HIGH COURT OF JUSTICIARY, SCOTLAND

Unto the Right Honourable the Lord Justice-General, the Lord Justice Clerk and Lords Commissioners of Justiciary

PETITION

Of

Robbie the Pict
BROADFORD
Isle of Skye

To the

NOBILE OFFICIUM

Of the

HIGH COURT OF JUSTICIARY

26 May, 2014

Concerning

Appeal Reference HCA/2014-001643-XJ

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RESPECTFULLY SHOWS THAT THE DECISION DELIVERED BY LADIES SMITH, CLARK AND WOLFFE, IN '*Robbie the Pict v. PF PORTREE'* dated 22 May 2014, TO DENY THE APPELLANT ANY PUBLIC HEARING WHICH HE MAY ATTEND IN ORDER TO EVINCE HIS LEGAL ARGUMENTS WITH REFERENCE TO STATUTE, WAS WRONG IN LAW AND THUS CREATED AN EXTRA-ORDINARY MISCARRIAGE OF JUSTICE, PRINCIPALLY FOR THE FOLLOWING REASONS:

Re: Covering letter from Justiciary Clerks with "JUDICIAL COMMENTS" attached.

LADY SMITH, LADY CLARK OF CARLTON and LADY WOLFFE's names appear at the head of some 110 words described as "Judicial Comments" as opposed to a judicial Decision or Interlocutor. For the sake of brevity this will be referred to as the property of Lady Smith. It reads:

"For the reasons already explained by the first sift judge (sic) –reasons which we consider to be clear and entirely adequate – this appeal is not arguable."

Since there is no statutory definition of 'arguable' in the 1995 Act cited, we must seek common sense meaning of the condemnation 'not arguable'. It is based on the Latin root 'arguo' meaning to 'clarify' or to 'prove'. It would thus seem grossly prejudicial to state in advance that the appellant cannot possibly clarify or prove his challenges, and therefore refuse him the opportunity to even try.

Since Lady Smith adopts wholesale the thinking of Lord Stewart we may also consider 'not arguable' to equate with 'not stateable' as his Lordship claims. That phrase has at least been defined by the Scottish Government, in their justification of the sifting process, as meaning 'of no merit whatever'. This Petitioner wholly agrees that an appeal having 'no merit whatever' has no place clogging up the busy channels of the Scottish High Court of Appeal.

However, we are here dealing with an appeal which complains that the trial judge has failed to address the principal defence point. He has obviously then failed to give any reasoned judgment concerning that point. Lord Stewart, who appears to have considered the Sheriff's Stated Case disproportionately, therefore makes no reference to the principal point of appeal. (Lack of Home Secretary's signature and Seal of Office on the Approval Order for the Intoximeter EC/IR breath analysis device – please see below.)

So when the complaint from the first sift is that the sifting judge has **not given reasons**, or even noted, the principal point of appeal, and then the Judges at second sift state that **they consider the first Judge's reasons "to be clear and entirely adequate"** we seem to enter the realms of Franz Kafka and/or Lewis Carroll. This is 'Wednesbury unreasonable' and should have no place in Scottish jurisprudence. That is all that is said about a substantial criminal appeal, wherein legal argument citing statutory requirements, or complaints about procedural abuse, is evinced over some 30 pages.

The second part of the 'Judicial Comments' relates only to the request that the Appellant be allowed to attend the second sift, having experienced the frustration of his appeal arguments not being commented upon at first sift, giving the impression that they were not even read.

Lady Smith ignores the terms of the European Case Authority of ***Zuhk v. Ukraine*** **[2010]** in favour of reciting the terms of the Criminal Procedure (Scotland) Act 1995 at Section 107. However, the 1995 Act was passed prior to the arrival into force of the Human Rights Act 1998, some 3 years later. It might be useful to consider the fate of Sections 14 and 15 of the same 1995 Act at the hands of the Supreme Court in ***Cadder v. HMA*** **[26 October 2010]** wherein Lord Hope described 3 notable case authorities in Scotland as "no longer good law in the light of the Grand Chamber's ruling in Salduz and that they should be over-ruled."

Some of the following references to the right to a hearing may also be applicable to the sifting process. Secret courts denying public hearings where government shortcomings are concerned may no longer be best practice. **Justice is not seen to be done**, by any stretch of the definition.

CRIMINAL STANDARD OF PROOF

Any conviction wherein a criminal offence is alleged must meet the criminal standard of proof, not the civil standard of probability, the accommodation of social policy or any other deviation. Doubts about whether the Secretary of State has fulfilled statutory requirements or other duties placed on him by law, or even whether legislation is properly in place to secure the intent of Parliament must accrue to the defendant in a criminal prosecution. If a Parliament intends to employ the force of criminal law to ensure compliance with social policy then that legislation must be in lawful order and beyond challenge. The offence is not *mala in se* but *mala prohibita* and failure to comply with an artificial prohibition must be proved beyond reasonable doubt.

We now move to the meat of this Petition:

A. THE RIGHT TO AN APPEAL HEARING ACCORDING TO INTERNATIONAL LAW

The right to a hearing according to law which reviews a convicted person's principal points (at least) of appeal is entrenched in International Law [**Article 14.1 and 14.5 of the United Nations Covenant on Civil and Political Rights (UNCCPR) (1976)]** to which the United Kingdom (UK) is a State Party.

(1) UN COVENANT ON CIVIL AND POLITICAL RIGHTS (1976)

Article 14.1

1. All persons shall be equal before the courts and tribunals. **In the determination of any criminal charge against him,** or of his rights and obligations in a suit at law**, everyone shall be entitled to a fair and public hearing** by a competent, independent and impartial tribunal **established by law**.

Article 14.5

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

The terms of the above Covenant flow from the **Universal Declaration of Human Rights (UDHR) of 1948**, to which the UK is a signatory and State Party. The relevant **Articles, 2 and 10,** read as follows:

(2) UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

Article 2.

Everyone is <u>entitled to all the rights</u> and freedoms set forth in this Declaration, <u>without distinction of any kind,</u> such as race, colour, sex, language, religion, political or other opinion, **<u>national</u> or social origin**, property, birth or other status. Furthermore, **no distinction shall be made on the basis of the political, <u>jurisdictional</u> or international status of the country or territory to which a person belongs,** whether it be independent, trust, non-self-governing or under any other limitation of sovereignty**.**

In the jurisdiction of England and Wales an Appellant may attend and participate in a second sift hearing. In the jurisdiction of Scotland Lady Smith would deny the right of both attending a second sift and enjoying a review of a conviction in a public Court where the Appellant may evince his Appeal arguments while soundness of the criminal charge against him is determined.

Article 10.

Everyone is entitled in full equality to **a fair and public hearing** by an independent and impartial tribunal, **in the determination** of his rights and obligations and **of any criminal charge against him.**

"**Determination**" is of course defined as: 'a final conclusion by judicial decision' (Waverley), 'a settling of any controversy by judicial decision' (Longmans), 'the settlement of a dispute by the authoritative decision of a judge or arbitrator' (Oxford Dictionaries)**.** These definitions respect the Latin root '*termino*' = 'setting of a limit, end or boundary line', all indicating finality. In other words '**the determination'** is whatever occurs procedurally in the process of reaching a final decision point, beyond which there is no further appeal or process seeking redress of grievance.

(3) EUROPEAN CONVENTION ON HUMAN RIGHTS (1950)

The chain of argument then leads us to the European Convention on Human Rights and Fundamental Freedoms (1950). Although this had force of law from the coming into force of the European Communities Act 1972, it was given more respect when it was incorporated into the **Human Rights Act 1998 (at Schedule1).** Although the UK Parliament at Westminster failed to publish Article 13 concerning effective remedy, they seem to have forgotten that they had already signed up to that particular right in 1976 (above). Westminster also chose to omit the terms of the preamble, particularly the following:

"Considering the **Universal Declaration of Human Rights** proclaimed by the General Assembly of the United Nations:"

However Article 6 survives to read:

"1 **In the determination** of his civil rights and obligations or **of any criminal charge against him, everyone is entitled to a fair and public hearing** within a reasonable time **by an independent and impartial tribunal established by law.** ……

2 Everyone charged with a criminal offence shall be presumed innocent until **proved guilty according to law.**

3 Everyone charged with a criminal offence has the following minimum rights:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, **to be given it free when the interests of justice so require;**

(d) to examine or have examined witnesses against him and **to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;**

RETURNING TO THE UN COVENANT ON CIVIL AND POLITICAL RIGHTS

To square the circle countering Lady Smith's Opinion, that the Appellant's belief that an accused person has the right to a public hearing in the determination of a criminal charge made against him is "incorrect", we must return to the terms of the **UNCCPR (1976)** referred to above:

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, **without distinction of any kind**, such as race, colour, sex, language, religion, political or other opinion, **national or social origin**, property, birth or other status.

2. **Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.**

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated **shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;**

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

The Nobile Officium of the High Court of Justiciary may see fit to make a determination on that point alone and refer the Appeal back to the High Court of Justiciary (Appeal Court) for a full and public hearing, attended by the Appellant, and according to law.

B. THE ACTUAL GROUNDS OF APPEAL

1. RIGHT TO A REASONED JUDGMENT

The right to a reasoned judgement in response to at least the principal points of Appeal is considered an inherit aspect of a fair hearing and thus is due to the Appellant *(Hiro Balani v. Spain 1992).* Neither Lord Stewart nor Ladies Smith, Clark or Wolffe, all Judges with a civil background, have addressed the principal point of appeal, thus failing to consider the criminal standard of proof in any way.

The principal grounds in law, upon which the Appellant argues that the conviction is unsafe, has not been addressed by anyone in a judicial capacity, from the Trial Judge to Lady Smith's Bench.

To enable that claim to be tested by the Nobile Officium, their Lordships must find a justification in law for the absence of subscription and the absence of the Seal of Office of the Home Secretary of the day, 'One of Her Majesty's Principal Secretaries of State', on the Approval Order prescribing the Intoximeter EC/IR breath-testing device as 'Approved by the Secretary of State', thus permitting its information to be admissible in any Court in the UK as evidence, and making the ministerial approval 'enforceable in law'. Their Lordships must also find an enabling provision in statute, providing authority and means whereby such an Order may be issued with proper and universal authority.

The Crown has persuaded the trial Judge that the approval document is not a form of legislation and thus does not require a Cabinet Minister's signature or Seal of Office. A Scottish Case Authority, belonging ironically to Lady Smith, indicates that legislation requires proper subscription by the Cabinet Minister concerned **(*Somerville v. Scottish Ministers* – [2005] CSOH 24).** There is also irony in the fact that both the Crown and this writer cite the same case in support of their positions, namely *R. v. Skinner* [1968]; examination of that point alone would reap rich rewards, but the opportunity for clarity seems to have been forgone by all thus far.

The somewhat desperate manoeuvre by the Crown of claiming that the document is not legislation in favour of the device in question and thus seeking the protection of the so-called '*Carltona Doctrine'*, is a red herring. No matter what the nature of the approving document, it must, in law, be made by the Home Secretary and have his State Seal of Office affixed. In claiming that such a document is merely an administrative decision made under law, as opposed to the making of law itself, immediately presents a problem of universal enforceability, especially in Scotland. The Interpretation Act 1978 settles the matter of such instruments being legislative in nature.

PRIMARY LEGISLATION – ROAD TRAFFIC ACT 1988, Sections 7 and 11.

The only indirect reference to approval orders appears in both Sections 7 and 11 of the Act, merely as adjectival descriptions of types of devices. There are no enabling provisions, as compared with the likes of Section 20 of the Road Traffic Offenders Act 1988 (in relation to speed measuring devices). It is interesting to note that some Approval Orders cite section 7 and some section 11, highlighting the inadequacy of statute on this issue.

"Section 7.

(1) In the course of an investigation into whether a person has committed an offence under section 3A, 4 or 5 of this Act a constable may, subject to the following provisions of this section and section 9 of this Act, require him—

(a) to provide two specimens of breath for analysis **by means of a device of a type approved by the Secretary of State**, or……"

The purported Approval Order for the Intoximeter EC/IR in 1998 cites *Section 7(1)(a)* for its authority, therefore the Home Secretary (or another Cabinet Minister) must sign it.

An interesting comparitor is found in Section 11, where no enabling provision appears.

"Section 11.

Interpretation of sections 4 to 10.
(1) The following provisions apply for the interpretation of sections 3A to 10 of this Act.
(2) In those sections—
"drug" includes any intoxicant other than alcohol,
"fail" includes refuse,
"hospital" means an institution which provides medical or surgical treatment for in-patients or out-patients,
"the prescribed limit" means, as the case may require—
(a) 35 microgrammes of alcohol in 100 millilitres of breath,
(b) 80 milligrammes of alcohol in 100 millilitres of blood, or
(c) 107 milligrammes of alcohol in 100 millilitres of urine,
or such other proportion as may be prescribed by regulations made by the Secretary of State.
"registered health care professional" means a person (other than a medical practitioner) who is—
(a) a registered nurse; or
(b) a registered member of a health care profession which is designated for the purposes of this paragraph by an order made by the Secretary of State.

INTERPRETATION ACT 1978

Since this question involves statutory interpretation we are entitled to enlist the aid of the Interpretation Act 1978.

INTERPRETATION ACT 1978 [– Relevant Extracts]

"3. Judicial notice.

Every Act is a public Act to be judicially noticed as such, unless the contrary is expressly provided by the Act.

5. Definitions.

In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule.

11. Construction of subordinate legislation.

Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act.

12. Continuity of powers and duties.

(1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires.
(2) Where an Act confers a power or imposes a duty on the holder of an office as such, it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, by the holder for the time being of the office.

21. Interpretation etc.

(1) In this Act "Act" includes a local and personal or private Act; and "**subordinate legislation**" means Orders in Council, **orders**, rules, regulations, schemes, warrants, byelaws and **other instruments made or to be made under any Act**.
(2) **This Act binds the Crown.**

Schedule 1

"Secretary of State" means 'One of Her Majesty's Principal Secretaries of State'.

We can also be assisted by reading the terms of the Ministers of the Crown Act 1975 at Paragraphs 5-7.

MINISTERS OF THE CROWN ACT 1975

"SCHEDULE 1
PROVISIONS APPLYING TO CERTAIN MINISTERS AND THEIR DEPARTMENTS

[Paragraphs 1-4 are not considered relevant.]

5. The Minister shall for all purposes be a corporation sole, and **shall have an official seal**, which **shall be authenticated by the signature of the Minister** or of a secretary to the Ministry or of any person authorised by the Minister to act in that behalf.

6. **The seal of the Minister shall be officially and judicially noticed**, and every document purporting to be an instrument made or issued by the Minister and to be sealed with the seal of the Minister authenticated in the manner provided by paragraph 5 of this Schedule or to be signed or executed by a secretary to the Ministry or any person authorised as aforesaid, shall be received in evidence and be deemed to be so made or issued without further proof, unless the contrary is shown.

7. A certificate **signed by the Minister** that any instrument purporting **to be made or issued by him was so made or issued** shall be conclusive evidence of that fact."

So where, in the learned Sheriff's Stated Case, is any attempt to explain why a purported 'approval order', absent the signature of the Home Secretary and absent his State Seal of office, nonetheless meets the criminal standard of proof? Where is the *ratio decidendi* rebutting the claim that statutory requirements need to be heeded? Why can the rule of law be denied?

The above grounds of Appeal at (B) are repeated for emphasis and to draw attention to the gross miscarriage of justice. The remaining grounds of Appeal are insisted upon and are summarised in the Note of Appeal already lodged with the High Court of Justiciary at 'second sift'.

Any appeal which has the temerity to point out failures or short-comings on the part of the authorities, especially the judiciary, is bound for a rough ride in almost any country but that is the type of appeal which tests the mettle of a justice system. No judiciary can prefer the rule of political convenience to the rule of law. Such an attitude insults it *raison d'etre* and betrays the trust of the people, never mind breaching all professional oaths. A mature, intelligent and sophisticated system receives any complaint of substance graciously, taking the opportunity to

make corrections and reparations necessary, grateful for the opportunity to restore and preserve the standing of the law in the public mind.

Both sift process bear no evidence of having considered the principal document in any appeal process, name the Note of Appeal. Lady Smith even repeats the term in direct quotes, betraying either unfamiliarity or mockery, or both. The response of both sifts seems to have chosen simply to ratify the weak self-justification of a far-from-learned Sheriff, instead of examining and replying to the points of appeal made in accordance with statutory requirements. The Appellant has merely 'read statute out loud'. The person denying statute must provide justification for that radical act. The Crown was unable to do that during the trial process. The Sheriff simply failed to address the question so the reply to the points of appeal will not be found in the secondary document in a criminal appeal process, the Sheriff's Stated Case, merely a response as he wishes, or not.

BREACH OF ARTICLES 4 and 18 OF THE ACT OF UNION 1707

Finally, this petition is obliged to complain of a breach of Article 19 of the Act of Union of 1707, a foundation stone of the notional treaty between the Kingdoms of Scotland and England.

Article 18 protects the laws concerning Private Right in Scotland. As a sovereign integer, along with all fellow countrymen and women, this Petitioner claims the Private Right to have a public hearing of an Appeal against a criminal conviction before an independent and impartial tribunal, established by law. Section 107 of the Criminal Procedure (Scotland) 1995 seeks to deny that right, a right that existed in Scotland before 1995. It therefore offends the notional treaty between the Kingdoms, particularly:

"but that no alteration be made in Laws which concern private Right, except for the evident utility of the subjects within Scotland."

This Petitioner considers and asserts that his right granted in 1976 under the UNCCPR (above) at Article 14(5) qualifies beyond doubt as a human and private Right, namely:

"Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

The respecting of this right in English jurisdiction leads to a further breach of the notional treaty, at Article 4, which breads in part:

"**And that there be a Communication of all other Rights**, Privileges and Advantages which do or may belong to the Subjects of either Kingdom except where it is other ways expressly agreed in this Articles."

The Petitioner cannot find any express disagreement, unsurprisingly, with the canons of Human Rights originating from 1948 onwards, but nonetheless these canons grant rights to person in Scottish jurisdiction. To deny the right of attending even a second sift becomes an act of gross discrimination and thus violates Article 14 of the ECHRFF, which is now unquestionably directly applicable in the united kingdoms, courtesy of the Human Rights Act 1998, Schedule 1:

"Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

That private Right was in force as of the coming into force of the European Communities Act 1972 (January 1st, 1973) and the arrival of Section 107 of the 1995 Act purported to apply legislation incompatible with the Convention. However, it is the view of this petitioner that the coming into force of the Human Rights Act 1998 (in 1999) sounds its legal death-knell in Scotland as 'not Convention compliant'.

As we as a country embark on the great adventure of recovering our sovereign dignity, let us be confident that we can depend upon a Judiciary who will respect, uphold and work by the Rule of Law. It is the greatest gift the legal community can give to our People. Anything less would be an extraordinary miscarriage of justice.

According to law,

Robbie the Pict

Isle of Skye

26 May, 2014 (Styled without legal assistance.)

Appendix 1. Note of Appeal to Second Sift – Already supplied.

Appendix 2. Original Note of Appeal – Already supplied.

[Should there be any administrative difficulty in recovering or locating these appendices, please contact the Petitioner for immediate re-supply. RtP.]