

IN THE SUPREME COURT OF THE UNITED KINGDOM

IN THE MATTER OF

A REFERENCE BY THE LORD ADVOCATE

UNDER PARAGRAPH 34 OF SCHEDULE 6 TO THE SCOTLAND ACT 1998

IN RELATION TO

**WHETHER THE QUESTION FOR A REFERENDUM ON SCOTTISH
INDEPENDENCE CONTAINED IN THE PROPOSED BILL RELATES TO
RESERVED MATTERS**

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THE LORD ADVOCATE'S REFERENCE

**FIRST APPENDIX TO THE LORD ADVOCATE'S REFERENCE:
*THE SCOTTISH INDEPENDENCE REFERENDUM BILL***

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THE LORD ADVOCATE'S REFERENCE

Introduction

1. This is a reference by the Lord Advocate under para.34 of Schedule 6 to the Scotland Act 1998 (“SA”). That provision allows the Lord Advocate to refer to the Supreme Court any devolution issue which is not the subject of proceedings. That power is one of the Lord Advocate's retained functions (s.52(6) SA). The devolution issue referred is a question arising by virtue of the SA about reserved matters (para.1(f) of Schedule 6 SA). The question, set out fully in paragraph 21 below, asks this court to determine whether a Bill providing for a referendum on Scottish independence would relate to a reserved matter.
2. The Scottish Government has been elected on a manifesto commitment to hold a referendum on the question of Scottish independence in the course of the current session of the Scottish Parliament. The extent to which legislation to give effect to such a commitment would relate to reserved matters is contested and has been and remains subject to much debate. A proposed Bill providing for such a referendum is appended to this Reference: the Scottish Independence Referendum Bill. The Scottish Government wishes to introduce the Bill. The First Minister, recognising that the question of whether a Bill providing for an advisory referendum on independence relates to reserved matters is contested, asked the Lord Advocate to consider making a reference under para.34 of Schedule 6. Having given this matter detailed consideration the Lord Advocate has decided to make a reference.
3. When introducing the Bill it will be necessary for the Minister introducing it to state that in his or her view such legislation would be within the legislative competence of the Scottish Parliament. That is a requirement of law (s.31(1) SA) and parliamentary procedure (Standing Orders of the Parliament, Rule 9.3(1A)). The Scottish Ministerial Code, para.3.4 provides that any Bill must be accompanied by a statement, which has been cleared by the Law Officers, that the Bill is within the legislative competence of the Scottish Parliament. These provisions were noticed by this Court in *The United Nations Convention on the Rights of the Child (Incorporation)(Scotland) Bill Reference* [2021] UKSC 42; 2022 SC (UKSC) 1 at para.12. The Lord Advocate needs to have the necessary degree of confidence that a Bill would be within devolved competence in order to “clear” such a statement.
4. In the present case, the Lord Advocate does not have the necessary degree of confidence. Most recently, in *Keatings v Advocate General* [2021] CSIH 25, 2021 SC 329 the Lord President, delivering the Opinion of the Inner House of the Court of Session, and after referring to case law of this Court, suggested, in comments that were *obiter* that it may not be too difficult to arrive at a conclusion on whether an Act to hold a referendum on Scottish independence “relates to” reserved matters (para 66). However, the former Lord Advocate did not address the Court of Session, and the Court did not opine, on the substantive question of whether such a Bill

would relate to reserved matters, and no Bill was before the Court in that case. Nor did the court consider the clearance of any Bill by the Law Officers. The Court did, at para.55, recognise that a Bill may be introduced and passed by the Scottish Parliament.

5. The Lord Advocate considers:

- (1) There is a genuine issue of law that is unresolved;
- (2) That issue of law is of exceptional public importance to the people of Scotland and the United Kingdom; and
- (3) It is directly relevant to a central manifesto pledge that the Scottish electorate has endorsed.

In the circumstances, the Lord Advocate has determined that it is appropriate for her to exercise her powers under para.34 read with para.1(f) of Schedule 6 SA to obtain a ruling from the Supreme Court on whether the holding of an advisory referendum on independence would relate to reserved matters. The answer to the question referred will determine whether the Scottish Parliament can debate and vote upon the Bill which is the subject of a manifesto commitment.

6. The Scottish Government, the Scottish Parliament and the people of Scotland and the wider United Kingdom ought to have clarity on the scope of the relevant reservations on this issue of fundamental constitutional importance. Being questions of law, only this Court can provide that clarity and unless the issue is judicially resolved there will remain uncertainty and scope for argument about the powers of the Scottish Parliament. That is not in the best interests of the people of Scotland or of the United Kingdom.

7. In these circumstances, the Lord Advocate has determined that it is appropriate for her to obtain a judicial determination from the Supreme Court. Accordingly, the Lord Advocate makes this reference, in exercise of her retained functions, under para.34 of Schedule 6 SA. It is the first time this power has been exercised by the Lord Advocate. That is a measure of the fundamental importance of the issue and its exceptional nature.

8. The Lord Advocate asks the Court to determine this reference by answering the question posed at paragraph 21, below.

Background

9. At the May 2021 Scottish parliamentary election, the Scottish National Party (“**the SNP**”) was returned as the largest party in the Scottish Parliament (64 seats). The Scottish Government

(for the purposes of s.44 SA) is composed of SNP members (with the Scottish Law Officers). The Scottish Government has entered into a co-operation agreement with the Scottish Green Party which holds seven seats. The SNP manifesto for the 2021 Scottish parliamentary election stated: “*We are seeking the permission of the Scottish people in this election for an independence referendum to take place after the [COVID-19] crisis. This would be within the next Parliamentary term on a specific date to be determined by our democratically elected parliament.*” (p.11). A similar commitment was made in the Scottish Green Party manifesto for the 2021 election: “*An independence referendum should be held during the next parliamentary session*” (p.51). Accordingly, a majority of MSPs in the Scottish Parliament were elected on a manifesto which made a commitment to a referendum on Scottish independence during the life of the current Parliament. In December 2019, the First Minister wrote to the Prime Minister asking that he promote legislation, as had been done in advance of the 2014 referendum, so that the Scottish Parliament could legislate, free of any legal doubt, for an independence referendum. In January 2020, the Prime Minister refused that request. Accordingly, the Scottish Government has resolved to introduce its own legislation. The Scottish Government’s consistent position has been that the 2021 Scottish parliamentary election provides a clear mandate from the Scottish electorate to do so.

10. However, whether the Scottish Parliament has the power to pass such a Bill has been a source of debate since what is now the SA was first introduced in the UK Parliament in 1997. Opinion remains divided on the issue.

Jurisdiction

11. This Court’s jurisdiction is conferred by para.34 of Schedule 6 SA which provides that the Lord Advocate (and certain other Law Officers) may “*refer to the Supreme Court any devolution issue which is not the subject of proceedings.*” A “*devolution issue*” includes “*any other question arising by virtue of this Act about reserved matters*” (para.1(f) of Schedule 6 SA). Both the definition of a devolution issue and the right to make a reference are cast in broad terms. Given the various other provisions of the SA which allow the Lord Advocate (and others) to require ongoing proceedings to be referred to the Court, para.34 of Schedule 6 is specifically designed to allow those empowered by it to seek resolution of a devolution issue before the question becomes the subject of proceedings. It is a jurisdiction which has never before been invoked in respect of Scotland.
12. The right to refer a devolution issue to the Court is a retained function of the Lord Advocate: s.52(6) SA. The Lord Advocate makes this reference in the exercise of that function having determined that it is in the public interest that the issue be determined by the Court at this time.

13. In *Keatings*, above, the Lord President expressed the view that the Court of Session could not be called upon to consider the competence of a Bill before it had passed through the parliamentary process (paras.60-61). Those observations were broadly consistent with the submissions made on behalf of both the Advocate General and the Lord Advocate. To the extent that they apply to those such as the pursuer in *Keatings*, the Lord Advocate agrees with the Lord President’s observations. However, in this Reference, the Lord Advocate seeks a decision from the Supreme Court on the scope of two specific reservations to enable her to fulfil her role in enabling the Scottish Government to meet the requirements of s.31 SA. This Reference raises questions “*arising by virtue of [the SA] about reserved matters*”. The observations of the Lord President in *Keatings* should be read subject to para.34 and para 1(f) of Schedule 6 SA. In the context such a qualification was not suggested on behalf of the Lord Advocate in *Keatings*, and to that extent, the present Lord Advocate departs from that position. The Lord Advocate’s position on *Keatings* will be more fully explained in her Written Case for this Reference.

The Legislative Competence of the Scottish Parliament

14. The Scottish Parliament has the power to make laws for Scotland: s.28(1) SA. That power is subject to the restrictions imposed on the Scottish Parliament’s legislative competence: s.29 SA. A provision of an Act of the Scottish Parliament is not law so far as the provision is outside the legislative competence of the Scottish Parliament: s.29(1) SA. A provision is outside legislative competence if it “*relates to reserved matters*”: s.29(2)(b) SA. Whether a provision “*relates to*” a reserved matter is to be determined “*by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances*”: s.29(3). Reserved matters are those set out in Schedule 5 to the SA: s.30(1) SA. They include both the Union of the Kingdoms of Scotland and England (para.1(b) of Schedule 5 SA) and the Parliament of the United Kingdom (para.1(c)).

The Reservation of the Union and the Parliament

15. Paragraph 1(b) and 1(c) of Schedule 5 to the SA provide, respectively, that “*the Union of the Kingdoms of Scotland and England*” and “*the Parliament of the United Kingdom*” are reserved matters. Whether the proposed question relates to either or both reservations depends upon (a) the scope of each reservation; (b) the purpose of the Bill; and (c) what the effect of the Bill would be in all the circumstances.
16. The Scottish Government accepts that an Act to dissolve the Union is not within the legislative competence of the Scottish Parliament. It does not necessarily follow, however, that the

proposed Bill, providing for an advisory referendum on independence, relates to reserved matters.

17. In respect of the reservation of the Parliament of the United Kingdom, this Court has held this reservation to embrace the sovereignty of Parliament (*UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; 2019 SC (UKSC) 13 at para.61). It was recognised in *Moohan v Lord Advocate* [2014] UKSC 67; 2015 SC (UKSC) 1 at paras.17, 71, 91 and 102 that should Scotland become independent this would involve a reduction in the scope of the UK Parliament’s powers. It was also recognised in the *Continuity Bill* case that the reservation at para.1(c) of Schedule 5 was not infringed where the ultimate power of the UK Parliament to change the law is not affected. Given the advisory nature of the proposed referendum, it is questionable whether the proposed question (or the answering of it) purports to alter the fundamental principle of parliamentary sovereignty nor would it have this effect.
18. The proposed question for a referendum is itself neutral on the question of independence. Whilst the Scottish Government itself clearly wishes to persuade the people of Scotland to vote in favour of independence, such a Bill might be introduced or supported by a party that had the opposite political position.
19. Moreover, the Bill does not stipulate what should happen in response to the result. By contrast, for example, the Parliamentary Voting System and Constituencies Act 2011 provided for legal changes to take effect upon a specified result in the vote. The Bill provides only that the referendum should be held. Consequently, as a matter of law, the legal effect of a referendum held pursuant to the Bill would be nil: *Moohan v Lord Advocate* [2014] UKSC 67; 2015 SC (UKSC) 1 at para.47 (Lord Neuberger). That is made clear by s.1 of the Bill which states the purpose of the Bill to be “*to make provision for ascertaining the views of the people of Scotland on whether Scotland should be an independent country*”.
20. The question referred raises legal issues of the highest public importance to the people of Scotland as to the devolved competence of the Scottish Parliament. The Lord Advocate respectfully requests the Supreme Court to determine those issues.

The Question

21. Accordingly, the Court is asked to answer the following question:

Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be “*Should Scotland be an independent country?*” relate to reserved matters? In particular, does it relate to: (i)

the Union of the Kingdoms of Scotland and England (para.1(b) of Schedule 5); and/or
(ii) the Parliament of the United Kingdom (para.1(c) of Schedule 5)?

Procedural Issues

22. In accordance with Rule 41(2), this reference has been served on the Advocate General for Scotland. Having regard to the spirit of Practice Direction 10.1.7, this reference will also be intimated to the Attorney General, the Counsel General to the Welsh Government, the Advocate General for Northern Ireland and the Attorney General for Northern Ireland.
23. In view of the fundamental constitutional importance of the issue referred by the Lord Advocate, and to allow a fuller period for consideration of the reference by the other Law Officers, the Court is invited to make the following directions:
- a. To extend the time prescribed in Practice Direction 10.2.3 to 14 days; and
 - b. To extend the time prescribed in Practice Direction 10.2.5 to 28 days.



**RT. HON. DOROTHY BAIN, Q.C.
HER MAJESTY'S ADVOCATE**



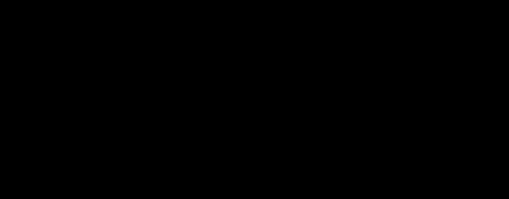
DOUGLAS ROSS, Q.C.



TOM HICKMAN, Q.C.



CHRISTINE O'NEILL, Q.C.



PAUL REID, ADVOCATE

27 JUNE 2022

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**FIRST APPENDIX TO THE LORD ADVOCATE'S REFERENCE:
*THE SCOTTISH INDEPENDENCE REFERENDUM BILL***

**THE FOLLOWING ACCOMPANYING DOCUMENTS ARE ALSO PUBLISHED:
Explanatory Notes (SP Bill X-EN), a Financial Memorandum (SP Bill X-FM), a Policy
Memorandum (SP Bill X-PM), a Delegated Powers Memorandum (SP Bill X-DPM) and
statements on legislative competence (SP Bill X-LC).**

Scottish Independence Referendum Bill

[PRE-INTRODUCTION]

An Act of the Scottish Parliament to make provision for the holding of a referendum in Scotland on a question about the independence of Scotland.

Referendum

1 Purpose of this Act

The purpose of this Act is to make provision for ascertaining the views of the people of Scotland on whether Scotland should be an independent country.

2 Referendum on Scottish independence

- (1) A referendum is to be held in Scotland on a question about the independence of Scotland.
- (2) The question is—
“Should Scotland be an independent country?”.
- (3) The ballot paper to be used for the purpose of the referendum is to be printed—
 - (a) in the form set out in Parts 1 and 2 of the schedule, and
 - (b) according to the directions set out in Part 3 of the schedule.
- (4) The date on which the poll at the referendum is to be held is 19 October 2023, unless before then regulations are made under subsection (6).
- (5) Subsection (6) applies if the Scottish Ministers consider—
 - (a) that it is impossible or impracticable for the poll at the referendum to be held on 19 October 2023, or
 - (b) that it cannot be conducted properly if held on that date.
- (6) The Scottish Ministers may by regulations appoint a later date as the date on which the poll at the referendum is to be held.
- (7) Regulations under subsection (6)—
 - (a) may include incidental, supplementary or consequential provision,
 - (b) may modify any enactment (including this Act), and
 - (c) are subject to the affirmative procedure.

*Franchise***3 Entitlement to vote at the referendum: qualifying foreign nationals**

- (1) The Referendums (Scotland) Act 2020 applies for the purposes of determining entitlement to vote at the referendum, subject to the following modifications.
- (2) Section 4(d) (those who are entitled to vote) has effect as if for “relevant citizen of the European Union” there were substituted “qualifying foreign national”.
- (3) Schedule 7 (interpretation) has effect as if—
 - (a) after the definition of “qualifying address” there were inserted—
 - ““qualifying foreign national” has the meaning given in section 202(1) of the 1983 Act,”
 - (b) the definition of “relevant citizen of the European Union” were repealed.

*Further provision about conduct of referendum etc.***4 Application of the Referendums (Scotland) Act 2020 to the referendum**

- (1) The Referendums (Scotland) Act 2020 applies for the purposes of the referendum.
- (2) That is subject to [exceptions and modifications].

*Final provisions***5 Interpretation**

- (1) References in this Act to “the referendum” are to the referendum to be held under section 2.
- (2) Any other word or expression used in this Act which is also used in the Referendums (Scotland) Act 2020 has the same meaning as in that Act.
- (3) Subsection (2) does not apply where the context requires otherwise.

6 Ancillary provision

- (1) The Scottish Ministers may by regulations make any incidental, supplementary or consequential provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act.
- (2) Regulations under subsection (1) may—
 - (a) modify any enactment (including this Act),
 - (b) apply for the purposes of the referendum any provision of any enactment (either with or without modifications),
 - (c) include incidental, supplementary, consequential, transitional, transitory or saving provision.
- (3) Regulations under subsection (1)—
 - (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act, but
 - (b) otherwise are subject to the negative procedure.

7 Commencement

This Act comes into force on the day after Royal Assent.

8 Short title

The short title of this Act is the Scottish Independence Referendum Act.

SCHEDULE
(introduced by section 2(3))

FORM OF BALLOT PAPER

PART 1

FRONT OF BALLOT PAPER

BALLOT PAPER	<i>[Official mark]</i>
VOTE (X) ONLY ONCE	
Should Scotland be an independent country?	
YES	<input style="width: 100px; height: 60px;" type="checkbox"/>
NO	<input style="width: 100px; height: 60px;" type="checkbox"/>

PART 2

BACK OF BALLOT PAPER

[Unique identifying number]
 Area of *[insert council name]*.
 Referendum on 19 October 2023

PART 3

DIRECTIONS AS TO PRINTING THE BALLOT PAPER

- 1 Nothing is to be printed on the ballot paper except as set out in this schedule.
- 2 So far as practicable, the instructions specified in paragraphs 3 to 6 must be observed in printing the ballot paper.
- 3 Words printed on the ballot paper must be printed—
 - (a) in a sans serif font (for example, Arial), and

- (b) in characters of at least 14 point size.
- 4 The direction to “**VOTE (X) ONLY ONCE**” and the “**YES**” and “**NO**” options must be printed in bold capital letters.
- 5 The ballot paper must be at least 180mm wide.
- 6 The voting boxes where the vote is to be marked must each be 21mm square.

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**SECOND APPENDIX TO THE LORD ADVOCATE'S REFERENCE:
*CERTIFICATES OF SERVICE AND NOTICE***

(A) CERTIFICATE OF SERVICE

The date on which this Reference was served on the Respondent:
28 June 2022

**I certify that this Reference and associated appendix was served on the Advocate
General for Scotland as Relevant Officer and Respondent in terms of the Supreme
Court Rules 2009.**


28 June 2022


Scottish Government Legal Directorate
Scottish Government
1F North
Victoria Quay
Edinburgh
EH6 6QQ


Method of Service:
Personal service by Messengers-at-Arms.

The contact details of agents for the Respondent:
Office of the Advocate General for Scotland

[REDACTED]
Queen Elizabeth House
Edinburgh
EH8 8FT

(B) CERTIFICATE OF NOTICE

The date on which Notice of this Reference was given:
28 June 2022

I certify that Notice of this Reference and associated appendix was given to the Attorney General for England and Wales, Attorney General for Northern Ireland and the Counsel General for Wales in accordance with Annex 1 to UK Supreme Court Practice Direction 10.

[REDACTED]
[REDACTED]
28 June 2022

[REDACTED]
Scottish Government Legal Directorate
Scottish Government
1F North
Victoria Quay
Edinburgh
EH6 6QQ
[REDACTED]

Method of Notice:

Notice was given by electronic means (namely email).

The contact details of agents for those persons given Notice:

Attorney General for England and Wales

[REDACTED]
Treasury Solicitor
102 Petty France
London
SW1H 9EA
United Kingdom

Attorney General for Northern Ireland

[REDACTED]
Office of the Attorney General for Northern Ireland
PO Box 1272
Belfast
BT1 9LU

Counsel General for Wales

[REDACTED]
[REDACTED]
[REDACTED]

Legal Services Department
Constitution and Justice Team
Office of the First Minister and Cabinet Office
Welsh Government
Cathays Park
King Edward VII Avenue
Cardiff
CF10 3NQ

Annex B

Section 38(1)(b) – applicant has asked for personal data of a third party

An exemption under section 38(1)(b) of FOISA (personal information) applies to a small amount of the information requested because it is personal data of a third party, and disclosing it would contravene the data protection principles in Article 5(1) of the General Data Protection Regulation and in section 34(1) of the Data Protection Act 2018. This exemption is not subject to the ‘public interest test’, so we are not required to consider if the public interest in disclosing the information outweighs the public interest in applying the exemption.