1995 Act so far as they relate to a compatibility issue.

Time limits for appeals to the Supreme Court of devolution issues and compatibility issues

9.—(1) This paragraph applies where—

- (a) a convertible devolution issue has, before the relevant date, been determined by a court of two or more judges of the High Court of Justiciary (whether in the ordinary course of proceedings or on a reference under paragraph 9 of Schedule 6 to the 1998 Act); and
- (b) no application has by that date been made to that Court for permission to appeal under paragraph 13(a) of that Schedule.

(2) In relation to such a case, section 288AA(7) of the 1995 Act has effect as if the reference to the date of determination against which the appeal lies were a reference to [22nd April 2013].

(3) This paragraph applies where—

- (a) a convertible devolution issue has, before the relevant date, been determined by a court of two or more judges of the High Court of Justiciary (whether in the ordinary course of proceedings or on a reference under paragraph 9 of Schedule 6 to the 1998 Act);
- (b) an application to the High Court of Justiciary for permission to appeal under paragraph 13(a) of Schedule 6 to the 1998 Act has, before the relevant date, been refused; and
- (c) no application has by that date been made to the Supreme Court for permission to appeal under paragraph 13(a) of that Schedule.

(4) In relation to such a case, section 288AA(8) of the 1998 Act has effect as if the reference to the date on which the High Court refused permission under that paragraph were a reference to [22nd April 2013].

10.—(1) This paragraph applies where—

- (a) a devolution issue other than a convertible devolution issue has, before the relevant date, been determined by a court of two or more judges of the High Court of Justiciary (whether in the ordinary course of proceedings or on a reference under paragraph 9 of Schedule 6 to the Scotland Act 1998); and
- (b) no application has by that date been made to that Court for permission to appeal under paragraph 13(a) of that Schedule.

(2) In relation to such a case, paragraph 13A of that Schedule has effect as if the reference to the date of determination against which the appeal lies were a reference to [22nd April 2013].

(3) This paragraph applies where—

- (a) a devolution issue other than a convertible devolution issue has, before the relevant date, been determined by a court of two or more judges of the High Court of Justiciary (whether in the ordinary course of proceedings or on a reference under paragraph 9 of Schedule 6 to the Scotland Act 1998);
- (b) an application to the High Court of Justiciary for permission to appeal under paragraph 13(a) of Schedule 6 to the 1998 Act has, before the relevant date, been refused; and
- (c) no application has by that date been made to the Supreme Court for permission to appeal under paragraph 13(a) of that Schedule.

(4) In relation to such a case, paragraph 13B of that Schedule has effect as if the reference to the date on which the High Court refused permission under that paragraph were a reference to [22nd April 2013].

General

11. A person admitted to bail under section 112(6) of the 1995 Act pending the determination of an appeal under paragraph 13(a) of Schedule 6 of the 1998 Act against a determination of a convertible devolution issue is, from the time at which the issue becomes a compatibility issue under article 3, to be treated as having been admitted to bail pending determination of an appeal under section 288AA of the 1995 Act.

12. For the purposes of section 121(5)(a) of the 1995 Act, an appeal under paragraph 13(a) of Schedule 6 to the 1998 Act against a determination of a convertible devolution issue is, from the time at which the issue becomes a compatibility issue under article 3, to be treated as an appeal under section 288AA of the 1995 Act.

Name
Parliamentary Under Secretary of State
Department

Dover House,
London
Date

EXPLANATORY NOTE

(This note is not part of the Order)

STATUTORY INSTRUMENTS

2012 No. (C.)

CONSTITUTIONAL LAW

DEVOLUTION, SCOTLAND

The Scotland Act 2012 (Commencement No.[]) Order 2012

Made - - - - - ***

The Secretary of State makes the following Order in exercise of the powers conferred by section 44(5) and (6) of the Scotland Act 2012⁽⁶⁾.

Citation

13. This Order may be cited as the Scotland Act 2012 (Commencement No.[]) Order 2012.

Appointed Day

14. [22nd April 2013] is the appointed day for the coming into force of the following provisions of the Scotland Act 2012—

- (a) section 34 (Convention rights and EU law: role of Advocate General in relation to criminal proceedings);
- (b) section 35 (references of compatibility issues to the High Court or Supreme Court);
- (c) section 36 (Convention rights and EU law: criminal appeals to the Supreme Court);
- (d) section 37 (time limits for appeals on devolution issues in criminal proceedings);
- (e) section 38 (review and power to amend sections 34 to 37).

Name
Parliamentary Under Secretary of State
Department

Dover House,
London
Date

⁽⁶⁾ 2012 c.11.

EXPLANATORY NOTE

(This note is not part of the Order)

NOTE AS TO EARLIER COMMENCEMENT ORDERS

(This note is not part of the Order)

<i>Provision</i>	<i>Date of Commencement</i>	<i>S.I. No.</i>
