

2013 No. 7 (S. 1)

CONSTITUTIONAL LAW

DEVOLUTION, SCOTLAND

**The Scotland Act 2012 (Transitional and Consequential
Provisions) Order 2013**

<i>Made</i> - - - -	<i>8th January 2013</i>
<i>Laid before Parliament</i>	<i>10th January 2013</i>
<i>Coming into force</i> - -	<i>22nd April 2013</i>

The Secretary of State makes the following Order in exercise of the powers conferred by section 42(1), (2) and (4) of the Scotland Act 2012(a).

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Scotland Act 2012 (Transitional and Consequential Provisions) Order 2013 and comes into force on 22nd April 2013.

(2) In this Order—

“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995(b);

“the 1998 Act” means the Scotland Act 1998(c);

“the 2012 Act” means the Scotland Act 2012;

“compatibility issue” has the meaning given by section 288ZA(2) of the 1995 Act(d);

“convertible devolution issue” has the meaning given by article 2;

“devolution issue” has the meaning given by paragraph 1 of Schedule 6 to the 1998 Act(e) as if the amendments made by section 36(4) of the 2012 Act were not in force;

“relevant date” means 22nd April 2013.

Definition of convertible devolution issue

2.—(1) A convertible devolution issue is a question arising in criminal proceedings before the relevant date which—

(a) is a devolution issue;

(b) would have been a compatibility issue had it arisen on or after that date; and

(a) 2012 c.11.

(b) 1995 c.46.

(c) 1998 c.46.

(d) Section 288ZA was inserted by section 34(3) of the Scotland Act 2012.

(e) Paragraph 1 was amended by sections 12(2)(a) and 36(4) of the Scotland Act 2012 and S.I. 2011/1043.

(c) has not been finally determined before the relevant date.

(2) But a devolution issue arising in criminal proceedings before the relevant date is not a convertible devolution issue if—

- (a) the issue has been referred, or a determination of the issue has been appealed, to the Supreme Court under Schedule 6 to the 1998 Act; and
- (b) the hearing of the reference or appeal commences before the relevant date.

Convertible devolution issue to become compatibility issue

3.—(1) Subject to paragraphs (2) to (4), a convertible devolution issue becomes a compatibility issue for all purposes on the relevant date.

(2) Where a hearing to determine a convertible devolution issue (whether at first instance or on a reference from a lower court) commences before the relevant date but the court has not determined the issue by that date, the issue becomes a compatibility issue immediately after the court determines it.

(3) Where the hearing of an appeal against a determination of a convertible devolution issue commences before the relevant date but the court has not determined the appeal by that date, the issue becomes a compatibility issue immediately after the court disposes of the appeal.

(4) Where a convertible devolution issue arises in a trial commencing before the relevant date but the trial verdict has not been returned by that date, the issue becomes a compatibility issue immediately after the verdict is returned.

(5) In this article, a trial is taken to commence—

- (a) in solemn proceedings, when the oath is administered to the jury;
- (b) in summary proceedings, when the first witness is sworn.

(6) Except as otherwise provided for in this Order, a devolution issue arising in criminal proceedings before the relevant date remains a devolution issue notwithstanding the commencement of sections 34 to 36 of the 2012 Act.

4.—(1) Article 5 has effect in relation to a convertible devolution issue from the time at which it becomes a compatibility issue under article 3.

(2) Articles 6, 7 and 8 have effect in relation to a convertible devolution issue from the relevant date.

Determinations

5. A determination of a convertible devolution issue is to be treated as a determination of a compatibility issue.

References

6.—(1) A reference of a convertible devolution issue under paragraph 9 of Schedule 6 to the 1998 Act is to be treated as a reference of a compatibility issue under section 288ZB(1) of the 1995 Act^(a).

(2) A reference of a convertible devolution issue under paragraph 11 of that Schedule is to be treated as a reference of a compatibility issue under section 288ZB(4) of the 1995 Act.

(3) A reference of a convertible devolution issue under paragraph 33 of that Schedule is to be treated as a reference of a compatibility issue under section 288ZB(5) of the 1995 Act.

(4) Where a reference to which paragraph (3) applies is from a court other than a court consisting of two or more judges of the High Court of Justiciary, section 288ZB(7) of the 1995

(a) Section 288ZB was inserted by section 35 of the Scotland Act 2012.

Act is to be read as requiring the Supreme Court to remit the proceedings to the court which made the reference.

Appeals to the Supreme Court

7.—(1) An application to a court of two or more judges of the High Court of Justiciary or to the Supreme Court for permission to appeal under paragraph 13(a) of Schedule 6 to the 1998 Act against a determination of a convertible devolution issue is to be treated as an application to that court for permission to appeal against a determination of a compatibility issue under section 288AA(5) of the 1995 Act(a).

(2) An appeal under paragraph 13(a) of that Schedule against a determination of a convertible devolution issue is to be treated as an appeal under section 288AA(1) of the 1995 Act if, before the relevant date, the High Court of Justiciary or the Supreme Court has granted permission to appeal.

(3) In such a case the permission to appeal is to be treated as granted under section 288AA(5) of the 1995 Act.

(4) A refusal by the High Court of Justiciary or the Supreme Court, before the relevant date, of permission to appeal under paragraph 13(a) of that Schedule is to be treated as made by that Court under section 288AA(5) of the 1995 Act.

Right of the Advocate General to take part in proceedings

8. Where, before the relevant date, the Advocate General was a party to criminal proceedings so far as they related to a convertible devolution issue by virtue of paragraph 6 of Schedule 6 to the 1998 Act, the Advocate General is to be treated as being a party to criminal proceedings in pursuance of section 288ZA(1) of the 1995 Act so far as they relate to a compatibility issue.

Time limits for appeals to the Supreme Court of devolution issues and compatibility issues

9.—(1) This article applies where—

- (a) a convertible devolution issue has, before the relevant date, been determined by a court of two or more judges of the High Court of Justiciary (whether in the ordinary course of proceedings or on a reference under paragraph 9 of Schedule 6 to the 1998 Act); and
- (b) no application has by that date been made to that Court for permission to appeal under paragraph 13(a) of that Schedule.

(2) In relation to such a case, section 288AA(7) of the 1995 Act has effect as if the reference to the date of determination against which the appeal lies were a reference to 22nd April 2013.

10.—(1) This article applies where—

- (a) a convertible devolution issue has, before the relevant date, been determined by a court of two or more judges of the High Court of Justiciary (whether in the ordinary course of proceedings or on a reference under paragraph 9 of Schedule 6 to the 1998 Act);
- (b) an application to the High Court of Justiciary for permission to appeal under paragraph 13(a) of Schedule 6 to the 1998 Act has, before the relevant date, been refused; and
- (c) no application has by that date been made to the Supreme Court for permission to appeal under paragraph 13(a) of that Schedule.

(2) In relation to such a case, section 288AA(8) of the 1998 Act has effect as if the reference to the date on which the High Court refused permission under that paragraph were a reference to 22nd April 2013.

(a) Section 288AA was inserted by section 36(6) of the Scotland Act 2012.

11.—(1) This article applies where—

- (a) a devolution issue other than a convertible devolution issue has, before the relevant date, been determined by a court of two or more judges of the High Court of Justiciary (whether in the ordinary course of proceedings or on a reference under paragraph 9 of Schedule 6 to the Scotland Act 1998); and
- (b) no application has by that date been made to that Court for permission to appeal under paragraph 13(a) of that Schedule.

(2) In relation to such a case, paragraph 13A of that Schedule has effect as if the reference to the date of determination against which the appeal lies were a reference to 22nd April 2013.

12.—(1) This article applies where—

- (a) a devolution issue other than a convertible devolution issue has, before the relevant date, been determined by a court of two or more judges of the High Court of Justiciary (whether in the ordinary course of proceedings or on a reference under paragraph 9 of Schedule 6 to the Scotland Act 1998);
- (b) an application to the High Court of Justiciary for permission to appeal under paragraph 13(a) of Schedule 6 to the 1998 Act has, before the relevant date, been refused; and
- (c) no application has by that date been made to the Supreme Court for permission to appeal under paragraph 13(a) of that Schedule.

(2) In relation to such a case, paragraph 13B of that Schedule has effect as if the reference to the date on which the High Court refused permission under that paragraph were a reference to 22nd April 2013.

General

13. A person admitted to bail under section 112(6) of the 1995 Act(a) pending the determination of an appeal under paragraph 13(a) of Schedule 6 of the 1998 Act against a determination of a convertible devolution issue is, from the time at which the issue becomes a compatibility issue under article 3, to be treated as having been admitted to bail pending determination of an appeal under section 288AA of the 1995 Act.

14. For the purposes of section 121(5)(a) of the 1995 Act(b), an appeal under paragraph 13(a) of Schedule 6 to the 1998 Act against a determination of a convertible devolution issue is, from the time at which the issue becomes a compatibility issue under article 3, to be treated as an appeal under section 288AA of the 1995 Act.

Amendment of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989

15.—(1) The Criminal Legal Aid (Scotland) (Fees) Regulations 1989(c) are amended as follows.

(2) In—

- (a) Schedule 1, Part 2, paragraph 6(a);
- (b) Schedule 2, Part 1, Chapter 1, paragraphs 1A(b) and 4(e);
- (c) Schedule 2, Part 1, Chapter 2, paragraphs 1A(b) and 4(e);
- (d) Schedule 2, Part 2, Chapter 1, paragraph 7(a);
- (e) Schedule 2, Part 2, Chapter 2, paragraph 7(a);
- (f) Schedule 2, Part 3, Chapter 1, paragraphs 1A(b) and 3(e);
- (g) Schedule 2, Part 3, Chapter 2, paragraphs 1A(b) and 3(e); and
- (h) Schedule 2, notes on operation, paragraph 3(eb),

(a) Section 112(6) was amended by the Criminal Justice (Scotland) Act 2003 asp 7, section 66(5)(c).

(b) Section 121(5) was inserted by S.I. 1999/1042, Schedule 1, paragraph 13(3).

(c) S.I. 1989/1491; relevant amending instruments are S.S.I. 2005/656, 2007/180, 2010/212 and 2012/276.

after “devolution” insert “or compatibility”.

Amendment of the Criminal Legal Aid (Scotland) Regulations 1996

16. For regulation 4(1)(k) of the Criminal Legal Aid (Scotland) Regulations 1996^(a) substitute—

- “(k) proceedings in the Supreme Court on appeal from the High Court of Justiciary under—
- (i) paragraph 13 of Schedule 6 to the Scotland Act 1998; or
 - (ii) section 288AA of the 1995 Act,
- including any application for permission to appeal.”.

Amendment of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999

17.—(1) In regulation 2(1) of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999^(b), in sub-paragraph (1) of the definition of “excluded proceedings”—

- (a) in sub-paragraph (1), for “.” substitute “;”;
 - (b) after sub-paragraph (1), insert—
- “(m)any reference on a compatibility issue under section 288ZB(1) or (2) of the 1995 Act;”.

Michael Moore
Secretary of State
Scotland Office

Dover House,
London
8th January 2013

^(a) S.I. 1996/2555; relevant amending instrument S.S.I. 2009/312.
^(b) S.I. 1999/491; relevant amending instrument S.S.I. 2008/240.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes transitional and consequential provision on the coming into force of sections 34 to 37 of the Scotland Act 2012 (“the Act”). Sections 34 to 36 of the Act introduce a new system of “compatibility issues” in criminal proceedings in Scotland. Section 37 of the Act makes provision for time limits for seeking permission to appeal to the Supreme Court against a determination of a devolution issue in Scottish criminal proceedings.

From 22nd April 2013 any new European Convention of Human Rights (“ECHR”) issues or EU law issues arising in Scottish criminal proceedings will be compatibility issues. This Order makes provision in relation to existing cases and sets out how the new law will be applied and adapted. The Order converts most existing devolution issues that relate to ECHR and EU law issues into compatibility issues. Generally existing devolution issues will be converted into compatibility issues on 22nd April 2012. In some cases conversion will happen at a later date depending upon the particular stage that the devolution issue has reached – notably those cases that are midway through being heard by the courts at the point when the relevant provisions in the Act are commenced.

Article 2 of the Order defines a “convertible devolution issue”. This is a question arising in criminal proceedings before the relevant date which would have been a compatibility issue if it had arisen after the relevant date.

Article 3 provides for convertible devolution issues to be treated as compatibility issues and sets out when this conversion will take place. A convertible devolution issue will be treated for all purposes as a compatibility issue, subject to certain exceptions.

Article 4 sets out when articles 5 to 8 have effect.

Articles 5 to 7 set out the consequences of a convertible devolution issue becoming a compatibility issue.

Articles 8 provides that where a convertible devolution issue is treated as compatibility issue and the Advocate General for Scotland was a party to proceedings relating to that convertible devolution issue, then the Advocate General is to be treated as a party to the proceedings that the compatibility issue relates to.

Articles 9 to 12 make provision imposing time limits for seeking permission to appeal to the Supreme Court against a determination of a devolution issue that was determined before the commencement of section 37 of the Act.

Section 112(6) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) makes provision for a person to be admitted to bail pending the determination of an appeal to the Supreme Court in respect of a devolution issue or a compatibility issue. Article 13 provides that where a person is admitted to bail pending the determination of a devolution issue and that devolution issue becomes a compatibility issue then from the time of conversion the person is treated as being admitted to bail pending the determination of the compatibility issue.

Section 121 of the 1995 Act makes provision in respect of disqualification, forfeiture and disability attaching to a person as a result of a conviction. Article 14 provides that where provision is made in respect of an appeal under paragraph 13(a) of Schedule 6 to the Scotland Act 1998 Act and the devolution issue in respect of the appeal becomes a compatibility issue then for the purposes of section 121 the appeal is to be treated as an appeal under section 288AA of the 1995 Act.

Articles 15 to 17 make consequential changes to various legal aid regulations so that these regulations take account of compatibility issues.

STATUTORY INSTRUMENTS

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