Public Interest Immunity in Scots Law

Introduction

The Lockerbie case has already contributed significantly to the jurisprudence of the law of evidence. *Al Megrahi v HM Advocate*[1] continues in that vein, shedding some light on how the law relating to public interest immunity now operates following devolution.

The Case

Megrahi having unsuccessfully appealed against his conviction for murder, the Scottish Criminal Cases Review Commission under s.194B of the Criminal Procedure (Scotland) Act 1995, referred the case to the High Court on the basis that there may have been a miscarriage of justice in the case, since the Crown had not disclosed to the defence the existence of two documents which had been given by a foreign authority to the UK Government in confidence. Megrahi then presented to the court as petition for the recovery of the documents.

The Lord Advocate took the view that it would be appropriate to disclose these documents to Megrahi, subject to the right of the Advocate General to raise a plea of public interest immunity. The Advocate General, representing the UK government and specifically the Foreign Secretary, raised such a plea, producing a public interest immunity certificate signed by the Foreign Secretary which indicated that the disclosure of the documents would damage the UK government's international relations and threaten national security as a result of making foreign governments less wiling to communicate information to the UK government and to co-operate in areas such as counter-terrorism.

Counsel for Megrahi argued that the decision whether to disclose a document in her possession, during the course of criminal proceedings, must be taken by the Lord Advocate in her capacity as head of the system of criminal prosecution. The representation of any public interest in criminal proceedings, has been traditionally and remains the role of the Lord Advocate, who indeed has a duty to raise any public interest objection to disclosure. Thus since no public interest objection had been raised by the Lord Advocate, it must be inferred that she did not consider that there was a public interest objection to the disclosure of the documents sought. Accordingly, were the Advocate General to be entitled to intervene to prevent disclosure by the Lord Advocate, this would amount to direct interference by the UK Government in the pursuit of independent prosecutions by the Lord Advocate.

The court disagreed, noting[2] that while, prior to devolution, the Lord Advocate would consider questions of public interest immunity raised by other arms of the UK

[1] 2008 SLT 333.
[2] At para 12.

Government and weigh them against other interests, such competitions would be resolved within that Government. However, now that the Lord Advocate cannot be a member of the United Kingdom Government, 'distinct public interests may potentially be publicly in competition. To that extent at least there has been a practical change in the Lord Advocate's role consequent upon devolution.' The Lord Advocate's position that it was in the interests of the administration of justice that the documents be released to Megrahi, was clearly made subject to the Advocate General's plea of public interest immunity. Although the issue of public interest immunity in criminal proceedings had traditionally been raised by the Lord Advocate, and in appropriate circumstances might still be raised by her, that did not mean that it was always incumbent on the Lord Advocate herself to assert that immunity. Thus where, as in the present case, the particular public interests sought to be protected are peculiarly within the governmental responsibility of a UK minister, it is appropriate for the Lord Advocate to allow that minister to raise the plea of immunity, and permit the issue of competing public interests to be adjudicated upon by the court. The court thus rejected Megrahi's contention that the Advocate General's plea of public interest immunity was incompetent.

Commentary

The result in this case is hardly surprising, since it was inevitable, following devolution and the Lord Advocate consequently ceasing to be a member of the UK government, that instances would arise, especially in areas such as national security, where a branch of that government would be more appropriately placed than the Lord Advocate to raise a plea of public interest immunity. Such a situation has indeed long been predicted by commentators[3]. Thus it seems sensible that in such cases, the Lord Advocate having adopted the view that disclosure is in the interests of justice, that position is subject to the right of the relevant minister to raise a plea of public interest immunity. Ultimately, it will be for the court to decide whether or not to uphold the plea and the court in the present case pointed out that '[c]onsideration of the issues is likely to be better informed if there is represented before the court the party with the closest involvement with the public interest potentially in competition with the public interest in the administration of justice'.

It is of course implicit in all of this that while the public interest in the administration of justice may sometimes trump the competing public interest, there will be occasions when it does not, even though the liberty of an innocent man may be at stake. This is especially likely to be the case where the competing public interest is a powerful one, as where issues of national security are involved. It is clear, moreover, that the right to a fair trial in terms of Article 6 of the ECHR does not give an accused an absolute right to demand the production of relevant evidence, since the European Court of Human Rights observed in *Edwards v U.K.* that in some cases it may be necessary to withhold certain evidence from the defence to safeguard important public interests such as national security [4]. Thus it

[3] See M L Ross with J Chalmers, *Walker and Walker: The Law of Evidence in Scotland*, 2nd ed. (2000) para 10.9.2.
[4] (2003) 15 BHRC 189 at para 53.

remains to be seen whether the plea of public interest immunity will eventually prevail in this case.

It is also clear that there will remain cases where it will be appropriate for the Lord Advocate as head of the system of criminal prosecution in Scotland herself to raise a plea of public interest immunity e.g. where disclosure of the material in question would threaten the efficient operation of the system of the detection and prosecution of crime. In this context the court in *Megrahi*[5], having cited the views of Bingham L.J. in *Makanjuola v Commissioner of the Metropolitan Police*[6] that since the assertion of public interest immunity is not the exercise of a right but the observation of a duty, public interest immunity cannot in any ordinary sense be waived, expressly reserved its opinion as to whether such a duty is imposed on the Lord Advocate in Scottish criminal proceedings, 'and, in particular, whether the Lord Advocate is obliged to place before the court for decision every issue which gives rise to a public interest immunity question.' The court cited the example of the Lord Advocate deciding in a particular case that the interests of justice required the disclosure of information to an accused, 'albeit there might be a presentable argument that a public interest immunity consideration (say, the protection of informers) militated against such disclosure.' It may be suggested that it would be sensible for the Lord Advocate not to be under an absolute duty to raise the plea, since although the court is theoretically the final arbiter in such matters, it might be practically unworkable if every single instance where the question of the public interest might possibly arise required to be placed before the court. It is very likely that in practice the relevant ministers already engage in a balancing exercise before deciding to raise a plea of public interest immunity, as indeed the Foreign Secretary admitted doing in this case. While the question of public interest immunity may theoretically be raised by the judge if not raised by a party[7], there is no recorded example of this actually happening.

There is also the question of who else might be entitled to raise the plea. Lord Avonside stated in *Higgins v Burton*[8] that a claim of public interest could only be put forward 'by a Minister of the Crown or by the Lord Advocate'. This view was echoed by Lord Sutherland in *Parks v Tayside Regional Council*[9], who suggested that English decisions which suggested that public interest immunity might be claimed by local authorities and even private bodies required to be treated with caution in Scotland, albeit that he seemed to concede that private bodies might sometimes be able to protect material from disclosure by raising a plea of confidentiality. However, the court in *Megrahi* cited[10], seemingly with approval, the view of Lord Reid in *Rogers v Home Secretary*[11] that the plea might be raised by any interested person. It may be foolish to read too much into this, since the relevant dicta are quoted in relation to another issue, so that the question is hardly being addressed directly, but it is possible that the *Megrahi* case hints at a change of approach as regards this matter.

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[5] At para 14.
[6] [1992] 3 All ER 617at 623.
[7] Per Lord Reid in *Rogers v Home Secretary* 1973 AC 388 at 400.
[8] 1968 SLT (Notes) 52.
[9] 1989 SCLR 165 at 168.
[10] Att para 17.
[11] [1973] AC 388 at 400.

Finally, it might be asked what significance the case might have as regards the possible success of Megrahi's appeal against conviction. It will be recalled that the Scottish Criminal Cases Review Commission had referred his case to the High Court on the basis that there may have been a miscarriage of justice because the Crown had not disclosed to the defence the existence of the documents in question. The investigatory powers of the Commission allow it to secure access to such material[12], and it has been held that a plea of public interest immunity will not permit documents to be withheld from the Commission.[13] If the court is able to consider the documents in question, it may be that it will agree that there has been a miscarriage of justice because of the existence of significant evidence which was not heard at the original proceedings, there being a reasonable explanation as to why it was not so heard[14]. However, this depends on the material being available to the court. If an attempt to have the documents disclosed in later proceedings is met by a plea of public interest immunity, and that plea is upheld by the court, then there will be no new evidence for the court to consider and the appeal must fail. Many would regard this as a profoundly unsatisfactory outcome, but it would appear that the Lockerbie case may still have some way to go before it has run its course.

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[12] Criminal Procedure (Scotland) Act 1995 s.194I-J.
[13] Even documents which 'deal with questions of national security', per Lord Clarke in *Scottish Criminal Cases Review Commission v HM Advocate*, 2001 SLT 905 at para.17.
[14] In terms of the Criminal Procedure (Scotland) Act 1995 s.106(3A). As to the test for deciding whether the existence and significance of additional evidence should satisfy the court that there has been a miscarriage of justice, see *Megrahi v HM Advocate* 2002 SCCR 509 at para.219.