Seminar organized by the Supreme Court of Ireland and ACA-Europe

How our courts decide: The decision-making processes of Supreme Administrative Courts

Dublin, 25 – 26 March 2019

Answers to questionnaire: United Kingdom

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UK Supreme Court Response to ACA Seminar Questionnaire – "How our Courts Decide: the Decision-Making Processes of Supreme Administrative Courts", Dublin, 25-26 March 2019

Section A:

A1. Supreme Court of the United Kingdom.

A2. The UK Supreme Court is the final court of appeal for the separate jurisdictions of (i) England & Wales, (ii) Scotland and (iii) Northern Ireland. The UK Supreme Court is the final court of appeal for all UK civil cases, criminal cases from England, Wales and Northern Ireland, and devolution and compatibility issues from Scotland, Wales and Northern Ireland.

A3. The UK Supreme Court is based in Parliament Square, Westminster, London. In 2017, the court sat for a week in Edinburgh, in 2018 for week in Belfast and this year plans to sit for a week in Cardiff.

A4. The website link is as follows: https://www.supremecourt.uk/.

Section B:

A5(a). The UK Supreme Court is a court of final appeal. Usually, it sits as a second-tier appeal court (following proceedings in a first instance court like the County Court, Crown Court or High Court, followed by a first-tier appeal in the Court of Appeal or, in Scotland, the Court of Session). Many appeals also originate from the specialist tribunal system in the UK, in which cases appeals tend to be third-tier appeals by the time they reach the UK Supreme Court (e.g. in employment, tax, social security and most immigration/asylum matters). Exceptionally, there is a leap-frog procedure from a court of first instance (which will hand down an initial judgment) straight to the UK Supreme Court. There is also a procedure for referring Bills passed by the devolved legislatures in Scotland, Wales and Northern Ireland direct to the Supreme Court for abstract review of whether they are within legislative competence before they receive Royal Assent.

A5(b). The UK Supreme Court has jurisdiction in all areas of law. The UK does not have a separate Supreme Administrative Court/Council of State. The usual test for permission to appeal to the UK Supreme Court is whether the appeal raises "*an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time*" (UK Supreme Court Practice Direction 3, rule 3.3.3). In practice, a high proportion of cases are public law in some shape or form – administrative law, tax, human rights or constitutional law – but the court also deals with contract, tort, property, family and criminal law.

A5(c). See A2 and A(5)(a) above.

Section C:

A6. There are 12 full time Justices of the Supreme Court. There is also a supplementary panel consisting of retired Justices and holders of high judicial office in each part of the UK.

A7. In the financial year 2017/18, the UK Supreme Court received 228 permission to appeal applications. These are usually dealt with on the papers and, if permission is granted (i.e. the filter stage is passed), they go to an oral final hearing. A small number of permission applications is dealt with orally, typically if they raise the possibility of a reference to the Court of Justice of the European Union or are exceptionally sensitive, such as in the recent assisted suicide appeal of *Conway*.

A8. In the financial year 2017/18, the UK Supreme Court disposed of 199 permission to appeal applications and heard 85 final appeals.

**Note that the Justices of the UK Supreme Court also all sit as judges of the Judicial Committee of the Privy Council, which is the court of final appeal for a number of Commonwealth jurisdictions, particularly from the Caribbean, and British Overseas Territories and Crown Dependencies. This forms a substantial part of the workload of the Justices and support staff (including judicial assistants). The approximate division of work is 65% Supreme Court: 35% Privy Council work.

Section D:

A9. No, the UK Supreme Court does not have chambers or divisions. A separate panel is constituted for each case. Panels typically include some Justices with expertise in the relevant area and others who do not. There are some areas, including most public law, in which all the Justices have relevant expertise.

A10(a)-(f). Not applicable. There is no chamber system or formal system of specialisation within the court.

A10(g). Most UK Supreme Court appeals have a panel of 5 Justices, but the court sits in panels of 7, if it may be asked to depart from previous Supreme Court authority, and, exceptionally, 9 or even 11 justices, in cases considered to be of particular public importance. Panels must have an uneven number.

A10(h). As stated above, occasionally, the UK Supreme Court sits in enlarged panels. The panel granting permission to appeal may recommend this but the final decision lies with the President and Deputy President. The published criteria are: (i) if the Court is being asked to depart, or may decide to depart from a previous decision of the House of Lords or UK Supreme Court; (ii) a case of high constitutional importance; (iii) a case of great public importance; (iv) a case where a conflict between decisions in the House of Lords, Judicial Committee of the Privy Council and/or the UK Supreme Court has to be reconciled; and (v) a case raising an important point in relation to the ECHR.

A10(i). No.

A10(j). The panel hearing an appeal is usually presided over by the President or Deputy President, but if they are not sitting, by the most senior (by year of appointment) Justice on the panel. The Presider presides over the (short) pre-court discussion, over the hearing in court, and over the (longer) post-hearing deliberations and decides who is to write the leading judgment. The presider and two other members of the panel are normally asked to give any procedural directions which may be necessary before the hearing (e.g. giving permission for interventions). The court does not have a *juge rapporteur* system. The Presider will also try to keep track of progress in producing the final judgment or judgments. The President, Deputy President and two most senior Justices preside over permission to appeal panels and complete the paperwork involved.

A10(k). The President and the Deputy President of the UK Supreme Court decide upon the panels to hear appeals. The dates for appeal hearings are usually agreed with the parties by the listing officer and draft panels for each hearing prepared by the Registrar. These are then submitted to the President and Deputy President for approval. The Registrar also prepares a draft allocation of permission to appeal applications which is then submitted to the President and Deputy President for approval.

A11. No, there is no advocate general system in the UK Supreme Court or any lower UK courts.

Section E:

A12. The UK Supreme Court is a small institution, with approximately 45 permanent staff across all areas of operation and an additional 45 additional staff employed on a service contract basis. Within the court, research assistance is provided mainly by the 8 judicial assistants ("JAs") to the justices. These JAs are all qualified barristers or solicitors and, with one exception, serve one-year fixed terms. Research assistance is usually done on direct request from the JA's assigned justice(s) or, at times, other justices sitting on appeals to which particular JAs have been assigned. However, the justices do a lot of independent research and the onus is on the parties' counsel to provide all relevant materials. Further, the justices benefit from administrative assistance by the secretarial, registry and other staff.

A13. Apart from research assistance provided directly by the JAs, the library team at the UK Supreme Court provides important support in sourcing case law, journal and legislative materials for both the justices and the JAs, on request and through regular updates.

A14. No, administrative and research functions are largely divided between different types of staff.

A15. As explained above, research work is mainly done for the relevant JA's assigned justice, but some justices make requests for assistance to other JAs who have been assigned to the particular appeal. Justices are free to ask either for their own JA or a JA assigned to the particular case for assistance.

A16. There is no additional research/documentation department, apart from the library.

A17(a). Some Justices request pre-hearing notes from the JAs, but not all do and some believe this to be wrong.

A17(b). Most Justices request research assistance from their JAs on a majority of appeals. The level of assistance varies, ranging from research on niche or discrete points in an appeal to overall research. Some Justices do not do this at all.

A17(c). Most justices have oral and/or email discussions with their JAs on, during and after appeals. Some do not.

A17(d). Consideration and evaluation of the relevant law forms a central part of the JA role. When assigned to appeals, JAs are provided the core appeal papers (including lower court judgments, the parties' written submissions on appeal and, electronically, the case law and legislative material). The JAs also sit on the oral final hearings with their assigned justices. But JAs are not responsible for the opinions of their Justices and some Justices form their opinions without reference to those of their JAs.

A17(e). Comparative law analysis in the UK Supreme Court is done ad-hoc and, where relevant, usually driven by the parties. At times, individual justices make research requests to the JAs on points dealt with only summarily by the parties or not at all.

A17(f). Judgment drafting is exclusively for the Justices. However, some Justices ask their JAs to provide notes summarising the parties' written and oral arguments or key case law and providing short written opinions on the merits/outcome of the appeal. The use of these made by Justices varies. Some Justices never do this.

A17(g). JAs do not put forward a suggested or preliminary decision for justices to consider, other than through informal case discussions and, occasionally, short written opinions on the merits of an appeal.

A17(h). JAs provide further research assistance and input on judicial lectures by their justices. This forms a substantial part of the JA workload and is also an area that justices spend considerable time on through their own personal research.

Section F:

A18. There is an oral hearing in every appeal.

A19. Not applicable.

A20. As a matter of practice, the assigned Justices on the final appeal panel meet for a short pre-hearing discussion.

A21. Yes, each case receives a listing suggestion from the permission to appeal panel (setting a time estimate) and there can be further correspondence on this between the court registry and the parties. Time limits for oral submissions are strictly adhered to and enforced by the presiding justice in court.

A22. No. In practice, the Justices adopt a relatively interventionist approach, with a large number of questions for each party's counsel to deal with. However, the hearing times – typically one to two days - are long enough to enable them to develop their case as they see fit.

A23. The parties' written submissions form the broad range of what counsel may address in court. However, the formal limitation comes from: (i) the original pleadings in the action (e.g. particulars of claim/grounds of judicial review, defence, reply, counterclaim); (ii) the relevant notice of appeal (setting out the grounds of appeal and issues in the appeal); and (iii) the terms on which permission to appeal has been granted by the UK Supreme Court. In practice, justices often raise further points given the court's role as a court of final appeal charged with an overarching role.

A24. Occasionally, with the permission of the appeal panel, parties will be allowed to file additional post-hearing written submissions. Permission is usually reserved for new matters that arose in oral argument and were not previously addressed in the parties' written submissions prior to the hearing.

A25. It is highly unlikely that a Justice would be excluded from proceedings based on a legal opinion expressed during an oral hearing giving rise to a perception of bias. The more difficult question is whether a Justice should be recused because of an opinion expressed in an earlier case. The UK Supreme Court has its own "Guide to Judicial Conduct (2009)", which reflects principles laid down in cases including *Porter v Magill* [2002] 2 AC 357 (HL). Further guidance is provided in Part 3 of the 2009 Guide, in particular at paras 3.7-3.16. The main grounds for automatic or discretionary disqualification from a case are family and other personal ties to the parties to the appeal, or a significant personal interest (financial or non-financial) in the outcome of the appeal. The guidance deals with these situations more fully.

Section G:

A26-27. Written submissions for final appeal hearings tend to be in the 30-40 page range (per party), but some are considerably longer. Interveners tend to provide shorter written submissions (10-20 pages). For permission to appeal applications, the grounds of appeal should "normally" be limited to 10 pages (UK Supreme Court Practice Direction 3, rule 3.1.2). In practice, many grounds of appeal at the permission stage exceed this 10-page limit.

*I note that the numbering of questions on the questionnaire is in error after Q26. I treat "Q20" in Section G as Q27 and proceed with that re-numbering in the remainder of this response.

Section H:

A28. Yes, of course. But caution is needed in private law cases where parties may have their own reasons for not raising a particular point. This does not apply to public law cases, where the court is trying to arrive at the right answer irrespective of the parties' concerns.

A29. See above. The Justices discuss each case after the hearing in a formal structured way – the most junior Justice speaking first, followed by the others in order of seniority. The probable outcome then becomes plain and the lead judgment-writing is assigned accordingly. But everything can change if Justices change their minds. What began as the lead judgment can turn into a dissent and what began as a dissent can turn into the lead judgment. This does not happen often.

A30. No, English is the only official and working language of the court.

A31. See response to Q29 above.

A32. Preferences for particular outcomes are usually communicated in oral discussions or by email, usually after the oral hearing.

A33. Oral hearings are greatly valued by the court and frequently influence the outcome.

A34. Not applicable.

Section I:

A35. It is open to each individual Justice to deliver a separate judgment. The court tries to achieve a single lead judgment which represents the view of the majority and thus the ratio decidendi of the case. But Justices can add concurring judgements or dissenting judgments. Lead, concurring or dissenting judgments can be sole or joint.

A36. Judgments are usually delivered in the justice's own name, with other justices either agreeing or disagreeing. Occasionally, judgments are written as judgments of the court without specific naming.

A37. The UK Supreme Court's judgments are all handed down in writing, usually accompanied by an explanatory press summary prepared by a JA. The Justice who gave the lead judgment or was the main author of a judgment of the court also provides an oral explanation for the general public (available on YouTube).

A38. Yes, judgments and orders are separate documents.

A39. No, all decisions take the form of orders.

Section J:

A40-45. There are no mandatory timeframes for decisions of the UK Supreme Court, whether at the permission stage or when disposing of an appeal by way of final hearing and order with judgment.

In practice, on average, it takes approximately 18 months from the filing of the permission to appeal application to final judgment. At the permission stage, Justices usually decide whether to grant or refuse permission on the papers within 12 weeks of filing. Thereafter, depending on the parties' requirements and availability, appeals are heard orally within 9-12 months. Judgment is then usually

delivered 3 months after the hearing, but timeframes vary depending on the complexity of the case and the level of (dis)agreement within the panel.

In practice, the larger the panel and the greater the level of disagreement within it, the longer it will take to deliver final judgment. But in some cases, final judgment is delayed because of the need to ensure consistency in cases with related subject matter.

Section K:

A46-48. No, there have not been any major changes to the conventional timeframes or procedures.

Section I:

A49. Not applicable. Our model of decision-making is that each Justice has to take responsibility for the decision, whether by agreeing in the lead judgment, providing their own reasons, or dissenting.