

Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998

UKSC 31

Date: 23 November 2022

Justices

Lord Reed (President), Lord Lloyd-Jones, Lord Sales, Lord Stephens and Lady Rose

Background to the Appeal

The Scottish Government has drafted a Scottish Independence Referendum Bill which makes provision for a referendum on the question, "Should Scotland be an independent country?". Under the Scotland Act 1998 ("the **Scotland Act**"), the power of the Scottish Parliament to make legislation (or its "legislative competence") is limited. A provision of a Bill will be outside the legislative competence of the Scottish Parliament and therefore not law if it relates to the matters which have been reserved to the United Kingdom Parliament in Westminster (sections 29(1) and (2)(b)). These reserved matters include "the Union of the Kingdoms of Scotland and England" and "the Parliament of the United Kingdom" (Schedule 5, paragraphs 1(b) and (c)).

In this reference, the Lord Advocate (the senior law officer of the Scottish Government) asks the Court whether the provision of the proposed Bill which provides for a referendum on Scottish independence would be outside the legislative competence of the Scottish Parliament because it relates to either or both of the reserved matters of the Union or the United Kingdom Parliament. This is a legal question about the Scottish Parliament's power to make legislation under the Scotland Act. The Court is not being and could not be asked to give a view on the distinct political question of whether Scotland should become independent from the rest of the United Kingdom.

The powers of the Scottish Parliament were not in issue during the 2014 referendum on Scottish independence. This is because, in 2013, an Order in Council under section 30(2) of the Scotland Act modified the definition of reserved matters to enable the Scottish Parliament to pass the 2014 referendum legislation. The United Kingdom Government is currently unwilling to agree to the making of another Order in Council to facilitate another referendum on Scottish independence.

The Lord Advocate's reference was made under paragraph 34 of Schedule 6 to the Scotland Act. The Advocate General for Scotland (the Scottish law officer of the United Kingdom Government) raises two preliminary issues, namely, whether the Court can and should answer the reference. There are consequently three questions which the Court must consider. First, is the question referred by the Lord Advocate a "devolution issue"? If not, it cannot be the subject of a reference under paragraph 34 of Schedule 6, which would mean that the Court does not have jurisdiction to decide it. Secondly, even if it is a devolution issue, should the Court exercise its discretion to decline to accept the reference? Thirdly, if the Court accepts the reference, how should it answer the question the Lord Advocate has referred to it?

Judgment

In a unanimous judgment, the Court answers the questions before it as follows. First, the question referred by the Advocate General is a devolution issue, which means that the Court has jurisdiction to decide it. Secondly, the Court should accept the reference. Thirdly, the provision of the proposed Bill which makes provision for a referendum on the question, "Should Scotland be an independent country?" does relate to matters which have been reserved to the Parliament of the United Kingdom under the Scotland Act. In particular, it relates to the reserved matters of the Union of the Kingdoms of Scotland and England and the Parliament of the United Kingdom. Accordingly, in the absence of any modification of the definition of

reserved matters (by an Order in Council or otherwise), the Scottish Parliament does not have the power to legislate for a referendum on Scottish independence.

Reasons for the Judgment

Issue 1: Is the question referred by the Lord Advocate a devolution issue?

Only a “devolution issue” can be referred to the Court under paragraph 34 of Schedule 6 to the Scotland Act. The term “devolution issue” is defined by paragraph 1 of Schedule 6. Under paragraph 1(f), it includes “any other question arising by virtue of this Act about reserved matters” [13-14]. The Court concludes that the question referred by the Lord Advocate falls within this description and is therefore a devolution issue which the Court has jurisdiction to decide [47].

In reaching this conclusion, the Court holds, first, that the question referred is one “arising by virtue of” the Scotland Act because it is a question which arises under section 31(1) for the person wishing to introduce the Bill into the Scottish Parliament [16]. That person is required, on or before the Bill’s introduction, to give a statement confirming that, in their view, the provisions of the Bill would be within the legislative competence of the Scottish Parliament [9]. Secondly, the existence of the separate scheme for the scrutiny of Bills for legislative competence by the Court in section 33 of the Scotland Act does not prevent a reference from being made under paragraph 34 of Schedule 6 in relation to a proposed Bill, before it is introduced [21-27]. Thirdly, the terms of paragraph 1(f) of Schedule 6 are very wide. They are intended to sweep up any questions arising under the Scotland Act about reserved matters which are not covered elsewhere [37-42]. Fourthly, it is consistent with the rule of law and with the intention of the Scotland Act that the Lord Advocate should be able to obtain an authoritative judicial decision on the legislative competence of the Scottish Parliament in advance of the introduction of a Bill [44-46].

Issue 2: Should the Court decline to accept the Lord Advocate’s reference?

The Court concludes that it should accept the reference [54]. The reference has been made in order to obtain an authoritative ruling on a question of law which has already arisen as a matter of public importance. The Court’s answer will determine whether the proposed Bill is introduced into the Scottish Parliament. The reference is not therefore hypothetical, academic or premature [53].

Issue 3: Does the proposed Bill relate to reserved matters?

The question whether the provision of the proposed Bill which provides for a referendum on Scottish independence would relate to matters which have been reserved to the United Kingdom Parliament under the Scotland Act (section 29(2)(b)) is to be determined by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances (section 29(3)) [56-57], [70], [75].

A provision will relate to a reserved matter if it has something more than a loose or consequential connection with it [57], [71-72]. The purpose and effect of the provision may be derived from a consideration of both the purpose of those introducing the legislation and the objective effect of its terms [73]. Its effect is not restricted to its legal consequences [74].

Applying this test, the reserved matters which are relevant here are “the Union of the Kingdoms of Scotland and England” and “the Parliament of the United Kingdom” (Schedule 5, paragraphs 1(b) and (c)). The latter reservation includes the sovereignty of the United Kingdom Parliament [76]. The purpose of the proposed Bill is to hold a lawful referendum on the question of whether Scotland should become an independent country, that is, on ending the Union and the sovereignty of the United Kingdom Parliament over Scotland [77], [82]. The Bill’s effect will not be confined to the holding of the referendum. Even if the referendum has no immediate legal consequences, it would be a political event with important political consequences [78-81]. It is therefore clear that the proposed Bill has more than a loose or consequential connection with the reserved matters of the Union of Scotland and England and the sovereignty of the United Kingdom Parliament. Accordingly, the proposed Bill relates to reserved matters and is outside the legislative competence of the Scottish Parliament [82-83], [92].

The Scottish National Party (intervening) made further written submissions founded on the right to self-determination in international law and the principle of legality in domestic law [84]. The Court rejects these submissions, holding that the right to self-determination is not in issue here [88-89] and does not require a narrow reading of "relates to" in section 29(2)(b) so as to limit the scope of the matters reserved to the United Kingdom Parliament under the Scotland Act [90]. Similarly, the allocation of powers between the United Kingdom and Scotland under the Scotland Act does not infringe the principle of legality [91].

References in square brackets are to paragraphs in the judgment

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available online. [Decided cases](#)