

## **Access to the Supreme Court – the English Approach**

### **Procedural Law Colloquium - The functions of the Supreme Court – issues of process and administration of justice**

**Warsaw, 12-14 June 2014**

#### **(1) Introduction**

1. The United Kingdom Supreme Court (UKSC) is a relatively new Supreme Court. It was created by the Constitutional Reform Act 2005 (the 2005 Act) and started to sit in October 2009. The delay between creation and commencement arose because its premises were not ready until the latter date. It was created in order to ensure that the UK's constitutional arrangements were more closely, or rather obviously, aligned with a commitment to separation of powers.
2. Before 2005, as is well known, the supreme judicial authority in the UK was exercised by the House of Lords<sup>1</sup>, although by a combination of statutory provision (the Appellate Jurisdiction Act 1876) and constitutional convention, it was in fact only ever exercised by the judicial committee of the House of Lords. Only Lords of Appeal in Ordinary (Peers appointed under the 1876) and other members of the Lords who had held or held high judicial office in the UK (collectively 'Law Lords') constituted the judicial committee. As a consequence of this, prior to 2005 there was a functional, constitutional separation of powers. The 2005 Act by removing the House of Lords' judicial function and transferring it to the UKSC thus simply transformed a commitment to separation that held by way of constitutional convention into one that held by way of statute.

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<sup>1</sup> Strictly speaking by the High Court of Parliament, see Appellate Jurisdiction Act 1876, s4. Both Houses originally exercised parliament's judicial jurisdiction, however in 1399 the House of Commons declared it '*had no role in the jurisdiction*': M. Burton, *Civil Appeals* (Sweet & Maxwell) (2013) (*Burton on Civil Appeals*) at 225.

3. This paper considers the rules concerning access to the UKSC. It does so by setting out the following issues: the court's jurisdiction; standing; permission to appeal requirements; substantive nature of appeals; tied decisions and reopening of appeals. It then goes on to examine the nature of the remedies available to it, and any restrictions that apply to them. Because the court is the statutory successor to the House of Lords' judicial powers<sup>2</sup>, transferred to it by section 40 and schedule 9 of the 2005 Act<sup>3</sup>, it is necessary to consider both the UKSC and its predecessors' jurisdiction.

## **(2) The UK Supreme Court's Jurisdiction**

4. The UKSC is, as Andrews has described it, the highest appellate court in the United Kingdom<sup>4</sup>. It has no trial jurisdiction. Appeals lie to it from each of the UK's three legal jurisdictions: England and Wales; Scotland; and Northern Ireland. It has no original, or trial, jurisdiction<sup>5</sup>. Its role is to determine fundamental issues of law. It provides authoritative interpretations of statute, and clarifies and develops the common law i.e., judge-made law. Its jurisdiction is however limited to deal only with appeals that raise points of general public importance. As Lord Bingham put it describing the House of Lords' jurisdiction, *'In its role as a supreme court the House must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance. It cannot seek to correct errors in the application of settled law, even where such are shown to exist.'*<sup>6</sup> In order to do so it has the power to

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<sup>2</sup> As summarised in Supreme Court Practice Direction 1 at 1.1.6, *'The jurisdiction of the Supreme Court corresponds to that of the House of Lords in its judicial capacity together with devolution matters . . .'*

<sup>3</sup> See Explanatory Notes to Constitutional Reform Act, s40, "<http://www.legislation.gov.uk/ukpga/2005/4/notes/contents>".

<sup>4</sup> N. Andrews, *The Supreme Court of the United Kingdom and English Judgments*, (Legal Studies Research Paper Series, paper No. 23/2014) at 2 & \$,

<sup>5</sup> Constitutional Reform Act 2005, s40 only provides it with an appellate jurisdiction, and see Appellate Jurisdiction Act 1876, s3.

<sup>6</sup> *R v Secretary of State for Trade & Industry, ex parte Eastaway* [2000] 1 WLR 2222 at 2228.

*‘determine any question necessary to be determined for the purposes of doing justice under any enactment.’<sup>7</sup>* Its decisions bind all lower courts within the jurisdiction from which an appeal to it arose e.g., if the appeal originated from England and Wales, the UKSC’s decision binds all courts in England and Wales<sup>8</sup>. While such decisions will not bind the courts of the other UK jurisdictions, they will be highly persuasive authorities and are likely to be followed<sup>9</sup>.

5. The court’s appellate jurisdiction arises in three distinct areas: civil proceedings, including appeals from judicial review decisions; criminal proceedings; and devolution matters. It has, subject to two exceptions, no constitutional review role. It cannot, as for instance the US Supreme Court can, strike down legislation. As Lord Neuberger MR, now the current President of the UKSC, commented in 2009 regarding the court’s creation,

*‘. . . there was plainly no intention to create a Constitutional Court; that is to say, one that can carry out a constitutional judicial review of legislative action, as opposed to executive action. So, it is not intended that the new court should be able to strike down legislation on the ground of unconstitutionality.’<sup>10</sup>*

While that may have been an accurate summary in 2009, it must however now be read subject to what can, at best, be described as a nascent movement towards establishing a US-style power to strike down legislation; one anticipated by Lord Neuberger MR, again in 2009, when he went on to suggest that an unintended consequence of the court’s

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<sup>7</sup> Constitutional Reform Act 2005, s40(5).

<sup>8</sup> Constitutional Reform Act 2005, s41(2).

<sup>9</sup> See, for instance, *Donoghue v Stevenson* [1932] AC 562, which effectively created the modern law of negligence in England and Wales was an appeal from Scottish proceedings and was, hence, not technically binding on English and Welsh courts.

<sup>10</sup> D. Neuberger, *The Supreme Court: Is the House of Lords ‘losing part of itself’* (2 December 2009) at [19] <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-supreme-court-lecture-dec-2009.pdf>>.

creation might be for it, at some point in the future, to have ‘*its own Marbury v Madison moment*’ and discover such a jurisdiction<sup>11</sup>.

6. Its practice and procedure is governed by the Supreme Court Rules (2009) (SCR)<sup>12</sup> and fourteen Practice Directions<sup>13</sup>, which supplement the Rules. In addition the *House of Lords’ Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 remains in force and applies to the Supreme Court as it did to the House of Lords (discussed further below). In order to examine the court’s jurisdiction it is necessary to take each of its aspects in turn, including looking at its extant, albeit limited, constitutional review jurisdiction and the nascent movement to full constitutional review powers adverted to by Lord Neuberger MR. In general, except where the context makes it clear, the points made relate to the court’s civil rather than criminal jurisdiction.

**(i) Civil Jurisdiction**

7. Civil appeals lie to the UKSC from the following: the Court of Appeal in England and Wales<sup>14</sup>; the Court of Session in Scotland<sup>15</sup>; the Court of Appeal of Northern Ireland<sup>16</sup>. Appeals can only be brought if permission is obtained from either the court from which the appeal is to be brought or from the UKSC.
8. In exceptional circumstances, an appeal lies to the court from the High Court in England and Wales<sup>17</sup> and the High Court of Northern Ireland<sup>18</sup>. These appeals, known as ‘leapfrog

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<sup>11</sup> D. Neuberger, *ibid.* at [23] – [25].

<sup>12</sup> SI 1663/2009), Constitutional Reform Act 2005, s45.

<sup>13</sup> Practice Directions are issued under the court’s inherent jurisdiction as a superior court by the President of the Supreme Court.

<sup>14</sup> Constitutional Reform Act 2005, s40. For an overview see SCR PD 1.

<sup>15</sup> *Ibid*; Court of Session Act 1988, ss40 – 43, 24, 27(5), 32(5), and 52(3).

<sup>16</sup> Judicature (Northern Ireland) Act 1978, ss42, 44, and 45.

<sup>17</sup> Administration of Justice Act 1969, ss12 – 16.

<sup>18</sup> Administration of Justice Act 1969, ss12 – 16, Judicature (Northern Ireland) Act 1978, s43.

appeals' arise where an appeal to the relevant Court of Appeal would be unsuitable because a number of conditions are made out, as noted by Burton on Civil Appeals,

*'(i) the appeal involves a point of law of general public importance;*

*(ii) the point of law relates either to the construction of an act of Parliament (or statutory instrument) or is a point on which the Judge is bound by a decision of the Court of Appeal [which in turn would render any appeal to the Court of Appeal otiose as it too would be bound by its prior decision] or Supreme Court;*

*(iii) that a sufficient case has been made out to justify an application for permission to appeal to the Supreme Court; and*

*(iv) that all the parties consent.<sup>19</sup>*

In order to bring a leapfrog appeal the party wishing to bring it must obtain a certificate from the High Court judge whose judgment is to be appealed certifying the fact that the conditions are made out. That certificate must be issued immediately after the relevant judgment is given or within fourteen days of it being given<sup>20</sup>. Should such a certificate be issued, it and an application for permission to appeal must then be filed with the UKSC within the relevant time limits (see below).

9. There are a number of statutory restrictions on the ability to bring appeals in civil proceedings to the UKSC. Appeals cannot be brought in respect of:

(i) a decision of the Court of Appeal in England and Wales refusing permission to bring an appeal to that court (the Court of Appeal)<sup>21</sup>;

(ii) incidental decisions of the Court of Appeal in England and Wales, which may be challenged under rules of court<sup>22</sup>;

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<sup>19</sup> Burton on Civil Appeals at 236; SCR PD 1 at 1.2.17.

<sup>20</sup> SCR PD 1 at 1.2.18.

<sup>21</sup> Access to Justice Act 1999, s54(4).

- (iii) preliminary decisions of the Court of Appeal in England and Wales in respect of which permission to appeal to that court was not granted<sup>23</sup>;
- (iv) applications made by a permission whose access to the courts is restricted by an order under Senior Courts Act 1981, s42 i.e., an individual subject to a civil proceedings order restricting vexatious litigants' ability to issue or continue proceedings;
- (v) applications for permission to appeal decisions arising from County Court probate proceedings<sup>24</sup>;
- (vi) applications for permission to appeal decisions of the Court of Appeal in England and Wales heard on appeal from the High Court under Part III of the Representation of the People Act 1983;
- (vii) applications for permission to appeal a refusal by the Court of Appeal in England and Wales to reopen proceedings before it.

10. The UKSC also has jurisdiction to consider appeals arising from judicial review applications from each of the UK legal jurisdictions. This is, however, subject to the restriction that it has no jurisdiction to deal with appeals from refusals by the Court of Appeal in England and Wales to refuse to grant permission to itself to hear an appeal from a decision of the High Court refusing permission to apply for judicial review.<sup>25</sup>

## ***(ii) Criminal Jurisdiction***

11. The UKSC has no jurisdiction to hear criminal appeals from Scotland. It does not do so because the House of Lords had no such jurisdiction. It did not do so because at the time of the Act of Union between England and Wales and Scotland, the House of Lords had no

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<sup>22</sup> Senior Courts Act 1981, s58

<sup>23</sup> *Lane v Esdaile* [1891] AC 210.

<sup>24</sup> County Courts Act 1981, s82.

<sup>25</sup> SCR PD 1 at 1.2.21; *R v Secretary of State for Trade & Industry, ex parte Eastaway* [2000] 1 WLR 222; *R v Hammersmith & Fulham LBC, ex parte Burkett* [2002] 1 WLR 1593.

criminal jurisdiction. The question whether it obtained any criminal jurisdiction regarding Scotland was left open by the Act of Union 1707. It was however affirmed in *Bywater v. Lord Advocate* (1781) 2 Pat. 563, that no appeals lay from Scotland to the House of Lords. That position pertains today.

12. The court does however have appellate jurisdiction in criminal proceedings from both England and Wales and Northern Ireland. Such appeals can only be brought if they raise matters of general public importance, which appear to raise a point that ought to be considered by the UKSC<sup>26</sup>. Additionally, points of law may be referred by the Court of Appeal in England and Wales to the UKSC where such an issue as been referred to it by the Attorney-General upon an acquittal<sup>27</sup>. As part of its criminal jurisdiction it can also hear appeals arising from court-martial decisions<sup>28</sup>.

***(iii) Constitutional Review – under the European Communities Act 1972 and the Human Rights Act 1998***

13. The UKSC has two specific, statutory, powers which enable it to review the legality of primary legislation (and subordinate legislation), enacted by the UK Parliament. The first such power arises under the European Communities Act 1972 (the ECA). It gives primary to European Union law and renders it of direct effect in the UK. The ECA, as the House of Lords affirmed in *Factortame (No 2)*<sup>29</sup>, enabled, and required, the courts to give effect to European Union law even where it was contrary to the provisions of an Act of Parliament. Where such a conflict arose, the courts had to disapply the Act of Parliament. While this power is not limited to the UKSC, but is applicable by other courts in the UK,

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<sup>26</sup> Criminal Appeal Act 1968, ss33 – 34, Administration of Justice Act 1960, ss1 – 2; Criminal Appeal (Northern Ireland) Act 1980, ss31- 32, Judicature (Northern Ireland) Act 1978, s41 and schedule 1; SCR PD 1 at 1.2.10.

<sup>27</sup> Criminal Justice Act 1972, s36.

<sup>28</sup> Courts-Martial (Appeals) Act 1968, ss39 – 40.

<sup>29</sup> [1991] 1 AC 603.

it is its role as the ultimate appellate court ultimately to determine, as it did in the *Factortame* case whether and to what extent an Act of Parliament is in conflict with European law.

14. The second review power arises under the Human Rights Act 1998 (the HRA). Again, this power is not unique to the UKSC, but is a power it shares with the other superior courts in the UK e.g., the High Court and Court of Appeal in England and Wales. The HRA provides the senior courts with the power to review primary and secondary legislation to ascertain whether it is consistent, compatible, with the rights guaranteed in the European Convention on Human Rights. This review power does not, as Lord Irvine LC put it, give the courts, including the UKSC, ‘*the right to strike down Acts of Parliament. . .*’<sup>30</sup>.

15. The review power is limited in two ways: first, it only arises in the context of contested litigation where the question of an Act of Parliament’s compatibility arises as a consequence of the immediate issue – there is no general right to challenge the validity of Acts of Parliament *per se*; secondly, the review power requires the court to initially attempt to interpret the Act of Parliament consistently with the ECHR, if that is not possible it can then make a ‘*declaration of incompatibility*.’<sup>31</sup> Interpretation can go a long way to read words and meaning into a statute to render it, as far as possible, compatible with the Convention, but it does not go as far as to allow the courts to amend legislation<sup>32</sup>.

A declaration of incompatibility does not invalidate an Act; it simply informs Parliament

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<sup>30</sup> Irvine, *Human Rights, Constitutional Law and the Development of the English Legal System*, (Oxford) (2003) at 98.

<sup>31</sup> Human Rights Act 1998, s3(2)(b).

<sup>32</sup> *R v A (No 2)* [2002] 1 AC 45; *R v Lambert* [2002] 2 AC 545; *R v Offen* [2001] 1 WLR 253; *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2002] QB 48; *Ghaidan v Mendoza* [2004] 2 AC 557; for a discussion see A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP) (2009).

and the government of the issue. Crucially it leaves it to them to decide whether to amend the offending provision, repeal it or leave it as it is<sup>33</sup>. Neither Parliament nor the government are required to take any steps<sup>34</sup>.

**(vi) Constitutional Review – Devolution Jurisdiction**

16. The UKSC has two forms of devolution jurisdiction, both of which arise under the Scotland Act 1998, Northern Ireland Act 1998 and Government of Wales Act 2006. These Acts provide the devolved legislatures and executives in those parts of the United Kingdom with a number of powers and functions.

17. The first type of devolution jurisdiction arises in respect of the exercise of devolved powers and functions. The UKSC's jurisdiction remains primarily an appellate one. Such matters can be brought to the UKSC either by way of appeal from a decision of a superior court in England and Wales, Scotland or Northern Ireland, by way of a reference from one of those courts or by on of the Law Officers of the Crown<sup>35</sup>.

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<sup>33</sup> Human Rights Act 1998, ss 4 & 10.

<sup>34</sup> In addition to these three measures, HRA s19 also obligates the executive to consider whether proposed legislation is compatible with the Convention and make a statement to that effect when Bills are presented to Parliament. As such a culture of compliance is created. Only once has the executive not been able to make a positive statement on a Bill; the legislation was subsequently held to be compatible with the Convention: see *Communications Act 2003 and R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] 1 AC 1312. Also see *R v Home Secretary ex parte Simms* [1999] 1 AC 69 at 131, '*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.*'

<sup>35</sup> SCR PD 10.1.3.

18. The second type of devolution jurisdiction is both novel and unique in the UK. It again arises under the terms of the: Scotland Act 1998; the Northern Ireland Act 1998; and the Government of Wales Act 2006. It is a limited jurisdiction and it is not an appellate jurisdiction. It is however one that permits abstract, a priori, review of proposed legislation.

19. This jurisdiction can only be invoked by one of the Law Officers of the Crown (see below). It has only been used twice, once by the Attorney-General of Northern Ireland and once by the Attorney-General of England and Wales. Of the two references the former was withdrawn<sup>36</sup>, while the latter resulted in the UKSC's first act of constitutional review<sup>37</sup>.

***(vi) Common law constitutional review – early developments?***

20. The established fundamental principle of the UK's uncodified Constitution is that of Parliamentary Supremacy, that as Lord Mustill explained in the House of Lords' decision in *ex parte Fire Brigades Union* in 1995, '*Parliament has a legally unchallengeable right to make whatever laws it thinks fit.*<sup>38</sup>' This means that no court in the UK, including the UKSC, has the '*power to declare enacted law to be invalid.*<sup>39</sup>'

21. There is however a developing debate whether the UKSC has the power to strike down primary legislation on the grounds that it is unconstitutional. The basis for this development is the claim that Parliamentary sovereignty is no longer the sole, or the

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<sup>36</sup> See, B. Hale, *The Supreme Court in the UK Constitution*, (12 October 2012) (Legal Wales lecture) at 16.

<sup>37</sup> *Local Government Byelaws (Wales) Bill 2012 – Reference by the Attorney-General for England and Wales* [2012] UKSC 53, [2013] 1 AC 792.

<sup>38</sup> *R v Secretary of State for the Home Department, Ex parte Fire Brigades Union* [1995] 2 AC 513 at 597; and see Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edition, 1959) (Macmillan) at 39 – 40.

<sup>39</sup> *Railways Board v Pickin* [1974] AC 765 at 798.

fundamental principle of the UK's constitution. It is suggested that that principle is now subject to the rule of law, as Lord Hope put it in the *Jackson* case

*'The rule of law enforced by the courts is the ultimate controlling factor upon which our constitution is based. The fact that your Lordships have been willing to hear this appeal and give judgment upon it is another indication that the courts have a role to play in defining the limits of Parliamentary sovereignty.'*<sup>40</sup>

And as Lord Steyn put it in the same case,

*'The classic account given by Dicey of the doctrine of the supremacy of Parliament ... can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the ... new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.'*<sup>41</sup>

22. This idea has not been without its critics, who have argued, amongst other things, that Parliamentary sovereignty is not a product of the common law, and even if it was, it was not such as capable of revision by the judiciary<sup>42</sup>. At best the position can be said to be undetermined at the present time. As Lord Hope put it in *AXA General Insurance Ltd & Ors v Lord Advocate & Ors (Scotland)*

*'[50] The question whether the principle of the sovereignty of the United Kingdom Parliament is absolute or may be subject to limitation in exceptional circumstances is still*

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<sup>40</sup> *R (Jackson) v HM Attorney General* [2005] Q.B. 579 at [107].

<sup>41</sup> [2006] 1 AC 262 at [101] – [102].

<sup>42</sup> D. Neuberger, Who are the Masters now? (Lord Alexander lecture, 6 April 2011) at [42] *'I cannot accept the accuracy of the claim that Parliamentary sovereignty is a product of the common law, or that, because common law existed prior to Parliament's 'legislative supremacy', as Professor Allan put it, 'it defines and regulates it'*<sup>42</sup>. The error is that of post hoc propter hoc. And, with the exception of Coke's fleeting attraction to common law fundamentalism, I am not aware of any authority which supports, let alone establishes, the proposition that the common law created Parliamentary sovereignty. Nor am I aware of any significant authority which suggests that the common law can justify the courts lawfully setting aside or invalidating a statute.'

*under discussion. For Lord Bingham, writing extrajudicially, the principle is fundamental and in his opinion, as the judges did not by themselves establish the principle, it was not open to them to change it: The Rule of Law, p 167. Lord Neuberger of Abbotsbury, in his Lord Alexander of Weedon lecture, Who are the masters Now? (6 April 2011), said at para 73 that, although the judges had a vital role to play in protecting individuals against the abuses and excess of an increasingly powerful executive, the judges could not go against the will of Parliament as expressed through a statute. Lord Steyn on the other hand recalled at the outset of his speech in Jackson, para 71, the warning that Lord Hailsham of St Marylebone gave in The Dilemma of Democracy (1978), p 126 about the dominance of a government elected with a large majority over Parliament. This process, he said, had continued and strengthened inexorably since Lord Hailsham warned of its dangers. This was the context in which he said in para 102 that the Supreme Court might have to consider whether judicial review or the ordinary role of the courts was a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons could not abolish.*<sup>43</sup>

### **(3) Standing**

23. There are three categories of litigant who have standing before the Supreme Court: parties to appeals; interveners; and the Law Officers to the Crown.

#### (i) Parties and non-parties

24. Any party to civil proceedings against whom a relevant decision<sup>44</sup> is given may seek to, and if permission is granted, bring an appeal before the UKSC challenging that judgment or order. Conversely any other party to such proceedings may defend the relevant decision as a respondent to the appeal before the UKSC.

25. It is not clear from the case law, as the question has apparently not arisen, whether a non-party to proceedings can bring an appeal to the UKSC. The SCR contain no provisions regarding such a possibility. Theoretically, a case can be made for the UKSC having such a power however, at least in respect of appeals from the Court of Appeal of England and Wales. In *MA Holdings Ltd v George Wimpey UK Ltd* [2008] EWCA Civ 12 the Court of Appeal held that it retained an equity-based jurisdiction to allow non-parties to bring

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<sup>43</sup> [2011] UKSC 46, [2012] 1 AC 868 at [50].

<sup>44</sup> A relevant judgment is one given by a court from which appeals lie to the UK Supreme Court.

appeals, and that within its rules of court the term ‘appellant’ was not to be read restrictively as meaning a party to the decision to be appealed. It held that the term could be given a wide reading to include parties to the proceedings at first instance and those who had not been parties but whose interests were affected by the judgment. The need to show that your interests were affected would ensure that ‘*intermeddling busybodies*’ were not able to challenge decisions to which they had not been parties. It remains an open question whether the UKSC would, if the question arose, adopt the same reasoning as the Court of Appeal and, more significantly, hold that it had the same equity-based jurisdiction as the Court of Appeal.

26. In so far as criminal proceedings are concerned appeal may be brought by either the prosecutor i.e., in England and Wales, the Crown Prosecution Service, or the accused. Additionally, the Attorney-General may refer a point of law to the UKSC where such a reference has already been made to the Court of Appeal (Criminal Division) in England and Wales. Such references are made in order to clarify the law, and raise points of practical and general public importance<sup>45</sup>. The position is broadly similar in respect of criminal appeals from Northern Ireland<sup>46</sup>.

(ii) Interveners

27. Non-parties may obtain permission to make submissions to the UKSC in respect of any civil appeal as interveners<sup>47</sup>. Such non-parties may be: individuals, official bodies i.e., Secretaries of State, the Law Officers, local government bodies; non-governmental bodies e.g., NGOs, public interest groups; or, bodies with an interest in proceedings by way of judicial review. Where the proceedings before the court raise the question whether a

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<sup>45</sup> Criminal Justice Act 1972, s36.

<sup>46</sup> Criminal Appeal (Northern Ireland) Act 1980, ss31 – 32; SCR PD 1.2.14.

<sup>47</sup> SCR r. 15(1), SCR PD 3.3.17.

declaration of incompatibility should be made under the HRA the Crown, if it is not a party to the proceedings, has a right to intervene on the appeal<sup>48</sup>.

28. The rationale for permitting interventions is to ensure that on the matters of public importance that the court deals with it has the best possible understanding of the issues. As Lord Hoffmann put it in *E v The Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission intervening)* [2008] UKHL 66, [2009] 1 AC 536 at [2] – [3],

*‘[2] It may however be of some assistance in future cases if I comment on the intervention by the Northern Ireland Human Rights Commission. In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.*

*[3] An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the NIHRC only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way.’*

### (iii) The Law Officers to the Crown

29. The Law Officers of the Crown<sup>49</sup> are, as noted above, able to bring references to the UKSC concerning devolution questions. They are also able to bring references to the

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<sup>48</sup> Human Rights Act 1998, s5(2); SCR r. 40.

<sup>49</sup> The Attorney-General for England and Wales in respect of England and Wales, the Counsel General for Wales in respect of Wales, the Advocate General and the Lord Advocate for Scotland, and the Advocate General and Attorney General for Northern Ireland for Northern Ireland.

UKSC concerning the validity of Bills of the Scottish Parliament<sup>50</sup>, Welsh Assembly<sup>51</sup> and Northern Ireland Assembly<sup>52</sup> (see above) under the UKSC's *a priori* review jurisdiction. In order to bring a reference the relevant law officer is required to: file it with the UKSC within four weeks from the date when the relevant legislative body passes the Bill<sup>53</sup>; to specify the question in issue to be determined by the UKSC<sup>54</sup>; and serve a copy of the reference on any other law officer who is not a party to the reference and may have a potential interest in it<sup>55</sup>.

#### **(4) Permission to appeal**

30. Appeals from the courts in England and Wales and Northern Ireland can only be brought with either the permission of the relevant Court of Appeal or the UKSC. Scottish appeals are not, as a general rule, subject to a permission to appeal requirement<sup>56</sup>.

31. There are detailed provisions governing when and how permission to appeal must be sought. As a general rule permission must first be sought from the Court whose decision is to be appealed. If that application is unsuccessful, a fresh application can be made to the UKSC itself<sup>57</sup>. In civil matters a permission application must be made within 28 days of

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<sup>50</sup> The Advocate-General for Scotland, the Lord Advocate (for Scotland) and the Attorney-General for England and Wales are the relevant law officers to exercise this power in respect of Scotland.

<sup>51</sup> The Counsel-General for Wales and the Attorney-General for England and Wales are the relevant law officers to exercise this power in respect of Wales.

<sup>52</sup> The Attorney-General for Northern Ireland is the relevant law officer to exercise this power in respect of Northern Ireland.

<sup>53</sup> This arises in two circumstances: first, when a Bill is initially passed by the Assembly; and secondly, when a Bill, which has been passed and subject to reference to the UKSC has then been reconsidered and passed again by the Assembly: see Scotland Act 1998, ss33 and 36(5), Government of Wales Act 2006, ss112 and 111(7) and Northern Ireland Act 1998, ss11 and s13(6). In so far as Wales is concerned, references can also be made regarding proposed Orders-in-Council (in this context measures to transfer legislative powers to the Welsh Assembly) and Assembly measures (in this context primary legislation under powers conferred by Orders-in-Council, and a subordinate form of primary legislation made by the Assembly, subordinate to Acts of the Assembly) to the UKSC by the relevant law officer under Government of Wales Act 2006, ss96 and 99.

<sup>54</sup> SCR r. 41(3).

<sup>55</sup> SCR r. 41(2).

<sup>56</sup> Court of Session Act 1988, s40. Exceptions arise under a number of statutory provisions and also arise where an appeal from an interim decision of the Court of Session, except such decisions where there is a difference of opinion between the judges hearing the matter in that Court or where 'the interlocutory judgment is one sustaining a dilatory defence and dismissing the action.', see SCR PD 1 1.2.25(2) and (3).

<sup>57</sup> SCR r.10.2, PD 3.

the decision to be appealed being given. If the appeal concerns civil contempt, the time limit is however 14 days from that date at which permission to appeal was refused by Court whose decision is to be appealed<sup>58</sup>. Applications for leapfrog appeals must be made within one month of the High Court's decision to certify the appeal as one suitable for a leapfrog<sup>59</sup>. These time limits may be extended by the UKSC<sup>60</sup>.

32. Permission to appeal applications are dealt with by an Appeal Panel of the UKSC. It determines whether the proposed appeal is admissible, and if so whether it raises a point of law of general public interest. The Panel can grant or refuse permission, grant permission on specific terms, invite further submissions or direct an oral permission hearing take place<sup>61</sup>.

33. If permission to appeal is granted, the opposing party is required to give notice of objection within 14 days of being served with the application for permission to appeal. The opposing party to the proceedings (the respondent in the appeal before the UKSC) may do a number of things. They may: consent to the appeal; object to the appeal and seek to uphold the appealed decision for the reasons given in that decision; seek to persuade the court to uphold the decision on further grounds; or bring a cross-appeal if they wish to have the decision challenged varied in any way under SCR r. 25(2).

34. Parties are, of course, free to withdraw or abandon an appeal or concede an appeal<sup>62</sup>.

## **(5) Appeal Process and Hearings**

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<sup>58</sup> SCR PD 2.1.16.

<sup>59</sup> Administration of Justice Act s12.

<sup>60</sup> SCR PD2.1.13.

<sup>61</sup> Burton on Civil Appeals at 234; SCR PD 3.

<sup>62</sup> SCR PD 8.

35. Appeals are heard in public and are televised. They are generally heard by panels of five Justices, although on particularly important appeals panels of seven or nine may sit. The court has never sat en banc, although there is no reason in principle why it could not.
36. Appeals are argued orally before the court, and can last from half a day to, generally no more than, a week. Parties are however required to submit their evidence and legal argument in advance of the appeal hearing<sup>63</sup>. Should a matter be urgent hearings can be expedited<sup>64</sup>, and if necessary the UKSC can issue a stay of execution of any order under appeal to it<sup>65</sup>. Stays of execution will however only exceptionally be granted by the UKSC; the primary means by which an appellant is expected to obtain such a stay is from the court whose order or decision is subject to appeal<sup>66</sup>.
37. The court determines appeals by way of written judgment. There is a varied practice concerning judgments; the court may issue a single judgment of court, each Justice may deliver an individual judgment; majority or minority judgments may be given, as may concurring judgments.
38. The court has a general discretion to award the costs of any appeal. That discretion is exercised as the court considers just, which in practice means that costs follow the event.

#### **(6) Academic or hypothetical appeals**

39. The UKSC does not, as a matter of general principle, entertain academic or hypothetical appeals. As such appeals to it must, ordinarily, require the court to determine live issues

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<sup>63</sup> SCR PD 6.

<sup>64</sup> SCR PD 6.2.4.

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<sup>66</sup> SCR PD 8.14.1, SCR r. 37.

that exist between parties to a legal dispute<sup>67</sup>. It does not, as Zuckerman put it, ‘pronounce on purely theoretical questions that are of no immediate consequence for the parties’ rights.<sup>68</sup> In *Ainsbury v Millington* (1987), for instance, the House of Lords refused to give permission to appeal in proceedings that would, if permission had been given, resolved a significant issue of public importance: it would have clarified which of two conflicting lines of authority correctly stated the law regarding joint tenancies. It refused because no live dispute existed between the parties by the time the matter reached the House.

40. This general rule can however be set aside, and as such has been characterised as no more than a ‘*presumption*<sup>69</sup>’. The position appears now to be that the UKSC will exercise its discretion to hear an academic or hypothetical appeal when it is in the public interest to do so. In order for it to be in the public interest the proposed appeal must: i) involve a public authority; and ii) concern a question of public law, such as an issue of statutory interpretation<sup>70</sup> or a fundamental principle of law<sup>71</sup>.

## **(7) Tied decisions**

41. Prior to the UKSC’s creation, the possibility existed that appeals to the House of Lords could result in tied decisions, the consequence of which would be that the decision appealed was affirmed. The Constitutional Reform Act 2005 ensures that such situations

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<sup>67</sup> See, A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, (2013) (Sweet & Maxwell) at 1171ff.

<sup>68</sup> Zuckerman *ibid*; *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111.

<sup>69</sup> Zuckerman, *ibid*, at 1172.

<sup>70</sup> *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 per Lord Slynn, ‘*My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se.*’

<sup>71</sup> *Al-Rawi v The Security Service* [2011] UKHL 34, [2012] AC 531: whether closed material proceedings were compatible with the common law right to fair trial.

cannot arise for the UKSC. It does so through mandating that all appeals before the UKSC be heard by an uneven number of Justices<sup>72</sup>. Should, for whatever reason, such as ill-health, the panel of Justices hearing an appeal is reduced in number so that it can only continue with an even number, the 2005 Act provides that the senior judge on the panel may direct that the court remains duly constituted to continue to hear the appeal<sup>73</sup>. If such a direction is given and the court's decision is tied, then the appeal must be re-argued de novo before a fresh panel of Justices<sup>74</sup>.

### **(8) Reopening appeals**

42. Once a court has handed down its judgment it is *functus officio*; it no longer has any jurisdiction concerning the proceedings. This position pertained to the House of Lords prior to 1999. The question arose that year however whether the House could reopen a decided appeal after it had handed down its judgment. In *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* the House determined the question whether the former Head of State of Chile could be extradited to Spain.

43. Following judgment it became apparent that one of the Law Lords (Lord Hoffmann) was linked to Amnesty International, which had appeared before the House on the appeal. The question arose whether the House's decision was tainted by actual or apparent bias as a consequence of this. Pinochet Ugarte issued an application to the House seeking to reopen to appeal in order to have the decision set aside and then have it reheard before a fresh panel of Law Lords.

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<sup>72</sup> Constitutional Reform Act 2005, s42(1).

<sup>73</sup> Constitutional Reform Act 2005, s43, the panel must also have no less than three judges, of which the majority must be permanent judges of the court.

<sup>74</sup> Constitutional Reform Act 2005, s43(5).

44. Before the House could determine the substantive issue concerning bias, it had to address the question whether it had jurisdiction to reopen the appeal. It held it had such jurisdiction under its inherent jurisdiction as a final court of appeal, per Lord Browne-Wilkinson,

*‘In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. In Cassell & Co. Ltd. v. Broome (No. 2) [1972] A.C. 1136 your Lordships varied an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point.*

*However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.<sup>75</sup>*

**(8) House of Lords’ Practice Statement (Judicial Precedent) [1966] 1 WLR 1234**

45. The House of Lords was historically believed to be bound by its own decisions. This, of course, supports its role in providing clarity and certainty in the law. It was, however, recognised in 1966 that this focus on certainty could be counter-productive; *‘too rigid an adherence to precedent may lead to injustice . . .<sup>76</sup>’* To ameliorate this problem the House exercised its inherent jurisdiction in 1966 and issued a Practice Statement setting out its jurisdiction to depart from its own previous decisions. This discretion was to be, and is used, sparingly. It remains valid in so far as the UKSC is concerned, as was confirmed in *Austin v Southwark LBC* by Lord Hope,

*‘The Supreme Court has not thought it necessary to re-issue the Practice Statement as a fresh statement of practice in the court’s own name. This is because it has as much effect*

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<sup>75</sup> *R v Bow Street Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] UKHL 52.

<sup>76</sup> *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234

*in this court as it did before the Appellate Committee in the House of Lords. It was part of the established jurisprudence relating to the conduct of appeals in the House of Lords which was transferred to this court by s.40 of the Constitutional Reform Act 2005.*<sup>77</sup>

46. Since 1966 a number of principles have been developed, which govern the exercise of the power. These are summarised in *Burton on Civil Appeals* as follows:

- ‘(i) The power to overrule a previous decision is to be used only sparingly.*
- (ii) A decision ought not to be overruled simply because the Lords hearing the appeal consider that it was wrongly decided;’*
- (iii) Decisions which have been relied upon in making ‘contracts, settlements of property and fiscal arrangements’ or which govern criminal law ought not to be overruled.*
- (iv) Decisions concerned questions of construction ought not to be overruled.*
- (v) If a decision is not considered to be in keeping with modern ideas about public policy then it should be overruled.*
- (vi) If departing from a previous decision would involve a change in the law that ought properly to form part of a comprehensive reform of that area of law by Parliament or might result in unforeseen consequences, then the decision ought not to be overruled.*
- (vii) A previous decision ought to be overruled if it causes uncertainty*
- (viii) A previous decision ought not to be overruled where the issue in that case is of only academic interest in the case on appeal*
- (ix) The Court should be less ready to overrule longstanding decisions.*<sup>78</sup>

### **(9) Remedies available upon judgment**

47. The UKSC is able to issue procedural decisions governing interlocutory matters i.e., extensions of time, relief from non-compliance with its rules, security for costs, as well as final determinations. It has all the powers of the court from which an appeal arose. As such it can do the following affirm, vary or set aside the order or decision of the court below. It can order a new trial of the matter. It may also make any necessary order as to costs arising from the proceedings and any attendant order regarding judgment interest. Its orders are enforceable as if they were orders of a superior court of the jurisdiction

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<sup>77</sup> [2011] AC 355 at [24].

<sup>78</sup> *Burton on Civil Appeals* at 249 – 250, and then 250ff for a summary of the relevant case law.

from which the appeal originated i.e., if from England and Wales the order would be enforceable as an order of the High Court<sup>79</sup>.

## **(10) Conclusion**

48. This paper has provided a brief outline of the UKSC's jurisdiction and its ability to review legislation and consider devolution issues. It has outlined parties standing to bring proceedings before it, and the court's powers in respect of such proceedings. It has only be able to touch upon these various matters. It should be apparent however that the UKSC has a wide-ranging appellate jurisdiction, which enables it to exercise the full range of powers of the courts from which appeals are made to it. It should also be apparent that, in the majority of cases, access to the court is limited to: appeals that arise from live disputes between litigants and that, as it only deals with proceedings that give rise to points of law of general public importance it necessarily only deals with a small number of appeals each year<sup>80</sup>.

**John Sorabji**

**19 May 2014**

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<sup>79</sup> CPR PD 40B 13.

<sup>80</sup> Since 2009 it has handed down 380 decisions, approximately 70 – 80 per year; see <http://www.supremecourt.uk/decided-cases/index.shtml>