

Watch Out!

**The Person Prosecuting You Has
Threatened The Person Judging You...**

You Cannot Receive a Fair Trial!

The Prosecutors Have Threatened The Judges!

Introduction

1. This paper highlights an unprecedented and dangerous situation that has arisen in Scotland:
2. In June of 2011, after several important legal decisions went against the Scottish Executive (known as and sometimes referred to as the Scottish Ministers), the Scottish Justice Minister threatened the livelihood and careers of the people judging.
3. He basically said – Give us the decisions that we want or we will cut the funding of the court system. This, of course, threatens the salaries and career prospects of all judges.
4. The main function or duty of the Scottish Executive is to run the country to the extent permitted by Devolution. This duty includes carrying out all criminal prosecutions in Scotland. The actual Scottish Minister in whose name all prosecutions are performed is the Lord Advocate.
5. Please note that the Scottish Ministers are required to work under the doctrine of collective responsibility – all are equally responsible for the actions of any one of them. It follows that the Lord Advocate is equally and collectively responsible, along with the other Scottish Ministers, for the threats made by the Justice Minister.
6. So, each time a criminal prosecution is brought to court the person in whose name the prosecution is brought – the Lord Advocate - has threatened the person judging.
7. It is obvious that under these circumstances no one can receive a fair trial.
8. If I am correct and these reported threats mean that no one can receive a fair trial then the law is crystal clear about the consequences - the two main consequences are: a) The Lord Advocate has no power to prosecute any

criminal offence; and b) The court cannot even allow a criminal case to be heard when one of the parties – the prosecutor - has threatened to cut the funding of the system unless decisions go in their favour.

9. Several other consequences of these threats will be briefly set out later in the paper.
10. As a result of the above, at this moment in Scotland, thousands of innocent people are being unlawfully held in jail and many more face the prospect of being unlawfully and unfairly convicted.
11. The main part of this paper will now go into all of the above in more detail. It will set out and explain the facts and issues surrounding these threats, then set out the relevant law, before going on to apply the law to the facts and issues. It will conclude by informing people what, if any, action they may consider taking.
12. I will attempt to distribute this paper throughout Scotland - to the judges, all civil servants including the prosecutors, all people held in prison and every accused entering court. Any help in doing this will be appreciated.
13. Is it not simply common sense to realise that the consequences of threatening the judges is that you cannot take part, as a prosecutor or otherwise, in any legal proceedings?
14. I shudder to think what would happen to me or indeed any another citizen if I found myself in court after having threatened the judges.
15. We now find ourselves in the crazy situation that at criminal trials being held in Scotland the only person acting lawfully will be the accused...
16. The subject matter of this paper affects almost everyone – please read on:

The facts and issues

17. On the 1st of June 2011 the Herald newspaper reported that Scotland's Justice Minister had issued threats¹ to the funding of the Supreme Court².
18. These threats took place after several important judicial decisions³, had gone against the Scottish Executive⁴.
19. It has been widely reported that the Scottish Justice Minister said the following⁵:
- “It should be said that I am not going to pay for ambulance-chasing courts. As a Government we have to pay for the Supreme Court of the UK and I think they should recognise that we'll pay for our fair share of what goes there.”
- “But I am not paying money that would come out of the police budget, or prison budget or community payback budget because they are routinely taking cases that we as a country do not think should be going there.”
- “He who pays the piper, as they say, calls the tune.”
20. The general consensus⁶ is that the Scottish Executive, via the Justice Minister, has made a threat to the judges. They have basically said – Give us the decision(s) that we want or we will cut your funding.

¹ See the full article here: http://www.heraldscotland.com/mobile/news/crime-courts/macaskill-threat-to-end-supreme-court-funding.13900094?_=52dc2eec697d9b81d8238a6f78a629e480b6a688

² All references to the Supreme Court are to the Supreme Court of the United Kingdom.

³ See *Cadder v HMA* [2010] UKSC 43 and *Fraser v HMA* [2011] UKSC 24

⁴ The Executive branch (the Scottish Ministers). Compare with the Legislative branch.

⁵ From the Herald, Scotland. 1st June 2011. Can be found on-line at:

<http://www.heraldscotland.com/news/crime-courts/macaskill-threat-to-end-supreme-court-funding-macaskill-threat-to-end-supreme-court-funding.13900094>

⁶ See, amongst others, Lord McCluskey - reported in the Telegraph at:

<http://www.telegraph.co.uk/news/uknews/scotland/8554410/Lord-McCluskey-says-Kenny-MacAskills-conduct-is-unsuitable-for-a-Justice-Minister.html>. Of particular interest see the Firm magazine's reporting on this:

http://www.firmmagazine.com/news/2410/MacAskill_plans_to_cut_funding_for_%22ambulance_chasing%22_Supreme_Court.html. Please note that a simple web search of “McAskill ‘he who pays the piper’” will generate articles in the Scotsman, Spectator etc.

21. Please note that I can find no example of any Government Minister anywhere in the world making a similar threat to judges before.
22. Please note that this is not an isolated threat or incident. The Scottish Executive, via both the Justice Minister and the First Minister, has consistently attacked the Supreme Court and this has included attacks on and criticisms of individual judges. There are a great number of televised interviews, newspaper reports and 'blogs' that all publicise and confirm this.
23. To show the strength of feeling that this and other incidents have generated the resignation of a very well respected advisor – Lord Steel – should be noted⁷.
24. In addition the Law Society and the Faculty of Advocates have issued a statement⁸ regarding these threats and the Glasgow Bar Association has called for contempt proceedings to be brought against the First Minister and the Justice Minister⁹.
25. I have written to the Justice Minister expressing my concerns and have received a reply. Please note that the Scottish Ministers in their reply have confirmed that they do oppose the Supreme Court as a 'position of principle'¹⁰.
26. Please note that according to the Herald - "The Scottish Government pays a total of £477,000 a year to the UK Supreme Court"¹¹.
27. Please also note that for two main reasons this confirmed opposition to the Supreme Court will affect all judges rather than just those who work at the Supreme Court. Firstly, a position at the Supreme Court is very probably the ambition and final stop in the career path of most judges. Secondly, if threats

⁷ <http://ukscblog.com/lord-steel-confirms-resignation-after-snp-supreme-court-spat>

⁸ Can be found at: <http://www.lawscot.org.uk/news/press-releases/2011/june/joint-statement---law-society-and-faculty>

⁹ See:

http://www.firmmagazine.com/news/2449/Exclusive%3A_GBA_says_Salmond_%E2%80%9Cclearly%E2%80%9D_in_contempt_over_Supreme_Court_-_MacAskill_should_resign_and_proceedings_be_raised.html

¹⁰ See <http://www.firmmagazine.com/exclusive-scottish-government-defends-opposition-to-supreme-court-as-a-position-of-principle/>

¹¹ See <http://www.heraldscotland.com/news/crime-courts/macaskill-threat-to-end-supreme-court-funding-macaskill-threat-to-end-supreme-court-funding.13900094>

to cut the funding of the Supreme Court, and in addition attacks on the integrity of individual Supreme Court judges, after decisions went against the Scottish Executive, are made, without any apparent consequences then it is contended that this will influence all judges in their dealings with the Scottish Executive.

28. It should be noted that the Scottish Executive operate under the doctrine of collective responsibility. So, each threat or attack on the Supreme Court and the judges is the responsibility of all the Scottish Ministers. Collective responsibility is set out in Statute: Section 52(4) of the Scotland Act 1998; and has been adopted by the Scottish Executive in the Scottish Ministerial Code (see <http://www.scotland.gov.uk/Publications/2011/12/01141452/3>).

29. In criminal cases all criminal prosecutions are carried out by the Scottish Executive on behalf of the people of Scotland. The head of the prosecution service, on whose behalf all criminal prosecutions are performed, is the Lord Advocate who is also a member of the Scottish Executive¹².

30. It is well known that the Scottish Ministers are the biggest civil litigators. In fact, every civil case in Scotland potentially involves the Scottish Ministers. For the sake of brevity the remainder of this paper will only consider criminal trials although the principles set out apply equally to all civil litigation.

Summary of the facts and issues

31. The Scottish Ministers via the Lord Advocate are involved, as the prosecutor, in all criminal proceedings in Scotland.

32. The final decision making court for human rights issues raised in criminal proceedings in Scotland is the Supreme Court.

¹² See section 44 of the Scotland Act 1998 and *Cadder v HMA* [2010] UKSC 43

33. The Scottish Ministers have threatened to cut the funding of the Supreme Court as well as carrying out personal attacks on the integrity of some of the judges who sit there¹³.
34. All judges, not just those who sit in the Supreme Court, will be influenced by these threats and personal attacks.
35. This is an ongoing situation that affects the people of Scotland on a daily basis. The next section will set out the relevant law:

The law

36. One of the most important human rights is the right to a fair trial¹⁴ guaranteed by Article 6 of the ECHR and given domestic effect by the Human Rights Act 1998.
37. The relevant part of Article 6 is set out as follows:

“ARTICLE 6 - Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

38. It is contended that the threats made to the funding of the Supreme Court by the Scottish Ministers mean that there no longer exists an independent and impartial judiciary to hear and decide on the guilt or innocence of an accused in Scottish criminal trials. As such no one can receive a fair trial as required by article 6 of the ECHR and the Human Rights Act 1998. The next section will explain why this is so:

¹³ Please note that at the times these threats were made the two Scottish Law Lords who at that time sat at the Supreme Court are no longer there. Lord Rodger has sadly died and Lord Hope retired in June of 2013.

¹⁴ See the case of *Delcourt v. Belgium* at paragraph 25

The law- independence and impartiality

39. The duty of a judge is to interpret the law in order to resolve disputes between citizen and citizen and citizen and the state; in performing this very important duty a judge has to be independent and impartial; if a judge cannot be seen to be independent and impartial then they cannot hear the case.

40. This was probably best explained by Lord Bingham of Cornhill in the following way¹⁵:

“[6] The rule of law requires that judicial tribunals established to resolve issues arising between citizen and citizen, or between the citizen and the state, should be independent and impartial. This means that such tribunals should be in a position to decide such issues on their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case...”

“... It has however been accepted for many years that justice must not only be done but must also be seen to be done. In maintaining the confidence of the parties and the public in the integrity of the judicial process it is necessary that judicial tribunals should be independent and impartial and also that they should appear to be so. The judge must be free of any influence which could prevent the bringing of an objective judgment to bear or which could distort the judge’s judgment, and must appear to be so.”

Some other cases

41. In the case of *Starrs v Ruxton* [1999] ScotHC H CJ_259 the High Court of Justiciary found that the lack of security of tenure for temporary judges in Scotland meant that these temporary judges could not be seen to be independent and impartial. While realising that independence is inextricably linked to impartiality the High Court in relation to independence quoted from the case of *Findlay v the UK (Application no. 22107/93)* where the following was stated by the European Court of Human Rights (“EctHR”) (at 73 and 80):

¹⁵ See *Davidson v The Scottish Ministers* 2005 (No 2) 1 SC (HL) 7 in particular paras 6 – 7.

“The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see the Bryan v. the United Kingdom judgment of 22 November 1995, Series A no. 335-A, p. 15, para. 37).”

“For all these reasons, and in particular the central role played by the convening officer in the organisation of the court martial, the Court considers that Mr Findlay’s misgivings about the independence and impartiality of the tribunal which dealt with his case were objectively justified.”

42. The test used by the EctHR is whether any misgivings about the independence and impartiality of the tribunal exist and whether these misgivings can be objectively justified.

Application of the law to the facts and issues - Criminal cases

43. It is contended (applying the test for independence and impartiality set out in *Davidson* and *Findlay*) that the threats made by the Scottish Ministers directed at the judges concerning the funding of the Supreme Court are such as to introduce ‘an outside pressure’ or ‘a pressure extraneous to the case’ into all legal proceedings involving the Scottish Ministers. As the Scottish Ministers are involved in all criminal trials then it follows that these outside pressures are sufficient to raise misgivings about the independence and impartiality of all tribunals set up to decide the guilt or innocence of all persons accused of a criminal offence and these misgivings can be objectively justified¹⁶. As such it follows that no independent and impartial tribunal is available in Scotland to hear any criminal case.

¹⁶ The test used (taken from the ‘apparent bias’ cases) would probably be whether the fair minded and informed observer would conclude that there was a real possibility that the tribunal either is not or cannot be seen to be independent and impartial. In performing this task the fair minded and informed observer would consider whether there was any factor that could be objectively justified. See: *Davidson v The Scottish Ministers* 2005 (No 2) 1 SC (HL) 7 and *Helow v Sec of State for the Home Dept* 2009 S C (H L) 1 (2)

44. If the contentions set out in this section are correct and these threats mean that no independent and impartial tribunal exists in Scotland then what are the consequences?

45. The next section will set out the law in relation to the two main consequences

What is the law if no independent and impartial tribunal exists?

46. If the above sections are correct and the threats to the funding of the Supreme Court and the personal attacks on the judges made by the Scottish Executive means that there is no ‘independent and impartial tribunal’ to hear any criminal case then the following law comes into play.

47. Sections 34 – 37 of the Scotland Act 2012 modified the procedure, in criminal cases, for challenging acts or legislation of the Scottish Executive on, amongst other things, human rights grounds.

48. Previously, in both civil and criminal cases, a challenge to, amongst other things, acts or proposed acts of the Scottish Executive (and Scottish legislation) on human rights grounds was by way of a Devolution Issue. A challenge relating to the actions of the Judicial Branch of the Scottish Government was via section 6(1) of the Human Rights Act 1998.

49. Now, as Lord Hope of Craighead explained in *Kapri v the Lord Advocate representing Albania* [2013] UKSC 48 at paragraphs 15 – 17 and *O’Neill and Lauchlan v HM Advocate* [2013] UKSC 36 at paragraphs 4 – 9, in criminal proceedings, such as this, challenges to any branch (including the Judicial Branch and any legislation under the control of the Legislative Branch) of the Scottish Government on, amongst other things, human rights grounds is via a compatibility issue.

50. Section 288ZA(2) of the Criminal Procedure (Scotland) Act 1995, which was inserted into that Act by section 34(3) of the Scotland Act 2012 Act, provides that a “compatibility issue” is, among other things, “**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...**”

51. Section 6(1) of the Human Rights Act 1998 provides that “(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”
52. Convention rights are the sub-set of the European Convention on Human Rights (“ECHR”) given domestic effect by the Scotland Act 1998 and the Human Rights Act 1998. Article 6 – The Right to a Fair Trial - is such a right.
53. In Scotland all criminal prosecutions are carried out by the Lord Advocate on behalf of the Scottish Executive. Criminal prosecution is an executive function of state. The Scottish Executive are a public authority and therefore can be challenged by way of a compatibility Issue.
54. It follows if there is no possibility of a Fair Trial then it would be unlawful for the Lord Advocate to prosecute on behalf of the Executive.
55. But what about the other authorities involved in criminal prosecution such as the police and the court staff? The answer is that they are all responsible to and work for the Scottish Executive and as such their actions related to criminal prosecution are unlawful and can be challenged by way of a compatibility issue.
56. First consider the police – for the same reasons that it would also be unlawful for the Lord Advocate to prosecute on behalf of the Scottish Executive the police can’t investigate crime or even arrest anyone. If they were to do so it would be unlawful under section 6(1) of the Human Rights Act 1998. The reason for this is that the whole point of investigating crime or arresting someone is to charge them with that crime and bring them in front of a court. If there is no ‘independent and impartial’ tribunal available then they have no power to do any act that leads to that end.

57. Please note that at some stage the Police pass all prosecutions over to the Lord Advocate (via the local Procurator Fiscal) and as has already been explained, it would be unlawful for the Lord Advocate to prosecute.

58. Similar arguments can be made for the other public authorities acting under the control of the Scottish Executive:

59. For example: The court staff have no power to organise a criminal trial, arrange a jury, call witnesses or even pay expenses. It is all made unlawful by section 6(1) of the Human Rights Act 1998 and can be challenged by way of a compatibility issue.

What about the judges?

60. The judges, of course, are completely separate from the Scottish Executive. But they too are covered by section 6(1) of the Human Rights Act 1998 and their acts can be challenged in criminal cases by raising a compatibility issue.

61. As previously shown section 6(1) of the Human Rights Act 1998 is set out as follows:

“(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”

62. Please note that section 6(3) (a) of the Human Rights Act 1998 sets out that a ‘court or tribunal’ is a public authority.

63. In the *Attorney General’s Reference Number 2 of 2001* the House of Lords (now the Supreme Court), amongst other things, set out and explained the law around section 6(1) of the Human Rights Act 1998 and unlawful conduct. See Lord Nicholls of Birkenhead at paragraphs 31 to 35.

64. The following was stated: “When the very holding of the trial by the court would be unlawful, the trial must be stayed. Consistently with its own essential role as a court of law, the court cannot itself knowingly embark on a course of conduct declared by statute to be unlawful, that is, improper. Courts

exist to uphold the law. Whatever may be the appropriate remedy in respect of past or proposed conduct by other public authorities, the court cannot treat itself as having a discretion in respect of its own conduct in such a case.”

65. Therefore no court in Scotland can allow a criminal trial (or indeed any criminal appeal) to take place. All Scottish Judges, due to the binding effect of the House of Lords decision above, must ensure that this law is followed.

Conclusion

66. This paper runs to far too many pages but I couldn't see how to make it any more concise. I have not fully covered the procedural requirements of how to raise these issues in court. Please see two cases already referenced - *Kapri v the Lord Advocate representing Albania* [2013] UKSC 48 at paragraphs 15 – 17 and *O'Neill and Lauchlan v HM Advocate* [2013] UKSC 36 at paragraphs 4 – 9 and the legislation referred alongside the 'criminal court rules' set out on the Scottish Courts Web-site for more detail of how to actually raise a 'Compatibility Issue'.

67. I have not covered the effect of these threats on the judicial system of other parts the UK. As the Supreme Court covers the whole of the UK then there is obviously some effect. At its simplest – is the rest of the UK going to accept the Scottish Ministers threatening its judges? If the answer to that question is yes then can anyone in the UK receive a fair trial?

68. If you are reading this in prison and you were convicted after the 1st of June 2011 or had an appeal refused after this time then you should be released immediately. As far as I can work out the prison authorities, as a public authority, have no power to hold you.

69. If you are facing trial and you want to run with this...then please pass this paper to your lawyer. If you are representing yourself then please feel free to contact me (via the Scottish Human Rights Union at www.shru.org) by E-mailing: tomatshru@yahoo.com.

70. Please E-mail this paper to anyone who you think may be interested.

71. The conclusion is clear: Since these threats were made no one has or can receive a fair trial in Scotland and as such thousands of innocent people are being held in jail and thousands more face the prospect of being convicted unfairly.

72. Be prepared for an avalanche of damages claims and remember who will be paying.