

No System = No Fair Trial



Innocent people are being jailed

Introduction

1. In Scotland there is no publicly viewable system for the allocation judges to criminal trials or civil cases.
2. The lack of a publicly viewable and audited system means that the appointment of a judge to a particular trial or civil case is a discretionary decision made by the Scottish Executive.
3. If the Executive has the discretion to appoint a particular judge for a particular trial or civil case then this means that Scotland does not have an independent judiciary. Scotland's judges are completely under the control of the Scottish Executive.
4. This paper¹ will briefly explain that: a) judges must be independent of the Executive; and b) without a publicly viewable and audited system controlling the allocation of judges to trials and civil cases then Scotland's judges will never be independent.

¹ Please see the Fair Trial Campaign for this and other papers on this subject at: www.shru.org

The requirement of independence

5. Judges are required to be independent and impartial. This requirement is set out in the common law² and Article 6(1) of the ECHR. Article 6 was given domestic effect by the Human Rights Act 1998. The relevant part is set out as follows:

‘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...’
6. In relation to the requirement of **independence**: ‘The most basic requirement for independence is security of tenure such as to provide a guarantee against any interference with the judge's function from any outside source and in particular from the Executive...’³
7. In relation to the requirement of **impartiality**: ‘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.’⁴
8. Although the requirements of independence and impartiality are closely linked⁵ this paper will only concentrate on Scottish Judges’ lack of independence from the Scottish Executive.

No system

9. In Scotland there is no system for the allocation of judges⁶ to criminal trials and civil cases. Such allocations are under the control of the Scottish Executive.
10. It is obvious that without a publicly viewable and regularly audited system it is possible for the Scottish Executive to: a) allocate judges thought to be favourable to them in high profile trials and civil cases; and b) sideline a judge by not putting them forward for selection.

² *Davidson v the Scottish Ministers* 2005 1 S.C. (H.L.) 7 at paragraph 7

³ *Clancy v Caird* [2000] ScotCS 96 at paragraph 6

⁴ *Davidson v Scottish Ministers (No 2)* 2005 1 SC (HL) 7 at paragraph 6

⁵ Relation between independence and impartiality – See Lord Prosser in *Starrs v Ruxton* 2000 JC 208

⁶ A separate paper will explain why having no publicly viewable system for the allocation of jurors allows the Scottish Executive the possibility to rig juries.

11. These possibilities mean that there is no ‘guarantee against any interference with the judge's function from any outside source and in particular from the Executive...’⁷ and as such one of the ‘most basic requirements for independence’⁸ is missing.
12. My contention is that the Executive have an obligation to run a publicly viewable and regularly audited system that controls the allocation of judges to trials and civil cases. This system must select judges based solely on whether it is their turn to sit. As the Executive have failed to provide such a system then no judge allocated to sit by the Executive can satisfy the common law and article 6 ECHR requirement of independence.
13. It is fundamental that the allocation of a judge to a trial or civil case cannot be left to the discretion of the Executive. This applies as an even stronger proposition when the Executive are a party to the case. The Scottish Executive via the Lord Advocate prosecutes at all criminal trials and the Scottish Executive are a party to or a potential party in all civil cases⁹.

The consequences

14. If any trial or civil case has taken place in front of a non-independent judge or tribunal then the law is clear on the consequences: Any decision made must be set aside.¹⁰
15. In relation to criminal trials it is contended that all decisions made by a judge or judges who were not independent of the Executive must be set aside. All persons involved (whether convicted or not) must be fully compensated for their losses.
16. The same result applies to civil cases where the judge or tribunal was not independent of the Executive - it is contended that all decisions made by a judge who was selected to sit by the Executive have to be set aside. All persons affected by this must be compensated for any loss.

Conclusion

17. Without a publicly viewable and audited system that controls the allocation of judges to trials and civil cases then: a) there can be no guarantee that a judge has not been specially selected by the Scottish Executive; and b) it is impossible to hold a Fair Trial.

18. No System = No Independent Judiciary = No Fair Trial.

⁷ Ibid

⁸ Ibid

⁹ Devolution Issues – See the Scotland Act 1998, S.98 & Schedule 6.

¹⁰ *Millar v Procurator Fiscal (Scotland)* [2001] UKPC D4 (*Starrs v Ruxton* aftermath)