



## Briefing for the Public Petitions Committee

**Petition Number:** [PE1504](#)

**Main Petitioner:** Kathie Mclean-Toremar

**Subject:** Party litigants - Civil Appeals to the Supreme Court

Calls on the Parliament to urge the Scottish Government to consider changing the current legislation regarding Civil Appeals from the Court of Session to the Supreme Court. In accordance with paragraph 1.8 appeals from the Court of Session to the Supreme Court, a party litigant does not have the same rights as a criminal, a murderer, a sex offender or another person making the same Appeal.

### Background

The petition relates to a legal dispute in which the petitioner was involved and the rules which apply to party litigants (i.e. those without legal representation) who want to appeal

Court of Session cases to the United Kingdom Supreme Court (Supreme Court).

#### The petitioner's legal dispute

The legal dispute involved an insurance claim made by the petitioner in relation to a fire which broke out in the hotel which she owned. The insurance company did not accept this claim and voided the policy. The petitioner subsequently sued the insurance company in the Outer House of the Court of Session<sup>1</sup> and represented herself as a party litigant.

The Outer House found in favour of the defenders (i.e. the insurance company)<sup>2</sup> and the petitioner appealed this judgment to the Inner House of the Court of Session (Inner House),<sup>3</sup> again representing herself.<sup>4</sup> The Inner

<sup>1</sup> The Outer House of the Court of Session hears cases at first instance (i.e. cases that have not previously been to court). For details see the [Scottish Judiciary Court Structure guide](#)

<sup>2</sup> McLean or Toremar v CGU Bonus Ltd [2009] CSOH 78, para. 103

<sup>3</sup> The Inner House is primarily an appeal court, hearing civil appeals from both the Outer House and Sheriff Courts. For details see the [Scottish Judiciary Court Structure guide](#)

<sup>4</sup> McLean or Toremar v CGU Bonus Ltd [2012] CSIH 90

House also found in favour of the insurance company. It appears that the petitioner then wished to appeal the judgment of the Inner House to the Supreme Court (i.e. the final court of appeal for Scottish civil cases), but was unable to meet the procedural requirements to do so (see below).

## Appeals to the Supreme Court

### *Scotland*

In Scotland the general rule is that civil appeals to the Supreme Court are of right (i.e. without the requirement for the Inner House to grant permission – known as “leave to appeal”).<sup>5</sup> However, [Supreme Court Practice Direction 4](#)<sup>6</sup> puts certain procedural limits on such appeals (including those brought by party litigants),<sup>7</sup> providing that:

“In appeals where permission to appeal is not required (for example, in most Scottish appeals) the notice of appeal must be certified as reasonable by two counsel<sup>8</sup> from the relevant jurisdiction and signed by them” (para 4.2.2).

Under Rule 19 of the [Supreme Court Rules](#), the notice of appeal must be filed with the Supreme Court within 42 days of the date of the order/decision of the court.<sup>9</sup> For more details on Scottish Supreme Court appeals see paras 1.7–1.11 of the Supreme Court’s [guide to bringing a case to The Supreme Court](#).

### *England and Wales and Northern Ireland*

The rules for appeals to the Supreme Court from other UK courts differ from those in Scotland. Leave to appeal from the Supreme Court’s Appeal Panel (Appeal Panel) is needed. According to [Supreme Court Practice Direction 3.3.3](#) this will only be granted for applications that:

“raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal.”

In other words, for non-Scottish cases the Appeal Panel carries out a sift of cases considered suitable for appeal.

## Petitioner’s arguments

It appears that the petitioner was not able to find two counsel who would certify the appeal and so could not appeal to the Supreme Court.

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<sup>5</sup> Section 40 of the Court of Session Act 1988 as amended

<sup>6</sup> The Supreme Court’s Practice Directions are forms of procedural rules issued by the President of the Supreme Court which are used to regulate minor procedural matters

<sup>7</sup> See footnote 1 to [Supreme Court Practice Direction 4](#)

<sup>8</sup> The term “counsel” is defined by the [Supreme Court Rules](#) and includes advocates and enrolled solicitors (i.e. solicitor-advocates) with a right of audience in the Supreme Court

<sup>9</sup> This time limit can, however, be varied by the Supreme Court under Supreme Court Rule 5

The petitioner argues that the rule that two counsel have to certify an appeal provides “insurmountable hurdles and barriers ... for a Scottish party litigant to proceed to the Supreme Court”, and that it gives rise to an “inequality of arms” as it limits those who can appeal. The petitioner notes in particular that:

- in her view, party litigants are not able to approach counsel directly to request certification, but only through a solicitor;<sup>10</sup>
- solicitors may not have experience of dealing with party litigants and may be confronted with conflicts of interest preventing them from acting; and
- the 42 day period for filing a notice of appeal is too short.

The petitioner also appears to argue that the rule breaches Article 6 of the European Convention on Human Rights (ECHR) on the right to a fair hearing.

### **Scottish Government Action**

The Scottish Government recently (May 2013) consulted on [the treatment of civil appeals from the Court of Session](#). The consultation paper contrasted the current system in Scotland with that which applies in the rest of the UK and proposed that the rule that two counsel have to certify an appeal to the Supreme Court should be replaced by a more general requirement for the parties to seek leave to appeal.

The [Courts Reform \(Scotland\) Bill](#), introduced on 6 February 2014, builds on the above consultation paper and proposes that the current provisions for appeals (i.e. certification by two counsel) be replaced with a provision requiring the permission of the Inner House, or, failing such permission, permission of the Supreme Court (see section 111 of the Bill). If this section of the Bill becomes law, the requirement that two counsel certify appeals would no longer apply. Instead leave to appeal would be needed.

### **Scottish Parliament Action**

The Scottish Parliament does not appear to have conducted investigations into the specific issues raised by the petitioner.

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<sup>10</sup> In contrast, in its [response](#) to the recent Scottish Government consultation on [the treatment of civil appeals from the Court of Session](#), the Faculty of Advocates suggests that party litigants can approach the Faculty directly for assistance in this regard (see pages 3–4)

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