

A Fair Trial Requires Public Courts (Full Submission) (Version 1.0)

‘Society depends on the courts to act as guardians of the rule of law... Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny’¹.

Summary

1. In Scotland, since the start of the Coronavirus (Covid-19) lockdown in March 2020, the Scottish Courts and Tribunals Service (SCTS), banned the press and public from the courts.
2. The common law rules on ‘Open Justice’ demand that the courts are open to the press and public (and therefore open to public scrutiny). There are some limited exceptions to these rules that come into play when a private² hearing is necessary to do justice. Any exception to the general rule must only be to the minimum amount necessary.
3. The total exclusion of the press and public from Scottish courts was unnecessary. Limiting the number allowed in each court with social distancing and screening measures in place would have satisfied the principle of Open Justice.
4. The SCTS are responsible for the smooth running of Scottish courts and tribunals. Senior judges control the SCTS. This is obviously a conflict of interest that goes beyond excluding the press and public from the courts. No one can get a fair trial or civil hearing when the judges have a dual role that creates a conflict of interest.
5. The exclusion of the press and public from the courts means that all trials and hearings are unlawful. All decisions made are void. All people involved, from defendants in criminal cases to the parties in civil cases, must be compensated for this violation of their human rights.

¹ R v City of Westminster Magistrate’s Court [2013] QB 618, cited in A v BBC [2014] UKSC 25 at para. 23

² Private means that the press and public are excluded.

6. All judges, prosecutors, court staff and lawyers have a duty to disclose that the holding of trials and hearings with the press and public excluded: is a) unlawful; b) a violation of their right to a fair trial or civil hearing; and c) unnecessary.

Introduction

7. One of the general legal principles of our court system is that trials and hearings take place in public. During the Covid-19 pandemic the Scottish Courts and Tribunals Service (SCTS) banned the press and public from the court buildings and courts.
8. The SCTS is a jointly run enterprise comprising senior judges and senior members of the Scottish Administration. It is obviously a conflict of interest to have judges a) deciding cases or appeals; and b) being responsible for the smooth running of the courts and tribunals system. Thus, any challenge to the correctness of holding private trials and hearings will have to argue the point against the very people who set these private hearings up.
9. This paper will first set out the facts and issues, then the law on Open Justice and related matters before applying this law. It will then conclude by showing that any trial or civil hearing held, without the press and public being allowed to be there, is unlawful. It will show that any judges, prosecutors, lawyers and court staff who failed to disclose these facts have acted unlawfully (in both the criminal and civil sense). All decisions made are void.

The facts and issues

10. During the Covid-19 pandemic the United Kingdom (UK) Parliament³ and the Scottish Parliament⁴ passed legislation that, amongst other things, allowed them to order people to a) stay at home; b) only go outside to buy food or to exercise once a day; and c) only go to work if they cannot work from home.
11. The Scottish Parliament Information Centre (SPICe) gives a timeline⁵ of Covid-19 in Scotland and the UK. SPICe report the first day of Lockdown as being the 24th of March

³ The Coronavirus Act 2020.

⁴ The Coronavirus (Scotland) Act 2020

⁵ See <https://spice-spotlight.scot/2020/07/09/timeline-of-coronavirus-covid-19-in-scotland/>

2020. There is no mention, by SPICe or the legislation or the Scottish or British Governments, regarding Open Justice.

12. In late March, the SCTS excluded the press and public from the court buildings. Appendix A shows the evidence that confirms this. Note: that in England and Wales similar restrictions are in place, but this paper doesn't cover this.

Facts and issues: The exclusion of press and public from the courts. Was it necessary?

13. The courts and tribunals provide an essential service⁶. The question that needs answering is: was it necessary to exclude the press and public or was it possible to limit their number and put social distancing and screening measures in place?

14. Supermarkets are another example of an essential service. People still shop, but have to queue and do their shopping with social distancing in place. There is screening and hand wash stations. These measures have worked, as there are no reports of mass Covid-19 infections starting in supermarkets.

15. All the courts and tribunals have public galleries. Screening, coupled with limiting the number of people allowed to be present, would have satisfied the principle of Open Justice.

The Scottish Courts and Tribunals Service. A conflict of interest

16. Section 60 of the Judiciary and Courts (Scotland) Act 2008 (JCSA 2008) sets up the SCTS: '(1) There is established a body corporate to be known as the Scottish [F¹⁹Courts and Tribunals] Service (referred to in this Part as "the [F²⁰SCTS]").'

17. The Lord President (Scotland's senior judge) is tasked with the responsibility 'for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts,' (Section 2(1)(a) JCSA 2008).

18. Schedule 3 JCSA 2008, amongst other things, gives the SCTS a membership of: The Lord President, the Lord Justice Clerk (the second most senior judge in Scotland), the president of the Scottish Tribunals, a Sheriff Principal, a Sheriff or Summary Sheriff, a Justice of the

⁶ <https://www.scotcourts.gov.uk/rules-and-practice/attending-a-court/coronavirus/coronavirus---business-update>

Peace, a person holding the position of Chamber President in the First-tier Tribunal for Scotland, an advocate, a solicitor, a Chief Executive and three other members.

19. Judges at all levels, alongside the Scottish Government, run the Scottish Courts and Tribunals. It is easy to see why this creates a conflict of interest: Any appeal happens when a party claims that something has gone wrong in the court below. This can be an error of law or procedure. If a judge on the appeal panel is also a member of the SCTS, then it is easy to see that their duty to decide the appeal fairly is compromised. They will have concerns about the possible disruption caused to the courts below if they send the case back for a retrial.
20. Lord Carloway, Scotland senior judge and chair of the SCTS, recently expressed his concern about the backlog of cases caused by Covid-19⁷.
21. The question to ask is: Does the dual role given to Scotland's judges by the JCSA 2008 make it impossible for anyone in Scotland to receive fair trial? The Fair Trial Project contends that the answer to this question is yes.

The law - Open Justice

22. Lord Reed in the Supreme Court set out the principle of Open Justice: 'It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny'⁸.
23. There is a long line of judicial decisions confirming the principle. The Supreme Court⁹, the House of Lords¹⁰, the Scottish High Court¹¹ and the Court of Session¹² have all done so. These decisions emphasise that all courts in the UK are open to the press and public and therefore open to public scrutiny. Any decision made in private is overturned¹³.

⁷ See <https://www.scottishlegal.com/article/lord-president-vows-no-court-solution-will-compromise-fair-trials>

⁸ *A v BBC* [2014] UKSC 25 at para. 23.

⁹ *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38; [2013] 3 WLR 179 cited in *A v BBC* at para. 31.

¹⁰ *Scott v Scott* [1913] AC 417 cited in *A v BBC* at para. 29

¹¹ *A v BBC* [2014] UKSC 25 at para. 38

¹² *Sloan v B* 1991 SC 412 cited in *A v BBC* at para 34.

¹³ *Storer v British Gas* at para. 35

The law: Exceptions to Open Justice

24. Sometimes, justice requires a case to be held in private¹⁴. Any exception must be to the minimum amount necessary. The Supreme Court gives an example of this at paragraph 31 of *A v BBC*. They cite Lord Neuberger in *Bank Mellat*¹⁵. He states that the principle of Open Justice is ‘fundamental to the dispensation of justice in a modern, democratic society.’ He then explained that any exception can ‘only be taken (i) if it was strictly necessary to have a private hearing in order to achieve justice between the parties, and (ii) if the degree of privacy was kept to an absolute minimum.’

The law – The European Convention on Human Rights (ECHR)

25. The Human Rights Act 1998 gives domestic effect to many articles and protocols of the ECHR. One of these articles is Article 6, The Right to a Fair Trial. Article 6 covers both criminal trials and civil hearings. The relevant extract is:

“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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. ...”

26. Article 6(1) echoes the common law principle of Open Justice. In *B and P v UK*¹⁶ the European Court of Human Rights stated: “The public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of article 6(1), a fair hearing, the guarantee of which is one of the foundations of a democratic society”

¹⁴ See *A v BBC* at paras. 27 to 41, for a list of the exceptions to the rule of Open Justice.

¹⁵ *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38; [2013] 3 WLR 179

¹⁶ *B and P v United Kingdom* (2001) 34 EHRR 529, para 36

The law: Human rights and proportional restrictions

27. In times of a national emergency, such as a pandemic, necessity may require some restrictions on human rights. But these restrictions must be proportionate. This means that any measure must satisfy the test of being strictly necessary¹⁷. The total exclusion of the press and public from the courts doesn't seem to satisfy any necessity. It is unnecessary, as the press and public could easily attend any trial or civil hearing with screening and social distancing measures in place.

The law: Judicial bias

28. Judges are required to be independent and impartial. In its simplest form this means being free from any actual bias and there being no other factor that may, subconsciously, 'distort a judge's judgment'¹⁸.

The law - Disclosure

29. Everyone involved in court proceedings has a duty to disclose any information that may make a trial or civil hearing unfair. Judges have a duty to disclose any conflict of interest before a trial or hearing takes place¹⁹. Government employees, such as prosecutors and the court staff, have a similar duty²⁰. All lawyers²¹ have a duty to their clients and to the court to make full disclosure of any matter that may affect a fair trial.

Application of the law to the facts and issues

30. It is contended (applying the principle of Open Justice explained in *A v BBC*) that all decisions made in civil and criminal cases, with the press and public excluded from the court buildings, must be overturned.

¹⁷ See the Scottish Human Rights Commission's explanation of proportionality and human rights restrictions during Covid-19 in Scotland here: <https://www.scottishhumanrights.com/covid-19/>

¹⁸ See *Davidson v the Scottish Ministers* (No 2) 2005 1 SC (HL) 7 at paragraphs 6 to 20.

¹⁹ See *Clancy v Caird* 2000 SC 441 at para. 10 and *Davidson* at paras. 19, 20 & 54.

²⁰ *McDonald v HMA* [2008] UKPC 46 at para. 60

²¹ *Hilton v. Barker Booth and Eastwood* (2005) UKHL 8

31. It is contended that it is criminal and civil fraud to fail to disclose the consequences of a trial being held in private to the people involved.
32. In relation to the SCTS and conflict of interest, it is contended that this conflict of interest is a structural flaw in the Scottish Courts and Tribunals system. No one can receive a fair trial or civil hearing while judges have two roles. A full submission on this conflict of interest will appear on the web-site.

The consequences

33. The total exclusion of the press and public from Scotland's courts is a threat to justice and the rule of law. The only fix is to redo everything and compensate those affected. The Fair Trial Project calls for the resignation of all involved.

What can I do about this? Further information.

34. Please sign up for the Fair Trial Project's free newsletter. The newsletter will keep you up to date with the various campaigns we are running to ensure that people get a fair trial.

Appendix A: Evidence of The Press and Public Being Banned from Court Buildings.

1. The Fair Trial Project visited Glasgow Sheriff Court on Tuesday the 28th of July. No members of the public were allowed to enter the court building. Both civil hearings and criminal trials were taking place.
2. A representative of the Fair Trial Project visited Glasgow High Court on Tuesday the 28th of July and was refused entry by security staff and the police. Criminal trials were taking place.
3. 21st July 2020 - <https://www.scotcourts.gov.uk/the-courts/court-locations/glasgow-sheriff-court-and-justice-of-the-peace-court> (this is a copy from the web-site)

General information

This court is open for business, but please note the following arrangements at this time.

This court is only open to staff, judiciary, those with permanent office accommodation, media or parties who are directly involved in cases being heard in the building and who have been requested to attend at court.

Where court cases require personal appearance, intimation will have been made to parties in advance of the court date.

There is no public counter and members of the public will not be permitted to enter, unless requested by the court.

Fines can be paid online and by phone. See Fines Payment for latest information.

4. 3rd July 2020 - <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2020/06/01/sheriff-courts-business-update> -

SCTS News

Sheriff Courts Business Update

Jun 01, 2020

We are beginning to reopen our courts and tribunals buildings this week, in line with the Scottish Government Covid-19 move into Phase 1 of their Route map.

Eric McQueen Chief Executive of the Scottish Courts and Tribunals said: “I appreciate we are a long way from a new business as usual; social distancing requirements will be with us for some time, and reduce our building and physical hearing capacity by two thirds. The emphasis therefore has to be on maximising digital and remote business solutions, reducing the number of people in any court and tribunals building.

This will be challenging for us all and we are all learning. In these last weeks remarkable progress has been made and we need to make that sustainable, as ultimately digital solutions will lie at the heart of our courts and tribunals system.

To ensure the safety of all staff, judiciary and courts users, extensive risk assessments have taken place in every building, with measures now in place to ensure that strict social distancing and the highest hygiene standards are achieved. We ask for everyone’s cooperation to make this a reality.

We have been working with the Sheriffs Principal to increase the scope of our business and services, with safety being our key priority. This week we are introducing staff and sheriffs to closed courts to bring as much business up to date as possible and to prepare courts for the re-introduction of business from week commencing 15 June."

Summary Criminal business

The Lord Justice General, Lord Carloway, has today issued [a Practice Note](#) on the re-introduction of summary criminal business.

Custodies are currently being dealt with by the 10 “Hub” courts and from Wednesday 3 June a further five custody courts will be introduced at Livingston, Kirkcaldy, Greenock, Dumbarton and Airdrie. This will provide extra capacity to ensure that the increasing level of custody cases can be dealt with safely and efficiently.

Our courts will continue to be closed to the public for some time and wherever possible we will aim to carry out hearings remotely or through application in writing. The [facility to allow](#)

[Solicitors to represent clients remotely](#) without attending court continues and we encourage all solicitors to make best advantage of this.

Similarly the [guidance to resolve cases at the earliest opportunity](#) by facilitating pleas of guilty remains in place.

With the exception of custody courts, which will remain at the 15 Hub courts, all business will move back to their own courts from week commencing 15 June. Custody trials will remain a priority and where practicable, non-custody trial courts will also be programmed to allow the acceleration of cases administratively adjourned during lockdown. All undertakings will attend local courts.

Intermediate diets will be dealt with at all courts and will proceed administratively on the basis of written records, provided electronically by the Crown and defence. The accused will not be required to attend, unless the court directs otherwise. Trials following on from these diets will call on the previously assigned date. Where a trial cannot proceed on the original date, a new date will be fixed and intimated.

Virtual Summary Trials will be conducted in Aberdeen and Inverness Sheriff Courts next week. These will support future arrangements for summary trials being conducted remotely in future. See [Practice Note 1](#)

Further guidance and orders will be issued by Sheriffs Principal specifying how cited courts will recommence in each Sheriffdom.

Civil Business

For civil business a three-stage approach will be followed for all cases except summary cause actions for the recovery of heritable property.

Phase 1 – current

We will continue to build on the civil business that has already restarted through the Hub courts, the developments with the All Scotland Sheriff Personal Injury Court (ASSPIC) and the Sheriff Appeal Court (SAC) which will have its first three bench virtual appeal this week.

Alongside this the main focus will be on the backlog of casework submitted during the lockdown. undefended actions, cases which have resolved by way of joint minute, unopposed motions, pending extract decrees and simplified divorces should be given priority. Other work such as initial writs, simple procedure and summary cause registrations will be processed as part of the backlog.

Urgent business will continue to be dealt with via Hub courts with Civil Restart Applications and commissary being dealt with at local courts.

Phase 2 – (no earlier than 15 June 2020)

Non-urgent new civil business, lodged after Phase 1, will now be processed, with the exception of new simple procedure claims and summary cause actions for the recovery of heritable property.

All documents should as far as possible be submitted electronically.

All existing civil actions that were administratively discharged, adjourned, continued, sisted or paused during the lockdown will be case managed to regulate further procedure, however it is unlikely that evidential hearings will be assigned during this phase.

Procedural and substantive hearings which do not require evidence to be led will be conducted remotely. In the few cases where evidence is necessary and the hearing cannot be held remotely witnesses will attend court and will require to adhere to strict physical distancing arrangements. Cases involving children will be given priority.

The urgent civil applications (via Hub courts) and restart application processes will cease at this point.

Phase 3 (no earlier than 30 July 2020)

New simple procedure actions can be lodged electronically only, via civil online (unless in exceptional circumstances and on cause shown).

Further procedure in actions for the recovery of heritable property will be progressed.

Small Estate interviews for commissary business will be able to take place remotely.

Further information

Further details and arrangements are included in Practice Notes which will be issued shortly for each Sheriffdom. Please note the phasing is entirely dependent on the progress of Scottish Government's route map in the coming weeks. Updates will be provided via the [SCTS website](#) and Twitter @SCTScourttribs.

5. The Chief Executive of the Fair Trial Project, Tom Muirhead, visited the High Court in Glasgow on the 15th of April 2020 and was refused entry to the court building.
6. The Chief Executive of the Fair Trial Project, Tom Muirhead, visited the Sheriff Court in Glasgow on the 15th of April and the 9th of July 2020. He was refused entry to the court buildings on each occasion.