

Devolution and the Supreme Court

Quick Guide

October 2013

Introduction

The Supreme Court of the United Kingdom was established by Part 3 of the *Constitutional Reform Act 2005* and came into being on 1 October 2009. The Supreme Court has jurisdiction in relation to devolution matters under the *Scotland Act 1998*, the *Northern Ireland Act 1998* and the *Government of Wales Act 2006*; this was transferred to the Supreme Court from the Judicial Committee of the Privy Council.¹

Devolution Issues

The Supreme Court has jurisdiction to hear and determine "devolution issues", that is questions relating to the powers and functions of the legislatures and governments established in Scotland and Northern Ireland by the *Scotland Act 1998* and the *Northern Ireland Act 1998* respectively, and questions as to the competence and functions of the legislature and executive established by the *Government of Wales Act 2006*², whether or not the issue arises in proceedings in England and Wales, Scotland or Northern Ireland.

The Supreme Court can also be asked to scrutinise Bills of the Scottish Parliament (under section 33 of the *Scotland Act*), Bills of the Northern Ireland Assembly (under section 11 of the *Northern Ireland Act*) and proposed Assembly Bills under section 112 the *Government of Wales Act 2006*.

Such cases can reach the Supreme Court in four ways.

- By way of a reference of a question by a relevant officer (e.g. the Attorney General or Counsel General).
- By way of an appeal from certain superior courts of England and Wales, Scotland and Northern Ireland.
- By way of a reference of a devolution issue by certain appellate courts.
- By way of a direct reference of a devolution issue by a relevant officer whether or not the issue is the subject of litigation.³

¹ Supreme Court, *A Guide to bringing a case to the Supreme Court* [accessed 3 October 2012]

² *Government of Wales Act 2006* (c.32)

³ Supreme Court, UKSC Practice Direction 10, *Devolution Jurisdiction* [accessed 4 October 2012]

The Government of Wales Act 2006

Section 112 of the *Government of Wales Act 2006* provides a mechanism through which either the Counsel General or the Attorney General can obtain a decision by the Supreme Court as to whether an Assembly Bill or particular provisions of a Bill are within the Assembly's legislative competence. This may only be done within the **four week** period starting with the date the Bill was passed by the Assembly or, in the case of a Bill which has been reconsidered and approved by the Assembly, starting with the date the Bill was approved by the Assembly.

If the Counsel General or the Attorney General formally notifies the Clerk that he or she is not going to make such a reference then he or she is afterwards barred from doing so (unless the Bill has subsequently been **reconsidered** and approved).

Section 149 gives effect to Schedule 9, which makes detailed provision about the resolution of devolution issues. Paragraph 1 of the Schedule defines "devolution issues" to include questions of both the legislative competence of the Assembly in relations to Acts which it has passed and the executive competence of the Welsh Government. It also includes alleged failures by the Welsh Government to comply with its obligations under European Community law, or the European Convention on Human Rights.

Proceedings in England and Wales for the determination of a devolution issue may be instituted by the Attorney General or the Counsel General. The Counsel General may defend any such proceedings instituted by the Attorney General. This does not prevent other people from bringing or defending such proceedings, but where they do so then the Attorney General and the Counsel General must be notified of the proceedings, and are entitled to take part in them. Both the Attorney General and the Counsel General have a general power to require courts and tribunals to refer devolution issues in proceedings to which they are a party to the Supreme Court.

The Supreme Court Judgment AXA vs Lord Advocate

In October 2011 the Supreme Court handed down its judgment in the case of AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland). The case involved a legal challenge to the *Damages (Asbestos-related) Conditions (Scotland) Act 2009*; an Act of the Scottish Parliament. That Act provides that asymptomatic pleural plaques, pleural thickening and asbestosis constitute, and are to be treated as always having constituted, actionable harm for the purposes of an action for damages for personal injury. The effect of the Act, in Scotland, was to reverse the judgment of the House of Lords (sitting judicially) in the case of *Rothwell v Chemical & Insulating Co Ltd* in which it held that such effects were not actionable harm and could not therefore be the subject of a claim for damages for personal injuries.⁴

The judgment was significant for the devolved bodies in that the validity of the Scottish Act was questioned on common law grounds: it was argued by the appellants (insurance companies) that Acts of the Scottish Parliament are open to judicial review as an unreasonable, irrational and or arbitrary exercise of the legislative authority conferred by the *Scotland Act 1998* on the Scottish Parliament. The Lord Deputy President of the Supreme Court, Lord Hope, noted that:

⁴ Written Cabinet Statement by Theodore Huckle QC, Counsel General, *Supreme Court Judgement – AXA v Lord Advocate*, 12 October 2011 [accessed 4 October 2012]

the question as to whether Acts of the Scottish Parliament and measures passed under devolved powers by the legislatures in Wales and Northern Ireland are amenable to judicial review, and if so on what grounds, is a matter of very great constitutional importance.⁵

In his leading judgment, Lord Hope decided that “Acts of the Scottish Parliament are **not** subject to judicial review at common law on the grounds of irrationality, unreasonableness or arbitrariness” [*Research Service emphasis*] but left open the possibility that an Act of a devolved legislature that contravenes the rule of law (e.g. abolishing judicial review or diminishing the role of the courts in protecting the interests of individuals) might be held to be unlawful. He further stated that:

while there are some differences of detail between the Scotland Act 1998 and the corresponding legislation for Wales and Northern Ireland, these differences do not matter for present purposes. The essential nature of the legislatures that the legislation has created in each case is the same.⁶

The Counsel General commented that:

In significantly limiting the grounds on which the courts might be willing to consider reviewing the Acts of the Scottish Parliament, the judgment is clearly welcome. It is of considerable significance for the Welsh devolution settlement.⁷

Referral of Bills

In July 2012 the Attorney General, the Rt. Hon. Dominic Grieve MP, referred the *Local Government Byelaws (Wales) Bill*⁸ to the Supreme Court. The judgment of the Supreme Court was unanimous in finding the Bill within the competence of the National Assembly for Wales in November 2012.⁹

A second Assembly Bill, *the Agricultural Sector (Wales) Bill*, was referred to the Supreme Court in August 2013. *The*

Damages (Asbestos-Related Conditions) Bill was referred by the Northern Ireland Attorney General to the Supreme Court in April 2011. The “Axa Case” judgment came in October 2011 and as a considerable overlap existed between the Scottish Appeal and the Northern Ireland Reference, the Northern Ireland Attorney General subsequently withdrew his Reference.¹⁰

No Scottish Parliament bills have been referred to the Supreme Court under section 33 of the *Scotland Act 1998* prior to being enacted.

⁵ Supreme Court Judgment, *AXA General Insurance Limited and others (Appellants) v The Lord Advocate and others (Respondents) (Scotland)*, UKSC 46, 12 October 2011 [accessed 4 October 2012]

⁶ Ibid.

⁷ Written Cabinet Statement by Theodore Huckle QC, Counsel General, *Supreme Court Judgement – AXA v Lord Advocate*, 12 October 2011 [accessed 4 October 2012]

⁸ *Local Government Byelaws (Wales) Bill 2012* [accessed 4 October 2012]

⁹ Written Statement, First Minister (Rt. Hon. Carwyn Jones AM), *Supreme Court Judgment – Local Government Byelaws (Wales) Bill Reference*, 21 November 2012 [accessed 16 October 2013]

¹⁰ Northern Ireland Attorney General, *Attorney General welcomes Supreme Court decision*, Press Release, 12 October 2011 [accessed 4 October 2012]

Further information

For further information on the/about **Devolution and the Supreme Court**, please contact **Alys Thomas** (alys.thomas@Wales.gov.uk), **Research Service**.

See also:

- Quick Guide **The Constitution Series: 9 – Assembly Acts and the Legislative Process**
- Quick Guide **The Constitution Series: 10 – Legislative powers of the National Assembly**
- Quick Guide **Reconsideration of Assembly Bills passed**
- **The Supreme Court**

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Alys Thomas