

ASSOCIATION OF THE COUNCILS OF STATE AND SUPREME ADMINISTRATIVE
JURISDICTIONS OF THE EUROPEAN UNION

18TH COLLOQUIUM

SCOTTISH RESPONSE

TO

QUESTIONNAIRE ON PRELIMINARY REFERENCES TO THE COURT OF JUSTICE OF
THE EUROPEAN COMMUNITIES

A full response to the questionnaire drafted by reference to the position in England and Wales has already been submitted. This response is intended principally to indicate areas in which the Scottish position may differ from that in the rest of Great Britain and otherwise adopts, with gratitude, the English response.

1.1 Procedures whereby an inferior court might refer a question to a superior court were in internal law until the Scotland Act 1998, which set up the devolved Scottish Parliament and Executive. The validity of both the legislative acts of the Scottish Parliament and the administrative acts of the Scottish Executive may be challenged in the courts on certain grounds. By way of example, in terms of the Scotland Act 1998, neither the Scottish Parliament nor the Executive may validly do any act which is contrary to European Community Law or the European Convention on Human Rights. Challenges to the validity of such acts on such grounds are termed "devolution issues". Where a devolution issue is raised in an inferior court the matter may be referred by that court to the appellate divisions of the civil and criminal supreme courts within Scotland, namely the Inner House of the Court of Session or the High Court of Justiciary for a ruling. An example of the use of that procedure is to be found in *A v Scottish Ministers* 2001 SC 1. Except where they are considering a request for a ruling from an inferior Scottish court, the Court of Session and the High Court of Justiciary, when acting in an appellate capacity, may refer a devolution issue to the Judicial Committee of the Privy Council for a ruling. For the event that a devolution issue should arise in proceedings in England and Wales or in Northern Ireland the Scotland Act 1988 makes provision for a roughly parallel mechanism in the courts of those parts of the United Kingdom.

1.2 As in England and Wales.

1.3 The procedural rules of the Court of Session and the High Court of Justiciary contain relatively brief provisions regulating the way in which a request for a preliminary ruling should be drafted. In both courts the task of framing the terms of the reference is left to the parties, subject to the direction of the court. The rules require that in framing the reference the parties should have regard to the notes of guidance issued by the Court of Justice of the European Communities. The request for a preliminary ruling may not be sent to the Court of Justice until the time for appeal against the decision has elapsed or, where an appeal is taken, the appeal has been determined.

As in England and Wales the rules are concerned solely with the mechanics of drafting the reference and do not relate to the circumstances in which the making of a reference may be judged appropriate.

1.4 Except in so far as a "devolution issue" arises (see answer 1.1 above) the High Court of Justiciary is the court of final instance in all criminal matters. Appeals to the High Court of Justiciary are not subject to any requirement of obtaining leave from the inferior court. In non-criminal matters the ultimate appellate instance is generally the House of Lords. In contrast to the position in England, any final substantive ruling of the Inner House of the Court of Session may be appealed to the House of Lords without the need to obtain leave from either the Court of Session or the House of Lords. There are some exceptions to that liberty to appeal to the House of Lords without leave in the case of some statutory appeals to the Court of Session from certain administrative tribunals. The question whether the requirement, in those exceptional cases, to obtain leave renders the Court of Session a tribunal of last instance has not arisen for consideration.

1.5 The position is as in England and Wales.

1.6 The admissibility of appealing a decision by a court of first instance to make, or refuse to make, a request for a preliminary ruling has been accepted - see *Wither v Cowie* 1991 SLT 401.

1.7 As in England and Wales.

1.8 Scottish statistics relative to this question are not available but it has to be said that the emergence of an issue of EC law occurs infrequently in ordinary Scottish practice.

1.9 The position is as in England and Wales.

1.10 The position in Scotland does not differ materially from that prevailing in England and Wales. Essentially the Scottish court holds to the approach that the primary research responsibility lies with counsel and that the function of the court is to adjudicate on the competing arguments advanced to it.

1.11 These situations have not arisen in Scotland.

1.12 It is not thought that any case has arisen in which any Scottish court has been invited to hear the Commission or any other community institution.

1.13 It has to be said that the Scottish courts have been infrequent "customers" of the Court of Justice. Even by comparison with member states of a similarly sized population (circa 5.5 million), the number of references which have been made since the accession of the United Kingdom in 1972 remains very small. The areas in which those few references from Scotland have been made have concerned principally questions arising in the agriculture and fisheries sector, the legislation relating to tachographs; and the free movement of workers, (including the financing of tertiary education).

In the period between 1995 and 2000 only three references were made. One of those concerned the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The other two related to general principles of European Community Law in the context of measures requiring the destruction of fish stocks in fish farms in the event of disease.

So far as timescales are concerned, in the first of the two fish farm cases the relevant dates are as follows:-

The action was raised in January 1997. An initial hearing in September 1997 was interrupted due to illness of one of the participants and the decision at first instance was rendered on 28 May 1998. The decision was thereafter appealed and the appeal was decided on 12 August 1999, the decision being that there should be a reference. The draft reference was finally adjusted and dispatched on 11 January 2000. Judgment from the CJEC is still awaited.

The timetable in the other of those two cases is as follows:-

The petition was lodged on 9 March 1999 and a hearing was held on 20 January 2000. The decision to refer was issued on 7 February 2000 and the request was dispatched to the CJEC on 18 February 2000. Judgment also still awaited in this case.

The reference in the third case, concerning the Brussels Convention, was made at a very early stage in the Scottish proceedings. It was later discontinued.

2.1 Since litigants in Scotland only infrequently request either the Court of Session or the High Court of Justiciary to seek a preliminary ruling from the Court of Justice, refusal of such a request is accordingly an even rarer event. Where the court decides to refuse a motion that it make a reference, reasons for that refusal will be given and those reasons will refer to the case-law of Court of Justice of the European Communities, so far as appropriate.

There has not been any case in which the court has decided *ex proprio motu* to make a reference.

2.2 There had been very few, if any, such cases.

2.3 Perhaps in reflexion of the small number of cases in which the issue of making a reference to the CJEC has arisen, the Scottish courts have not sought to elaborate particular guidelines or criteria for the making of a reference. There is, perhaps, a general informal view that at least at first instance the court should be inclined to interpret and apply Community law without referring the matter to the CJEC.

2.4 The Scottish courts would adopt the same approach as that followed in England.

- 2.5 This situation has not arisen. Were it to arise the Scottish courts would probably follow the approach indicated in the response drafted by reference to England and Wales.
- 2.6 The Scottish courts have not requested a preliminary ruling relating to these matters.
- 2.7 The position is as stated as respects England and Wales.
- 2.8 The position is broadly as prevails in England and Wales. Although parties may be agreed upon the desirability of making a reference to the Court of Justice and upon the terms of the proposed questions to the Court of Justice, the court in Scotland will generally wish to hear relatively extensive argument in order to satisfy itself that a reference is truly necessary for the decision of the case and in order to be confident that the argument and issues have been properly focused, so that one may be better placed in framing the appropriate question for the CJEC.
- 2.9 The position is broadly in line with that in England and Wales.
- 2.10 The procedural rules of the Court of Session give a brief indication of the structure and content of the reference to the Court of Justice in Form 65.3 [copy annexed]. An equivalent provision is to be found in the procedural rules of the High Court of Justiciary. As already mentioned, those rules require the drafters of the reference to have regard to the guidance published by the CJEC on this matter. The provisions of the Rules of Court stipulate succinctness and do not contemplate the adoption of annexes or other documents, in recognition of the translation problems which these may present. The provisional views of the Scottish court making the reference are not included in the request for a preliminary ruling. [A copy of the request submitted to the Court of Justice in the case of *Hydro Seafood GSP Ltd v Scottish Ministers* is attached.]
- 2.11 As in England and Wales.
- 2.12 The Scottish courts have not had occasion to request urgent consideration of a request for a preliminary ruling under the accelerated procedure of Article 104a of the CJEC Rules of Procedure since that possibility was introduced. For the rest, the English response is adopted.
- 2.13 Although the cases referred to in the response from England and Wales relate to the particular English rules and case law the Scottish position would be broadly similar in that the existence of a pending reference to the CJEC would not ipso facto exclude the taking of other procedural steps not dependent on the ruling ultimately to be given by the Court of Justice.
- 2.14 The Scottish procedural rules envisage the submission to the CJEC of a single document containing a succinct, but essentially complete, account of the relevant facts, or alleged facts, and the contentions of the parties. It is not Scottish practice to send copies of all the other papers constituting the court "process" or "dossier" since some of these may not be readily intelligible to those unfamiliar with the Scottish procedures or may contain much that is ephemeral. However the request for the preliminary ruling is usually accompanied by a copy of the written pleadings.

3.1 Yes. In the case in question the reference for a preliminary ruling had been made in proceedings concerning the enforcement in Scotland of a French judgment given at first instance. The questions referred to the CJEC related to the interpretation of certain provisions of the Brussels Convention. In the event, the French judgment which it was sought to enforce was reversed by the French appellate court, thus rendering the Scottish enforcement proceedings devoid of purpose.

3.2 The answer to this question is negative.

3.3 The position here is as in England and Wales.

3.4 Were this situation to arise it would probably be treated in the same manner as in England and Wales.

3.5 As in England and Wales.

4.1 As in England and Wales.

4.2 In common with England and Wales the Scottish courts have had no experience of any such situation.

4.3 No.

4.4 In so far as the judgment given by the CJEC does not result in extra judicial settlement of the dispute, the Scottish court would probably refer to the response and such parts of the reasoning of the judgment of the CJEC as appeared appropriate.

4.5 As in England and Wales.