



Supreme Court Ruling on 'Constitutional Settlement' for Scottish Local Government

1. Introduction

In May 2020 Andy Wightman, a former MSP, proposed a Members Bill to the Scottish Parliament. The Bill proposed the incorporation of the European Charter of Local Self-Government into Scots law. The primary purpose of the Bill is to ensure that:-

- Actions that Scottish Ministers take within their devolved powers are compatible with the charter
- Laws that are in the legislative competence of the Scottish Parliament are compatible with the charter and
- Action can be taken in the courts to challenge actions and laws if they are considered to be incompatible with the charter.

The Charter is an international treaty of the Council of Europe signed by the UK in 1997, which was of itself established in 1949 to uphold human rights, democracy and the rule of law in Europe. The Charter sets out some principles to protect the basic powers of local authorities.

In recent years the paucity of powers and resources for local authorities across the UK has led to many calls for a form of constitutional settlement for local authorities; this it is argued would level up the status of local councils, given greater parity to the powers of local authorities to that of other forms of central government. Arguably in doing so this would make UK local government more compatible to European models, where local municipalities have greater powers and resources at a local level in many other states. Many have asserted that the adoption of the Charter fully into the UK would enshrine a form of constitutional settlement for local authorities. Indeed this was a finding of the APSE Local Government Commission which considered this matter in its evidence gathering which informed at its final report ['Local By Default'](#). See chapter 2 page 39 onwards and recommendation 1.

However, the Bill has now been called into question by a Supreme Court Judgement on the 6 October 2021.

This briefing highlights that judgement. The judgement also covers a related case, that of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill but the focus of this briefing and commentary specifically relates to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill [2021]

2. About the European Charter of Local Self-Government (Incorporation) (Scotland) Bill [2021]

The Bill sets out a number of measures to incorporate the European Charter of Local Self Government into Scots law. This includes the following outline measures: -

- Places a duty on the Scottish Ministers to act compatibly with the Charter Articles;
- Places a duty on the Scottish Ministers to promote local self-government;
- Requires the courts to read and give effect to legislation, where possible, in a way that is compatible with the Charter Articles;
- Enables the courts to declare legislative provisions to be incompatible with the Charter Articles, and enables the Scottish Ministers to take remedial action, by regulations, in response to such declarations;
- Allows the courts to suspend the effect of a decision that the Scottish Ministers breached a duty imposed on them by the Bill, or
- Remove or limit the retrospective effect of such a decision;
- Requires each person introducing a Public Bill in the Parliament to make a statement about the extent to which, in their view, the Bill is compatible with the Charter Articles.

In effect the Bill was designed to significantly enhance the constitutional status of local authorities in Scotland and set out a series of remedies should their status be adversely impacted by other actions of the Scottish Government or Ministers. The Bill enjoyed the support of the Scottish Government.

However, the Bill has been challenged by the Attorney General and Advocate General who referred questions on the Bill to the Supreme Court. Whilst the Attorney General and the Advocate General did not take issue with the Scottish Parliament's decision to incorporate the Bill(s) into Scots law it did consider the limitations imposed on the legislative competence of the Scottish Parliament by the Scotland Act in passing legislation in effect beyond its powers.

3. Supreme Court Decision

The Supreme Court has now ruled on the issue of scope of the Bill

Its findings for the judgement states:-

“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.”

In a summary of the judgement the Supreme Court states its reasoning as: -

“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”

And in respect specifically to the European Charter of Local Self-Government (Incorporation) (Scotland) Bill [2021] it states (square brackets refer to the paragraphs in the full judgement):-

“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”.

4. What does this mean for Scotland’s Local Authorities?

Clearly there was widespread support for the Bill amongst local authorities in Scotland and support from COSLA (the Confederation of Scottish Local Authorities). Moreover, the Bill was being watched closely across the UK by those with an interest in increasing the standing, resources and powers of local government. The Bill of itself does not fall but it will now go back for further consideration, presumably to look at amendments that would allow it to be

considered compliant with the provisions of the Scotland Act. For now, this means that the constitutional position of local councils in Scotland remains unchanged.

5. Conclusions

This Supreme Court judgement clearly raises questions on the scope and powers of the devolved Parliament in Scotland and, whilst this may raise broader constitutional issues for Scotland, and the Scottish Parliament, from a local government perspective it also raises the fundamental issue of local authority powers overall.

UK local government may be considered to have significantly less powers generally available to it than many states across Europe. The negative impact of this imbalance is illustrated by the often-strained centre-local relations but this judgement further widens that chasm with a strain between local, the devolved level and the centre.

APSE supports COSLA's statement in response to the judgement that *"Local Government must have a meaningful role in whatever comes next and as a valued sphere in the Governance of Scotland."*

APSE will be closely monitoring developments in this matter and reporting back further to its member local councils.

Mo Baines

APSE Head of Communication and Coordination

Email mbaines@apse.org.uk