



Scotland Act 2012

2012 CHAPTER 11

PART 4

MISCELLANEOUS AND GENERAL

Miscellaneous

34 Convention rights and EU law: role of Advocate General in relation to criminal proceedings

- (1) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (2) For the italic heading before section 288A substitute “Convention rights and EU law compatibility issues, and devolution issues”.
- (3) After that heading insert—

“288ZA Right of Advocate General to take part in proceedings

- (1) The Advocate General for Scotland may take part as a party in criminal proceedings so far as they relate to a compatibility issue.
- (2) In this section “compatibility issue” means a question, arising in criminal proceedings, as to—
 - (a) whether a public authority has acted (or proposes to act)—
 - (i) in a way which is made unlawful by section 6(1) of the Human Rights Act 1998, or
 - (ii) in a way which is incompatible with EU law, or
 - (b) whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is incompatible with any of the Convention rights or with EU law.
- (3) In subsection (2)—

Status: This is the original version (as it was originally enacted).

- (a) “public authority” has the same meaning as in section 6 of the Human Rights Act 1998;
 - (b) references to acting include failing to act;
 - (c) “EU law” has the meaning given by section 126(9) of the Scotland Act 1998.”
- (4) Section 288A (rights of appeal for Advocate General: devolution issues) is amended as follows.
- (5) In the heading, before “devolution issues” insert “compatibility issues and”.
- (6) In subsection (1) omit “in pursuance of paragraph 6 of Schedule 6 to the Scotland Act 1998 (devolution issues)”.
- (7) For subsection (2) substitute—
- “(2) Where the Advocate General for Scotland was a party in pursuance of paragraph 6 of Schedule 6 to the Scotland Act 1998 (devolution issues), the Advocate General may refer to the High Court for their opinion any devolution issue which has arisen in the proceedings.
 - (2A) Where the Advocate General for Scotland was a party in pursuance of section 288ZA, the Advocate General may refer to the High Court for their opinion any compatibility issue (within the meaning of that section) which has arisen in the proceedings.
 - (2B) If a reference is made under subsection (2) or (2A) the Clerk of Justiciary shall send to the person acquitted or convicted and to any solicitor who acted for that person at the trial a copy of the reference and intimation of the date fixed by the Court for a hearing.”
- (8) In subsection (6) after “(2)” insert “or (2A)”.

35 References of compatibility issues to the High Court or Supreme Court

In the Criminal Procedure (Scotland) Act 1995, after section 288ZA (inserted by section 34) insert—

“288ZB References of compatibility issues to the High Court or Supreme Court

- (1) Where a compatibility issue has arisen in criminal proceedings before a court, other than a court consisting of two or more judges of the High Court, the court may, instead of determining it, refer the issue to the High Court.
- (2) The Lord Advocate or the Advocate General for Scotland, if a party to criminal proceedings before a court, other than a court consisting of two or more judges of the High Court, may require the court to refer to the High Court any compatibility issue which has arisen in the proceedings.
- (3) The High Court may, instead of determining a compatibility issue referred to it under subsection (2), refer it to the Supreme Court.
- (4) Where a compatibility issue has arisen in criminal proceedings before a court consisting of two or more judges of the High Court, otherwise than on a reference, the court may, instead of determining it, refer it to the Supreme Court.

- (5) The Lord Advocate or the Advocate General for Scotland, if a party to criminal proceedings before a court consisting of two or more judges of the High Court, may require the court to refer to the Supreme Court any compatibility issue which has arisen in the proceedings otherwise than on a reference.
- (6) On a reference to the Supreme Court under this section—
 - (a) the powers of the Supreme Court are exercisable only for the purpose of determining the compatibility issue;
 - (b) for that purpose the Court may make any change in the formulation of that issue that it thinks necessary in the interests of justice.
- (7) When it has determined a compatibility issue on a reference under this section, the Supreme Court must remit the proceedings to the High Court.
- (8) An issue referred to the High Court or the Supreme Court under this section is referred to it for determination.
- (9) In this section “compatibility issue” has the meaning given by section 288ZA.”

36 Convention rights and EU law: criminal appeals to the Supreme Court

- (1) The 1998 Act is amended as follows.
- (2) In section 57(3) (EU law and Convention rights: excepted acts of the Lord Advocate) omit the words after paragraph (b).
- (3) In section 102 (powers of courts or tribunals to vary retrospective decisions)—
 - (a) in subsection (4)(b) at the end insert “or to a compatibility issue.”;
 - (b) after subsection (5) insert—

“(5A) Where the decision mentioned in subsection (1) is a decision of the Supreme Court on a compatibility issue, the power to make an order under this section is exercisable by the High Court of Justiciary instead of the Supreme Court.”;
 - (c) in subsection (7) before the definition of “intimation” insert—

““compatibility issue” has the meaning given by section 288ZA of the Criminal Procedure (Scotland) Act 1995.”.
- (4) In paragraph 1 of Schedule 6 (devolution issues), after sub-paragraph (f) insert—

“But a question arising in criminal proceedings in Scotland that would, apart from this paragraph, be a devolution issue is not a devolution issue if (however formulated) it relates to the compatibility with any of the Convention rights or with EU law of

 - (a) an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament,
 - (b) a function,
 - (c) the purported or proposed exercise of a function,
 - (d) a failure to act.”
- (5) The Criminal Procedure (Scotland) Act 1995 is amended as follows.
- (6) After section 288A insert—

Status: This is the original version (as it was originally enacted).

“288AA Appeals to the Supreme Court: compatibility issues

- (1) For the purpose of determining any compatibility issue an appeal lies to the Supreme Court against a determination in criminal proceedings by a court of two or more judges of the High Court.
 - (2) On an appeal under this section—
 - (a) the powers of the Supreme Court are exercisable only for the purpose of determining the compatibility issue;
 - (b) for that purpose the Court may make any change in the formulation of that issue that it thinks necessary in the interests of justice.
 - (3) When it has determined the compatibility issue the Supreme Court must remit the proceedings to the High Court.
 - (4) In this section “compatibility issue” has the same meaning as in section 288ZA.
 - (5) An appeal under this section against a determination lies only with the permission of the High Court or, failing that permission, with the permission of the Supreme Court.
 - (6) Subsection (5) does not apply if it is an appeal by the Lord Advocate or the Advocate General for Scotland against a determination by the High Court of a compatibility issue referred to it under section 288ZB(2).
 - (7) An application to the High Court for permission under subsection (5) must be made—
 - (a) within 28 days of the date of the determination against which the appeal lies, or
 - (b) within such longer period as the High Court considers equitable having regard to all the circumstances.
 - (8) An application to the Supreme Court for permission under subsection (5) must be made—
 - (a) within 28 days of the date on which the High Court refused permission under that subsection, or
 - (b) within such longer period as the Supreme Court considers equitable having regard to all the circumstances.”
- (7) Section 288B (appeals to the Supreme Court) is amended as follows.
- (8) For the heading substitute “Appeals to the Supreme Court: general”.
- (9) In subsection (1)—
- (a) after “under” insert “section 288AA of this Act or”;
 - (b) omit “of a devolution issue”.
- (10) In sections 112(6), 121(5)(a), 121A(5), 122(4) and (5) and 177(8), after “under” insert “section 288AA of this Act or”.
- (11) In section 124(2)—
- (a) after “Part XA” insert “and sections 288ZB and 288AA”;
 - (b) after “purposes of” insert “a reference under section 288ZB or”;

- (c) after “appeal under” insert “section 288AA of this Act or”.

37 Time limits for appeals on devolution issues in criminal proceedings

In Schedule 6 to the 1998 Act (devolution issues) after paragraph 13 insert—

- “13A In criminal proceedings, an application to the High Court for permission under paragraph 13 must be made—
- (a) within 28 days of the date of the determination against which the appeal lies, or
 - (b) within such longer period as the High Court considers equitable having regard to all the circumstances.
- 13B In criminal proceedings, an application to the Supreme Court for permission under paragraph 13 must be made—
- (a) within 28 days of the date on which the High Court refused permission under that paragraph, or
 - (b) within such longer period as the Supreme Court considers equitable having regard to all the circumstances.”

38 Review and power to amend sections 34 to 37

- (1) The Secretary of State must arrange—
 - (a) for a review of the provision made by sections 34 to 37,
 - (b) for a report of the conclusions of the review to be made to the Secretary of State, and
 - (c) for a copy of the report to be given to the Scottish Ministers.
- (2) The review must be carried out as soon as practicable after the end of 3 years beginning with the day on which section 36(6) comes into force, or earlier if the Secretary of State considers it appropriate.
- (3) The review must—
 - (a) consider whether changes should be made to the provision made by sections 34 to 37;
 - (b) consider whether further provision should be made in relation to any matter dealt with by those sections;
 - (c) consider (in particular) whether an appeal to the Supreme Court on a compatibility issue should lie only if the High Court of Justiciary certifies that the issue raises a point of law of general public importance.
- (4) The Secretary of State may by order—
 - (a) amend the provision made by sections 34 to 37;
 - (b) make further provision in relation to any matter dealt with by those sections.
- (5) Provision made by order under subsection (4) may—
 - (a) amend, repeal or revoke an enactment passed or made before the order is made;
 - (b) confer power on the Secretary of State or the Scottish Ministers to make an order or regulations;
 - (c) include consequential, transitional or saving provision.

Status: This is the original version (as it was originally enacted).

- (6) In this section “enactment” includes an enactment contained in subordinate legislation (within the meaning of the Interpretation Act 1978) and an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament.
- (7) In making the first order under subsection (4) the Secretary of State must take into account the report made in accordance with subsection (1)(b).
- (8) No order under subsection (4) may be made unless the Secretary of State has consulted the Scottish Ministers.
- (9) A statutory instrument containing an order under subsection (4) may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.

39 Maximum penalties which may be specified in subordinate legislation

- (1) The 1998 Act is amended as follows.
- (2) In section 113 (subordinate legislation: scope of powers), for subsection (10) substitute—
 - “(9A) A power may not be exercised so as to create any criminal offence punishable with any of the penalties specified for the offence in subsection (9B) or (10).
 - (9B) In relation to Scotland, the specified penalties are—
 - (a) where the offence is triable on summary complaint only, imprisonment for a period exceeding 12 months and a fine exceeding level 5 on the standard scale,
 - (b) where an offence triable either on indictment or on summary complaint is tried on summary complaint, imprisonment for a period exceeding 12 months and a fine exceeding the statutory maximum,
 - (c) where the offence is tried on indictment, imprisonment for a period exceeding two years.
 - (10) In relation to England and Wales and Northern Ireland, the specified penalties are—
 - (a) where the offence is tried summarily, imprisonment for a period exceeding three months and a fine exceeding—
 - (i) in the case of a summary offence, level 5 on the standard scale,
 - (ii) in the case of an offence triable either way, the statutory maximum,
 - (b) where the offence is tried on indictment, imprisonment for a period exceeding two years.”
- (3) After subsection (11) of that section insert—
 - “(12) Her Majesty may by Order in Council amend subsection (9B) or (10) so as to change—
 - (a) any period of imprisonment specified there, or
 - (b) the amount of any fine so specified.”
- (4) In Schedule 7 (procedure for subordinate legislation), in paragraph 1, at the appropriate place insert—

“Section 113(12)

| Type A”.

- (5) The amendments made by paragraph 7 of Schedule 27 to the Criminal Justice Act 2003 (alteration of maximum penalties etc) have effect (when they come into force) in relation to section 113 as amended by this section as they have effect in relation to that section as originally enacted, except that in subsection (10A)(c) the words “Scotland and” are omitted.