HOUSE OF LORDS SESSION 2002–03
70th REPORT

APPEAL COMMITTEE

DAVIDSON (AP) (RESPONDENT) *V.* SCOTTISH MINISTERS (APPELLANTS) (SCOTLAND)

PETITION OF THE RESPONDENT THAT THE APPEAL BE DISMISSED AS INADMISSIBLE

REPORT

Ordered to be printed 31 July 2003

LONDON

(HL Paper 161)

ORDERS OF REFERENCE, ETC.

DIE MERCURII 13° NOVEMBRIS 2002

Appeal Committees—Two Appeal Committees were appointed pursuant to Standing Order.

DIE LUNAE 9° DECEMBRIS 2002

Davidson (Respondent) *v*. Scottish Ministers (Appellants) (Scotland)—The appeal of the Scottish Ministers was presented and it was ordered that in accordance with Standing Order VI the statement and appendix thereto be lodged on or before 20th January next.

DIE JOVIS 22° MAII 2003

Davidson (Respondent) *v*. Scottish Ministers (Appellants) (Scotland)—The petition of Scott Davidson praying that the appeal be dismissed as inadmissible was presented and referred to an Appeal Committee.

DIE VENERIS 4° JULII 2003

Davidson (AP) (Respondent) *v*. Scottish Ministers (Appellants) (Scotland)—The respondent's legal aid certificate was lodged.

MINUTES OF PROCEEDINGS

DIE JOVIS 31° JULII 2003

Present:

L. Bingham of Cornhill
L. Hoffmann
L. Hope of Craighead

The Lord Bingham of Cornhill in the Chair.

The Orders of Reference are read.
The Committee deliberate.
Counsel and Parties are called in.

Mr N. Brailsford QC and Mr James Mure appear for the appellant.
Mr A. O'Neill QC and Mr S. Collins appear for the respondent.

Mr O'Neill heard on behalf of the respondent, seeking the dismissal of the petititon of appeal.
Mr Brainford heard.
Mr O'Neill heard in reply.
Further and fully heard.
Bar cleared; and the Committee deliberate.
A draft Report is laid before the Committee by the Lord Hope of Craighead.
The Report is considered and agreed to, *nemine dissentiente*.
Ordered, That the Lord in the Chair do make the Report to the House.
Counsel recalled, and the Lord in the Chair is heard to say that the Committee would recommend To the House that the petition to dismiss the appeal be dismissed.
Ordered, That the Committee be adjourned *sine die*.

SEVENTIETH REPORT

from the Appeal Committee

31 JULY 2003

Davidson (Respondent) *v.* Scottish Ministers (Appellants) (Scotland)

ORDERED TO REPORT

The Committee (Lord Bingham of Cornhill (Chairman), Lord Hoffmann and Lord Hope of Craighead) have met and have considered the petition of the respondent praying that the appeal *Davidson (Respondent) v. Scottish Ministers (Appellants) (Scotland)* be dismissed as inadmissible. We have heard counsel on behalf of the respondent and appellant.

1. This is the considered opinion of the Committee.

2. The Committee have met and heard counsel on the incidental petition of Scott Davidson praying for the petition of appeal by the Scottish Ministers against the interlocutors of the Inner House of the Court of Session dated 11 September 2002 and 1 October 2002, in a cause in which Scott Davidson was the petitioner and the Scottish Ministers were the respondents, to be dismissed without further inquiry into its merits because it seeks to proceed without the prior leave of the Inner House.

Background

3. On 24 October 2001 Scott Davidson ("the petitioner"), who was then a remand prisoner in HM Prison, Barlinnie, lodged a petition in the Court of Session under the judicial review procedure. He alleged that the conditions of his detention in that prison were incompatible with article 3 of the European Convention on Human Rights and Fundamental Freedoms. He sought an order ordaining the Scottish Ministers to secure his transfer to conditions which were compliant with article 3, asked for an order to be made to that effect *ad interim* and also sought damages. His application for an order *ad interim* came before the Lord Ordinary (Lord Johnston) on 26 October 2001. The Lord Ordinary refused the application on the ground, among others, that section 21 of the Crown Proceedings Act 1947 had the effect of preventing the court from making an order for specific performance against the Scottish Ministers. He gave the petitioner leave to reclaim against his judgment to the Inner House.

4. The reclaiming motion was heard by an Extra Division of the Inner House (Lords Kirkwood, Nimmo Smith and Kingarth) on 29 and 30 October 2001. In the meantime the petitioner had been transferred from the conditions about which he was complaining to alternative conditions about which he made no complaint. As the need for a decision on the petitioner's application for an interim order had now gone, the court decided to appoint the reclaiming motion for an early hearing on the summar roll. The petitioner then amended his petition by adding craves for declarator that the order for specific performance which he sought against the Scottish Ministers could competently be made in an application to the supervisory jurisdiction of the court and that it was not precluded by section 21 of the Crown Proceedings Act 1947. On 18 December 2001, after a hearing on these issues over several days, a differently constituted Extra Division (Lords Marnoch, Hardie and Weir) by a unanimous decision refused the petitioner's reclaiming motion and adhered to the interlocutor of the Lord Ordinary: *Davidson v Scottish Ministers*, 2002 SC 205.

5. The petitioner then sought leave from the Extra Division which had pronounced the interlocutor of 18 December 2001 to appeal against that interlocutor to this House. It is not in

doubt that, as the petition for judicial review was still at an early stage, the interlocutor of 18 December 2001 was an interlocutory judgment. So it was an interlocutor of the kind for which, under section 40(1)(a) of the Court of Session Act 1988, the leave of the Inner House for such an appeal was required. Section 40(1) of that Act provides:

> "Subject to the provisions of any other Act restricting or excluding an appeal to the House of Lords and of sections 27(5) and 32(5) of this Act, it shall be competent to appeal from the Inner House to the House of Lords –
>
> (a) without the leave of the Inner House, against a judgment on the whole merits of the cause, or against an interlocutory judgment where there is a difference of opinion among the judges or where the interlocutory judgment is one sustaining a dilatory defence and dismissing the action;
>
> (b) with the leave of the Inner House, against any interlocutory judgment other than one falling within paragraph (a) above."

On 20 December 2001 the Extra Division by a majority (Lord Weir dissenting) refused leave to appeal.

6. The petitioner then embarked on the proceedings which have given rise to the issue which the Committee have been asked to consider. He presented a petition to the nobile officium to the Inner House. In that application he asked the court to hold that the interlocutor of the Extra Division of 18 December 2001 refusing his reclaiming motion and the interlocutor of 20 December 2001 refusing him leave to appeal to the House of Lords were each vitiated for apparent bias and want of impartiality, to set those interlocutors aside and to grant him leave to appeal to the House of Lords against the interlocutor of 18 December 2001. A breach of the requirement of apparent judicial impartiality was said to have occurred because Lord Hardie made statements during the passage through the House of Lords of the Scotland Bill while he was Lord Advocate about the effect of section 21 of the Crown Proceedings Act 1947 on the remedies that might be available to the courts in Scotland after devolution against the Scottish Ministers.

7. On 11 September 2002, following a hearing on the summar roll, the Second Division (the Lord Justice-Clerk (Gill) and Lords Kirkwood and Philip) held that Lord Hardie's involvement in the Scotland Bill had a material bearing on the question before the Extra Division, that a fair minded and informed observer would have concluded that there was real possibility of bias and that both interlocutors were therefore vitiated and must be set aside: *Davidson, Petitioner*, 2002 SLT 1231. The prayer of the petition was granted to the extent of setting aside the interlocutors of 18 and 20 December 2001. The application for leave to appeal to the House of Lords against the interlocutor of 18 December 2001 was refused. The reclaiming motion against the interlocutor of the Lord Ordinary was appointed to the summar roll for rehearing by a new Division. By that date the petitioner's release from custody was imminent. He has now been released.

8. The Lord Justice-Clerk expressed the following opinion, with which Lord Kirkwood and Lord Philip agreed, on the question whether leave to appeal to the House of Lords should be granted or the reclaiming motion should be reheard, at p 1237D-F:

> "[38] The petitioner has a reclaiming motion before the court in the previous process and has a right to have it heard and decided upon. We must therefore decide what further remedy we should give to the petitioner. Counsel for the petitioner moved that, in terms of the prayer of the petition, we should grant leave to appeal to the House of Lords. He relied on case law to the effect that the defect in a decision that has been vitiated in this way may be cured by an appellate court (cf Calvin v Carr [1980] AC 574 at pp 598-591; Re Medicaments and Related Classes of Goods (No 4) [2002] 1 WLR 269, Brooke LJ at paras 23-25). He accepted however that the court had an option to remit the case for a rehearing of the reclaiming motion before a properly constituted division.

> [39] Assuming that it would be competent in this case to grant leave to appeal to the House of Lords, I consider that that course would be inappropriate. No answers have yet been lodged to the petition. The first decision complained of does not exhaust the issues between the parties. It is confined to only one of several preliminary questions. If we were to allow the case to be appealed to the House of Lords there would remain other questions of relevancy, not to mention the substantive human rights question, that have yet to be decided at first instance.
>
> [40] In my opinion, the appropriate course is to set the interlocutors aside and to have the reclaiming motion reheard."

9. The petitioner has therefore failed on two occasions to obtain leave from the Inner House to appeal to the House of Lords against the interlocutor of the Extra Division of 18 December 2001 on the question whether section 21 of the Crown Proceedings Act 1947 precludes the making of an order for specific performance against the Scottish Ministers. The Scottish Ministers, for their part, wish to appeal against the interlocutor of the Second Division of 11 September 2002 on the question whether the interlocutors of the Extra Division of 18 and 20 December 2001 were vitiated by apparent bias because of the participation in those decisions of Lord Hardie. The question is whether the Scottish Ministers' petition of appeal is incompetent as they have not been given leave to appeal by the Inner House.

Discussion

10. Section 40(1)(a) of the Court of Session Act 1988 provides that it shall be competent to appeal to the House of Lords without the leave of the Inner House against a judgment on the whole merits of the cause. The issue in the present case is whether the nobile officium petition in which the interlocutor of 11 September 2002 was pronounced was part of the same cause as the petition for judicial review in which the Extra Division pronounced its interlocutors of 18 and 20 December 2001. Mr O'Neill QC for the petitioner submitted that the word "cause" in section 40(1) of the Court of Session Act 1988 should be given a wide meaning. He said that it was capable of embracing two different processes which were, in substance, concerned with the same subject matter.

11. There is no doubt that, although they were related to each other, the two petitions were treated by the court as separate processes. They had been presented to the court under different chapters of the Rules of the Court of Session 1994. The petition for judicial review was an application to the supervisory jurisdiction of the Court of Session which was made under rule 58.3. It was presented in the Outer House under rule 14. 2(e). The application to the nobile officium was made by way of a petition which was presented in the Inner House under rule 14.3(d). Each of the two processes had its own process number. It comes as no surprise to find that in paragraph 38 of his opinion in the petition to the nobile officium the Lord Justice-Clerk referred to the petition for judicial review as "the previous process". The petitioner sought to obtain relief under nobile officium against judgments which had been pronounced against him in his application for judicial review, but in point of form the two processes were separate processes. Furthermore, the interlocutor of 11 September 2002 was a judgment on the whole merits of the issue which was before the court in the petition to the nobile officium. That process is now at an end so far as the Court of Session is concerned. The issues between the parties that remain to be dealt with in that court are the issues which have been raised in the judicial review process.

12. In substance too the issues to which the two processes were directed are separate issues. In *Beattie v Corporation of Glasgow*, 1916, 2 SLT 314 Earl Loreburn examined the prohibition against appeals from interlocutory judgments except with the leave of the Division which pronounced these judgments. That prohibition was set out in section 15 of the Court of Session Act 1808, from which the current provision in section 40 of the Court of Session Act 1988 is derived. He said at p 315:

> "Now let us look at the nature of this statutory prohibition. As I read the statute it applies to interlocutory judgments, meaning judgments which are in substance interlocutory, not simply those that are in form interlocutory. A judgment may be interlocutory in form but final in substance as, for example, when it determines a liability to account, leaving merely the ancillary process of taking the account. The prohibition also applies where the judgment or decree is not on the whole merits of the cause."

In *Ross v Ross*, 1927 SC (HL) 4, 5 Viscount Dunedin observed that the whole gist of the matter was to be got out of Lord Loreburn's opinion in *Beattie's* case. At p 6 he said:

> "The test of finality in substance is whether the case would have been equally decided in substance whether the interlocutor under discussion had been pronounced as it was or had been pronounced to the opposite effect."

13. Testing the matter in that way, it is clear that the judgment of the Second Division in the application to the nobile officium was in substance final. The decision which the court reached in that process was a final judgment, and it would also have been a final judgment if it had been to the opposite effect. In that event the prayer of the petition would have been refused and the petition dismissed. As it was, the prayer was granted to the extent of setting the interlocutors of the Extra Division aside. The subject matter of this petition was finally disposed of when the court appointed the reclaiming motion in the judicial review process to be reheard by a Division which was differently constituted. There was nothing left for it to decide.

14. The Committee are therefore of the opinion that the petition for judicial review on the one hand and the petition to the nobile officium on the other hand are, both in form and in substance, separate processes. The interlocutor of the Second Division of 11 September 2002 was a judgment on the whole merits of the cause in the nobile officium process. The leave of the Inner House to appeal against that interlocutor is not required.

15. Mr O'Neill accepted that it was not open to the petitioner to appeal to the House against the interlocutor of the Extra Division of 18 December 2001, as he had been refused leave to appeal against that interlocutor by the Inner House. But he said that it was nevertheless his intention, if the appeal by the Scottish Ministers was allowed to proceed, to raise the issue about the effect of section 21 of the Crown Proceedings Act 1947 by way of a cross-appeal. The Committee wish to make it clear that it would not be open to him to take that course. The issue to which the interlocutor of the Second Division of 11 September 2002 relates is a self-contained issue against which there can be no cross-appeal. The issue which Mr O'Neill seeks to raise is the subject of an interlocutor in a process which is both in form and substance a different process.

16. In any event, the effect of the interlocutor of 11 September 2002 is that there is for the time being no valid judgment of the Inner House in the judicial review process against which an appeal can be made to this House. While their Lordships appreciate the petitioner's wish to have the issues raised in the petition for judicial review decided as soon as possible, the challenge which he himself has made to the independence and impartiality of the Extra Division due to the participation of Lord Hardie has raised an issue which will have to be disposed of first before further progress can be made in the judicial review process.

Recommendation

17. The Committee recommend that the incidental petition be dismissed.