

UK SUPREME COURTS HOLDS THAT SCOTTISH PARLIAMENT DOES NOT HAVE POWER TO INTRODUCE REFERENDUM ON SCOTTISH INDEPENDENCE

Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31

Introduction

On 23 November 2022, the Supreme Court handed down its decision in *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 [2022] UKSC 31*. The Supreme Court unanimously held that the Scottish Parliament did not have the power to legislate for a referendum on Scottish independence.

Background

The Scotland Act 1998 (“the SA 1998”) provided for the establishment of a Scottish Parliament with responsibility for devolved matters, which include health, education, housing, sport and arts, agriculture, forestry & fishing, emergency services, planning, social work, heritage, some transport, and tourism. Under the SA 1998, certain matters were reserved to the United Kingdom Parliament in Westminster, predominantly those which mainly deal with matters of a UK or international concern, such as the armed forces, the benefits system, the constitution and elections and relations with other countries.

Following success in the Scottish Parliament elections from 2007 by the Scottish National Party, a party committed to independence, an Order in Council was made under section 30(2) of the SA 1998 so as to enable the Scottish Parliament to legislate for the holding of a referendum on independence, which would otherwise be a “reserved” matter under the SA 1998.

On 18 September 2014, the referendum was held in Scotland in which the electorate was asked to vote on “*Should Scotland should be an independent country?*”. A majority of 55.3% voted against independence.

The Scottish Government now wishes to hold another referendum on independence, and has drafted a Scottish Independence Referendum Bill which makes provision for a referendum on the question: “*Should Scotland be an independent country?*”. The UK Government is unwilling to agree to the making of a further Order in Council under section 30(2) at the present time which would allow the Scottish Government to introduce its referendum bill.

The reference by the Lord Advocate of Scotland

The reference to the Supreme Court was made under paragraph 34 of Schedule 6 to the SA 1998 by the Lord Advocate of Scotland, Dorothy Bain KC, who is the principal legal adviser to the Scottish Government and represents the Scottish Government in civil proceedings.

In the reference, the Lord Advocate asked the Supreme Court to determine whether the provision of the proposed Bill that provides for a referendum on Scottish independence would be outside the

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legislative competence of the Scottish Parliament because it relates to either or both of the reserved matters of the Union or the United Kingdom Parliament.

In response, the Advocate General for Scotland (the Scottish law officer of the United Kingdom Government) raised two preliminary issues pertaining to whether the Supreme Court could – and should – answer the reference.

Issues for the Supreme Court

Accordingly, three questions arose for the Court:

First, was the question referred by the Lord Advocate a “*devolution issue*”? If not, it could not be the subject of a reference under paragraph 34 of Schedule 6 to the SA 1998, which would mean that the Supreme Court did not have jurisdiction to decide it.

Secondly, even if it were a devolution issue, should the Supreme Court exercise its discretion to decline to accept the reference?

Thirdly, if the Supreme Court were to accept the reference, how should it answer the question referred to it by the Lord Advocate?

Judgment

In a unanimous judgment, the Supreme Court held (with reference to the aforementioned questions before it):

1. The question referred by the Advocate General was a devolution issue, such that the Supreme Court had jurisdiction to decide it.
2. The Supreme Court should accept the reference.
3. The proposed referendum bill did relate to matters that have been reserved to the United Kingdom Parliament under the SA 1998. Accordingly, in the absence of any modification of the definition of reserved matters (by an Order in Council or otherwise), the Scottish Parliament did not have the power to legislate for a referendum on Scottish independence.

Taking each in more detail:

Was the question referred to the Supreme Court a “*devolution issue*”?

The term “*devolution issue*”, defined by paragraph 1 of Schedule 6 to the SA 1998, included “*any other question arising by virtue of this Act about reserved matters*” (paragraph 1(f)). This was a wide provision that was intended to “*sweep up*” any questions about reserved matters under the SA 1998 which was not covered in the preceding paragraphs. The question referred by the Lord Advocate fell within this description and accordingly was a devolution issue which the Supreme Court had jurisdiction to decide.

Should the Supreme Court exercise its discretion to decline to accept the reference?

Although the Supreme Court had on two previous occasions declined to accept a reference from the Attorney General for Northern Ireland under paragraph 34 of Schedule 10 to the Northern Ireland

Act 1998, which is the provision corresponding to paragraph 34 of Schedule 6 to the Scotland Act, those cases were very different from the present case.

In the present case it was appropriate that the Supreme Court accepted the reference. In particular, the present reference had been made in order to obtain an authoritative ruling on a question of law that had already arisen as a matter of practical importance. It was a question on which the Lord Advocate had to advise ministers. Moreover, the answer to the question would have practical consequences: namely, it would determine whether or not the proposed Bill was introduced into the Scottish Parliament. The question was therefore not hypothetical, academic or premature.

Did the proposed bill relate to “reserved matters” under the SA 1998?

In this case, two reserved matters were relevant – first, the reservation of the Union of the Kingdoms of Scotland and England; and second, the reservation of the United Kingdom Parliament, which “encompasses, amongst other matters, the sovereignty of Parliament”.

The purpose of the proposed Bill was to hold a lawful referendum on the question whether Scotland should become an independent country; a question that evidently encompasses the question whether the Union between Scotland and England should be terminated, and the question whether Scotland should cease to be subject to the sovereignty of the Parliament of the United Kingdom.

The effect of the bill was not confined solely to the holding of a referendum. A referendum was not just an exercise in public consultation or a survey of public opinion, but had a greater importance as reflected by its official and formal character. The Supreme Court considered that “[a] lawful referendum on the question envisaged by the Bill would undoubtedly be an important political event, even if its outcome had no immediate legal consequences, and even if the United Kingdom Government had not given any political commitment to act upon it. A clear outcome, whichever way the question was answered, would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate. The clear expression of its wish either to remain within the United Kingdom or to pursue secession would strengthen or weaken the democratic legitimacy of the Union, depending on which view prevailed, and support or undermine the democratic credentials of the independence movement. It would consequently have important political consequences relating to the Union and the United Kingdom Parliament.”

It was plain that a Bill which made provision for a referendum on independence – on ending the Union and the Parliament of the United Kingdom’s sovereignty over Scotland – has more than a loose or consequential connection with the Union of Scotland and England or the sovereignty of that Parliament.

Accordingly, the proposed referendum bill related to reserved matters, and was therefore outside the legislative competence of the Scottish Parliament.

Concluding Observations

The First Minister of Scotland, Nicola Sturgeon, made a statement making it clear that while she was disappointed with the decision, she nonetheless respected the judgment of the Supreme Court, and reiterated that in light of the decision, the Scottish Government would be treating the next UK general election (due to take place no later than January 2025) as a “de facto” referendum on independence.