



A Final Farewell to Scottish Independence? *Devolution issues under the Scotland Act 1998, Reference by the Lord Advocate (Rev1) [2022] UKSC 31* (23 November 2022).

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Abstract

The 2022 decision by the Supreme Court dismissing Holyrood's request to hold an independence referendum without the permission of Westminster has had a damning effect of the SNPs wishes to strive towards an independent Scotland. It is yet to be seen is this is just a bump in the road or a farewell to Scottish Independence. This Case Note aims to present the current political issues surrounding the call for independence as well as the potential impact this decision may have for a unified United Kingdom going forward.

Keywords

Devolution, Scotland, independence, referendum.

I. INTRODUCTION

In a decisive blow for the Scottish National Party and those hoping for an independence referendum in 2024, the Supreme Court handed down the decision in *Devolution issues under the Scotland Act 1998, Reference by the Lord Advocate (Rev1) [2022] UKSC 31*, stating that Holyrood, the Scottish Parliament, is unable to hold an independence referendum without the permission of Westminster. The likelihood of gaining permission is low in the current political climate. In this case, the Supreme Court was to decide whether Holyrood has the power to legislate for the holding of a referendum on Scottish Independence. A referendum is a public vote on a single political issue, which is often seen to increase democracy, but its use has

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remained controversial¹ with continued calls for a higher threshold than pure majority for such important decisions.

The Supreme Court had to consider three key questions: firstly, whether the issue came under the remit of the court? Secondly, if so, could the Scottish Parliament legislate to allow a referendum under the Scotland Act,² or was this considered to be reserved matters?³ And thirdly, can the Scottish Parliament pass legislation to allow for a referendum under international law?

II. BACKGROUND AND FACTS OF THE CASE

During the New Labour reforms in the 1990s, Scotland gained devolved powers in 1998 due to the Scotland Act 1998 allowing for some transfer of powers from central government in Westminster to local government within each devolved nation. In doing so, limited constitutional powers can be exercised by the Scottish Parliament for the benefit of the Scottish constituencies within a limited scope allowing for Westminster to retain those reserved matters⁴. For Scotland, legislative competence is limited under Section 29(1) which outlines the five circumstances in which legislation can be created:

- “(a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,*
- (b) it relates to reserved matters,*
- (c) it is in breach of the restrictions in Schedule 4,*
- (d) it is incompatible with any of the Convention rights (words omitted by the European (Withdrawal) Act 2018 (Repeal of EU Restrictions in Devolution Legislation etc))⁵*
- (e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.”*

The Scottish Parliament, however, cannot legislate beyond these powers with strict restrictions on what are reserved matters, only to be used by Westminster itself. These are strictly stated under paragraph 1 of Schedule 5 of the Scotland Act and, that the “Union of the Kingdoms of Scotland and England”⁶ is a reserved matter.⁷

The Scottish National Party (SNP) has formed the Scottish government since 2007 and has committed to obtaining independence for Scotland; in 2013 they were successfully granted permission from Westminster to hold an independence referendum.⁸ Unfortunately for the SNP, a majority (55.3%) voted to remain part of the United Kingdom.⁹ Despite assurances that this would be a once in a lifetime opportunity, there has been a renewed and increased interest in a

¹ House of Commons Library, ‘Referendums BRIEFING PAPER Number 7692, 31 August 2016’ 5. Available: <https://researchbriefings.files.parliament.uk/documents/CBP-7692/CBP-7692.pdf>. All links in this Case Note have been verified on 21 December 2023.

² Scotland Act 1998.

³ Reserved matters are legal issues that can only be dealt with by Westminster. The list of reserved matters can be found in the Scotland Act 1998 Schedule 5. This generally includes matters that have an impact on the whole of the UK such as immigration law, intellectual property law and criminal law.

⁴ Scotland Act 1998 Schedule 5.

⁵ As amended (in part) 31.03.2022.

⁶ Scotland Act 1998, Schedule 5, [1(b)].

⁷ Other examples are Section C4 Intellectual Property, Section B8 National Security or C6 Sea Fishing.

⁸ An Order in Council under s30(2) Scotland Act 1998.

⁹ ‘Scottish Independence Referendum Result - Scotland’s Referendum.’ Available: <https://scotlandreferendum.info/>.

second independence referendum.¹⁰ This has been the focus of the then First Minister, Nicola Sturgeon's endeavours; and more recently, transferred to, due to the recent turmoil within the SNP, to the new First Minister Humza Yousef. This interest in independence has broadened across the Scottish communities due to conflict with Westminster in the decision for the UK to leave the European Union.¹¹ Scotland voted overwhelmingly to remain,¹² however, the English majority opted to leave, which inevitably allowed for Westminster to instigate a withdrawal from the EU.¹³ This conflict in political allegiance as well as the devolved approach to the Covid-19 pandemic during 2020 and 2021 has stirred up greater support for a referendum on Scotland's independence.¹⁴

In response to this increased support, the Scottish Parliament have continued its roadmap towards independence, under the very new leadership of Humza Yousef. Legislation has been prepared should there be a new referendum¹⁵ as well as the current query submitted to the Lord Advocate in response to the Scottish Independence Referendum Bill.¹⁶ The legality of Holyrood's actions is now to be considered by the Supreme Court. Scotland currently lacks the ability to legislate for a referendum, especially an independence referendum. Westminster retains this power and firmly asserts that this is not currently under consideration.

III. THE DECISION

The court considered the three questions separately; firstly, it concluded that it did have jurisdiction to consider the issues arising from the Scotland Act 1998. The power to legislate for a referendum was a devolution issue and despite having been considered by the Lord Advocate, it was reasonable for the Supreme Court to also advise as to the legality of any legislation proposed by a devolved parliament.¹⁷

On the second question as to whether a referendum for independence would be considered a 'reserved matter,' the court determined that a referendum as to Scottish Independence, even if only for public interest, was a reserved matter as per Schedule 5, paragraph 1(b).¹⁸ Even if the referendum was advisory, with no legal implications, the political pressure could force Westminster to act, whether the public voted yes or no.¹⁹ Although neither type of referendum would ensure independence, both could have detrimental consequences. In explaining the complexities of referendum decisions, the Supreme Court referred to the difficulties that the Brexit referendum faced in becoming a reality. The Scottish First Minister (Nicola Sturgeon at the time) has since responded stating that the next General Election will

¹⁰ James Mitchell, Lynn Bennie, and Rob Johns, 'Referendum as Platform: The SNP and Scottish Green Membership Surge' (2017) 8(3) Political Insight 16.

¹¹ *ibid.*

¹² Elise Uberoi, 'Analysis of the EU Referendum Results 2016.' Available: <https://commonslibrary.parliament.uk/research-briefings/cbp-7639/>.

¹³ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement) 2019.

¹⁴ Johnathan Wheatley, 'British Politics and Policy at LSE: The Future of Politics after COVID-19: Four Trends That Are Already Discernible' 2. Available at: <https://blogs.lse.ac.uk/politicsandpolicy/politics-after-covid19/>.

¹⁵ Referendums (Scotland) Act 2020.

¹⁶ Scottish Independence Referendum Bill

Available: <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2022/06/scottish-independence-referendum-bill/documents/scottish-independence-referendum-bill/scottish-independence-referendum-bill/govscot%3Adocument/Draft%2BBill%2B-%2B27%2BJune%2B2022.pdf>.

¹⁷ *Devolution issues under the Scotland Act 1998, Reference by the Lord Advocate (Rev1)* [2022] UKSC 31, [47].

¹⁸ Scotland Act 1998, Schedule 5, para 1(b); *Devolution issues under the Scotland Act 1998, Reference by the Lord Advocate (Rev1)* [2022] UKSC 31, [77].

¹⁹ *Devolution issues under the Scotland Act 1998, Reference by the Lord Advocate (Rev1)* [2022] UKSC 31, [62].

stand as a *de facto* referendum, with her success indicating a vote for independence.²⁰ It will be for Humza Yousef in the future to take on this mantle and retain the SNP's success in the polls. The legality of a *de facto* referendum is questionable, but a response from Westminster is yet to be seen.

In reference to the third question of legislating an independence referendum under international law, the Supreme Court considered if Scotland had rights to self-determination. The Supreme Court recognised that the right to self-determination exists in international law under the United Nations Charter²¹ and the Covenant on Economic, Social and Cultural Rights 1966,²² which is also accepted by the UK. This is usually restricted to colonised countries where democratic participation has been removed. There is some dispute to whether Scotland has been politically colonised,²³ however, the ability to participate freely in the forming of the UK government negates this claim of breaching the conventions of international law.²⁴ Scotland cannot claim a right to self-determination.²⁵ As such legislating for an independence referendum is not obligatory under this provision.²⁶ The right to self-determination does not apply the right to secede where there is an agreed devolution of powers.²⁷

IV. CONCLUSION

With the ability of Scottish Parliament to legislate for a referendum definitively settled, it is now for the politicians to negotiate when and if an independence referendum will occur any time soon. The legal standpoint has long been clear as to the power of the devolved nation's parliaments, with these issues already stated within the Scotland Act; Holyrood is merely a decentralised extension of Westminster. However, with the ink still drying on Brexit there may be room to negotiate other matters of contention such as the long-standing call for ratification of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage. Which could allow for international safeguarding of the rich cultural heritage of Scotland's communities.

The potential for any future referendums will be decided in the next General Election by the voting public; with Humza Yousef in control of the SNP who knows what the voting public of Scotland will opt for. Potentially the legal turmoil of the previous SNP leadership will dampen the fire in the bellies of Scottish independence voters. Otherwise, another convincing win for the SNP will force Westminster to consider giving its permission for a second independence referendum continuing the perma-crisis within British public law.

²⁰ 'Scotland's Sturgeon: Next Election a "de Facto Referendum" on Independence | Reuters.' Available: <https://www.reuters.com/world/uk/scotlands-sturgeon-says-uk-court-ruling-referendum-only-makes-case-independence-2022-11-23/>.

²¹ United Nations, *Charter of the United Nations*, 24 October 1945, 1UNTS XVI.

²² United Nations, *International Covenant on Economic, Social and Cultural Rights* 16 December 1966, United Nations Treaty Series, Vol 993.

²³ Michael Hechter, *Internal Colonialism: The Celtic Fringe in British National Development* (2nd edn, Routledge 1999) 63; Robert J Hind, 'The Internal Colonial Concept' (1984) 26 *Comparative Studies in Society and History* 543; Iain MacKinnon, 'Colonialism and the Highland Clearances' (2017) 8 *Northern Scotland* 22.

²⁴ United Nations, 'United Nations Charter (Full Text)' (*United Nations*, 1945); United Nations *International Covenant on Economic, Social and Cultural Rights* 1966.

²⁵ United Nations, *International Covenant on Economic, Social and Cultural Rights* 16 December 1966, United Nations Treaty Series, Vol 99, Article 1.

²⁶ [2022] UKSC 31, [86].

²⁷ [2022] UKSC 31, [90].