



6 October 2021

PRESS SUMMARY

REFERENCE by the Attorney General and the Advocate General for Scotland – United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill
REFERENCE by the Attorney General and the Advocate General for Scotland – European Charter of Local Self-Government (Incorporation) (Scotland) Bill
[2021] UKSC 42

JUSTICES: Lord Reed (President), Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Sales, Lord Stephens

BACKGROUND TO THE REFERENCES

Under section 33 of the Scotland Act 1998 (“**the Scotland Act**”), the Advocate General, the Lord Advocate or the Attorney General may refer to the Supreme Court the question of whether any provision of a Bill passed by the Scottish Parliament would be within the legislative competence of the Scottish Parliament.

In this case, the Attorney General and Advocate General have referred questions to the Supreme Court in respect of two Bills passed by the Scottish Parliament in March 2021: the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill (“**the UNCRC Bill**”) and the European Charter of Local Self-Government (Incorporation) (Scotland) Bill (“**the ECLSG Bill**”). The UNCRC Bill and the ECLSG Bill are each designed to give effect in Scots law to a treaty to which the UK is a signatory: the United Nations Convention on the Rights of the Child (“**the UNCRC**”) and the European Charter of Local Self-Government (“**the ECLSG**”), respectively.

Neither reference takes issue with the Scottish Parliament’s decision to incorporate the UNCRC and ECLSG into Scots law. That is recognised to be a matter for the Scottish Parliament. The references reflect concerns, only, that the manner in which the Bills seek to incorporate the UNCRC and the ECLSG into Scots law breaches the limitations imposed on the legislative competence of the Scottish Parliament by the Scotland Act.

JUDGMENT

The Supreme Court unanimously decides that sections 6, 19(2)(a)(ii), 20(10)(a)(ii) and 21(5)(b)(ii) of the UNCRC Bill and sections 4(1A) and 5(1) of the ECLSG Bill would be outside the legislative competence of the Scottish Parliament. This means that the Bills will return to the Scottish Parliament so that these issues can receive further consideration.

Lord Reed gives the sole judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

Section 28(7) of the Scotland Act preserves the unqualified power of the UK Parliament to make laws for Scotland. If any provision of an Act of the Scottish Parliament purports to modify section 28(7) of the Scotland Act, it will contravene section 29(2)(c) of that Act, read together with paragraph 4(1) of Schedule 4 to that Act, and will therefore fall outside the competence of the Scottish Parliament [8]-[11], [21].

The Court decides that three provisions of the UNCRC Bill would modify section 28(7) of the Scotland Act and, for that reason, would fall outside the legislative competence of the Scottish Parliament. The first is section 19(2)(a)(ii) of the UNCRC Bill, which provides that, “[s]o far as it is possible to do so”, an Act of the UK Parliament “must be read and given effect in a way which is compatible with” the UNCRC [23]. This would require the courts, in certain circumstances, to give statutory provisions a meaning and effect which conflicts with that intended by the UK Parliament [26]. A qualification upon the UK Parliament’s legislative power would be imposed as a result [28]. Accordingly, as it would impliedly amend section 28(7) of the Scotland Act, section 19(2)(a)(ii) of the UNCRC Bill would be outside the legislative competence of the Scottish Parliament [36].

The second provision is section 20(10)(a)(ii) of the UNCRC Bill, which would enable the courts to strike down and invalidate provisions of Acts of the UK Parliament which are incompatible with the UNCRC, provided the relevant Act of Parliament was enacted before section 20 of the UNCRC Bill comes into force [38]-[40]. Allowing existing legislation to remain in force unamended is one of the ways in which the UK Parliament exercises its power to make laws for Scotland [42]. Making the continuation in force of Acts of the UK Parliament conditional on the courts’ decision that they are compliant with the UNCRC would therefore affect the power of the UK Parliament to make laws for Scotland [45]. Accordingly, section 20(10)(a)(ii) of the UNCRC Bill would be outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act [46].

The third provision is section 21(5)(b)(ii) of the UNCRC Bill, which would confer on the courts the power to declare that an Act of the UK Parliament is incompatible with the UNCRC, provided the relevant Act of Parliament was enacted after section 21 of the UNCRC Bill comes into force [48]-[49]. Such a declaration would affect the power of the UK Parliament to legislate for Scotland [51], insofar as it would impose pressure on the UK Parliament to amend or repeal the relevant Act to remove the incompatibility [52], would make it difficult if not impossible for public authorities to continue to implement the relevant Act [53], and could result in the Scottish Ministers adopting regulations to amend or repeal the relevant Act [54]. Accordingly, section 21(5)(b)(ii) of the UNCRC Bill would be outside the legislative competence of the Scottish Parliament, because it would modify section 28(7) of the Scotland Act [55].

Next, the Court considers section 6 of the UNCRC Bill, which would make it unlawful for any public authority, carrying out any function, to act in a way which is incompatible with the UNCRC [57]-[58]. It is not in dispute that this provision is, on its face, outside the legislative competence of the Scottish Parliament [59]. Counsel for the Lord Advocate argued that the provision is, nonetheless, permissible, because the courts will be able to interpret it so as to impose corrective limitations in individual cases [60], [68]. Such an approach would require the courts to assume a function which goes beyond interpretation as ordinarily understood [79]. It would also result in the circumvention of the system of pre-enactment scrutiny established by sections 31-33 of the Scotland Act, the operation of which is dependent on legislative provisions being drafted with sufficient clarity to enable the requisite assessments to be made by the person in charge of the Bill, the Presiding Officer, and, if a reference is made, the Supreme Court [12]-[17], [73]-[74], [79]. Accordingly, as it cannot properly be left to the courts to impose the necessary qualifications [77], section 6 of the UNCRC Bill would be outside the legislative competence of the Scottish Parliament [80].

Finally, the Court decides that two provisions of the ECLSG Bill would modify section 28(7) of the Scotland Act and, for that reason, fall outside the competence of the Scottish Parliament. The first is section 4(1A) of the ECLSG Bill, which provides that Acts of the UK Parliament “must be read and given effect in a way which is compatible with” the ECLSG [83]. This would sometimes require the courts to modify the meaning and effect of Acts of Parliament, producing results which the UK Parliament did not intend. Accordingly, for the same reasons as section 19(2)(a)(ii) of the UNCRC Bill, section 4(1A) of the ECLSG Bill would be outside the legislative competence of the Scottish Parliament [84].

The second provision of the ECLSG Bill is section 5(1), which would confer on the courts the power to declare that an Act of the UK Parliament is incompatible with the ECLSG [87]. For the same reasons as section 21(5)(b)(ii) of the UNCRC Bill, section 5(1) of the ECLSG Bill would affect the power of the UK Parliament to legislate for Scotland. It would therefore be outside the legislative competence of the Scottish Parliament [88]-[89].

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 at:

<http://supremecourt.uk/decided-cases/index.html>