

Judgement day for the Supreme Court

Brice Dickson considers the Supreme Court's output in 2021...

IN BRIEF

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The only change to the personnel of the Supreme Court during 2021 was the appointment of Lady Rose, who replaced the retiring Lady Black in January. Lord Lloyd-Jones and Lady Arden retired earlier this month but by the start of this week, their successors had still not been named.

The Supreme Court issued judgments in 58 cases in 2021 (compared with 53 in 2020), still well below the average of 67 per year since 2010. The cases embraced 60 appeals, two cross-appeals, one reference and an exercise by the court of its original jurisdiction. Of the appeals and cross-appeals, 28 were won, a success rate of 45%, very close to the 2020 figure of 47%. Three of the 58 cases were Scottish in origin and only one was from Northern Ireland. There was also one leapfrog appeal—*Financial Conduct Authority v Arch Insurance (UK) Ltd and other appeals* [2021] UKSC 1, ALL ER 1077—a case on the effect of COVID-19 on insurance contracts, which involved no fewer than 13 QCs.

The reference concerned the legislative competence of the Scottish Parliament to enact two Bills purporting to incorporate provisions of treaties into domestic law, one of which was the UN Convention on the Rights of the Child (*Reference by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill Reference by the Attorney General and the Advocate General for Scotland - European Charter of Local Self-Government (Incorporation) (Scotland) Bill* [2021] UKSC 42). The exercise of original jurisdiction was the case in which a barrister was accused of contempt of court for publicising a decision of the court before it had been officially announced: *Her Majesty's Attorney General v Crosland* [2021] UKSC 15 ALL ER (D) 84 (May); his unsuccessful appeal against conviction was reported later in the year ([2021] UKSC 58).

Appearances

In all but four of the 58 cases, five judges sat, but in three of these the judgments were ultimately issued in the names of only four

judges: in one of them Lord Kitchin had fallen ill and in the other two Lord Kerr, very sadly, had died. In such cases, with the agreement of the parties, the presiding judge can issue a direction under section 43 of the Constitutional Reform Act 2005 that the court is still duly constituted by the remaining four justices.

The four cases in which seven justices sat were *Uber BV and others v Aslam and others* [2021] UKSC 5 4 ALL ER 209, a test case on whether private hire vehicle drivers were 'workers' for the purposes of employment rights; *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 [2021] 4 ALL ER 1 and *Meadows v Khan* [2021] UKSC 21, two cases on the scope of liability for negligence, heard separately but by the same justices; and *In the matter of an application by Margaret McQuillan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3) and others* [2021] UKSC 55 [2021] ALL ER (D) 52 (Dec), the case from Northern Ireland which focused mainly on the temporal effects of Articles 2 and 3 of the ECHR (the right to life and the right not to be ill-treated). In the first of these four cases a direction under section 43 of the 2005 Act had again to be issued due to Lord Kitchin's illness after the hearing.

The justice who sat most frequently in the cases decided during 2021 was Lord Lloyd-Jones (32 cases). He was the most senior of the justices other than the president, Lord Reed, who sat in 26 cases and the deputy president, Lord Hodge, who sat in 28. Lord Lloyd-Jones actually presided in one more case than Lord Hodge, while Lord Briggs presided on five occasions. Lord Sales sat in 29 cases while, Lord Kitchin, no doubt due to his illness, sat in only 12.

We must bear in mind that Supreme Court justices also sit in Privy Council cases, 32 of which were decided in 2021 (one fewer than in 2020). Lord Hamblen was the most frequent sitter there, appearing in 17 cases (53%). Interestingly, Lords Reed and Hodge sat in only six and eight cases respectively.

Judgments

The 58 Supreme Court cases gave rise to 82 separate judgments. In as many as 42 of the cases (72%), there was just one judgment, but 15 of those 'single' judgments were jointly authored by more than one justice—an increasingly common feature of the Supreme Court. There were a further six joint judgments in the remaining 16 cases. The justice who seems particularly keen on co-authorship is



Lord Sales, who was involved in seven joint judgments. Lord Hamblen delivered four and Lords Hodge and Burrows three apiece.

Lord Sales was also the most prolific judgment-writer overall, with 13 judgments (45% of his cases). He was followed by Lord Leggatt with 12 and by Lady Arden with 11. Strangely, despite presiding in 26 cases, Lord Reed, the president, delivered only eight judgments and Lord Hodge, the deputy president, who presided on 12 occasions and sat 28 times, delivered only seven. Lord Kitchin delivered just two.

In the Privy Council, where 37 judgments were delivered in all, Lords Sales and Hamblen each delivered six and Lords Burrows and Stephens each delivered four. The deputy president delivered just one judgment and the president none at all. In the eight Privy Council cases in which a non-serving Supreme Court justice sat, the committee's judgment was written by that *ad hoc* judge.

The trend towards fewer dissenting judgments continued. In only four of the 58 Supreme Court cases were there any dissents, although in three of those there were two dissenters. Lords Hodge and Sales each dissented twice, the only other dissenters being Lords Briggs, Leggatt and Stephens. In the Privy Council there was only one outright dissent—by Lord Sales in *Friedland v Hickox (Anguilla)* [2021] UKPC 3, a case on the interpretation of a settlement agreement and a mediator's award.



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Topics considered

The most common legal fields dealt with were employment law (six cases), tax law (five cases) and immigration law (four cases). Articles in the ECHR featured prominently in nine cases, with the right to a private life (Article 8) being the most often cited.

As usual, only a handful of decisions were given significant coverage in the national press. One was *Uber BV and others v Aslam and others* (above), where the court confirmed that Uber drivers were indeed entitled to a range of employment rights. This was followed a month later by *Asda Stores Ltd v Brierley and others* [2021] UKSC 10 [2021] 4 All ER 305, where it decided that for the purposes of an equal pay claim employees in Asda's retail operations were entitled to compare themselves with employees in its distribution centres. In *R (on the application of Begum) v Secretary of State for the Home Department* [2021] UKSC 7 [2021] 2 All ER 1063 the justices denied Shamima Begum's request to be allowed to enter the UK in order to challenge the home secretary's decision to deprive her of British citizenship. They asserted that the right to a fair hearing does not trump all other considerations, such as the safety of the public.

In July two big decisions were issued on human rights issues. In *Regina (SC and others) v Secretary of State for Work and Pensions and others (Equality and Human Rights Commission intervening)* [2021] UKSC

26 [2021] 3 WLR 428 Lord Reed, for the court, ruled that limiting to two the number of children in respect of whom child tax credit or universal credit is payable does not violate Articles 8, 12 or 14 of the ECHR. And in *R (on the application of AB) v Secretary of State for Justice (Equality and Human Rights Commission intervening)* [2021] UKSC 28 [2021] 4 All ER 777 the president again refused to hold that detaining a person under the age of 18 in solitary confinement was automatically inhuman or degrading treatment under Article 3 of the ECHR. In an apparent riposte to those, like Lady Hale and Lord Kerr, who wanted the court to move away from the so-called mirror principle set out in *R (Ullah) v Special Adjudicator v Immigration Appeal Tribunal* [2004] UKHL 26 [2004] 3 All ER 785, Lord Reed stressed that it was not the purpose of the Human Rights Act to provide for rights which are more generous than those available before the European Court of Human Rights.

In November, the court found that a 37-year-old single man with a complex diagnosis of autistic spectrum disorder combined with impaired cognition should not be permitted to engage in sexual relations because he did not understand the principle of consent: *A Local Authority v JB (Respond and another intervening)* [2021] UKSC 52 [2021] 3 WLR 1381. The Mental Capacity Act 2005 was not incompatible with Convention rights. Similarly, in December it ruled that UK law did not breach any Convention rights just because it did not permit passports to be issued indicating that the holder was 'gender neutral': *R (on the application of Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56 [2021] All ER (D) 53 (Dec). Lord Reed again insisted that if the Human Rights Act were to be interpreted as giving judges the right to find breaches of ECHR rights even where the European Court would not do so it would represent a substantial expansion of the constitutional powers of the judiciary at the expense of Parliament.

Interveners

The court accepted interventions in 20 cases (35%, up from 25% in 2020), from a total of 43 interveners. The Equality and Human Rights Commission intervened on four occasions. There were six interveners in *Lloyd v Google LLC* [2021] UKSC 50, where the court refused permission for proceedings to be served on Google in the USA because, in the UK, damages cannot be recovered by any individual for misuse of personal data without first proving what unlawful processing of data has occurred and what damage or distress has been suffered as a result. There were also six interveners in *G v G* [2021] UKSC 9 [2021] All ER (D) 77 (Mar), a case about the effect of an asylum claim on an application for the

return of an abducted child under the Hague Convention.

In *HRH Emere Godwin Bebe Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC 3 [2021] 3 All ER 191, where there were three interveners, including the International Commission of Jurists, the court reaffirmed its ruling in *Lungowe v Vedanta Resources plc* [2019] UKSC 20 [2019] 2 WLR 1051 to the effect that a parent company can incur a duty of care in respect of activities of a subsidiary if it maintains group-wide policies and guidelines. This was a welcome ruling for environmental activists as well as for the 42,500 appellants in this case.

The swing towards restraint

On the basis of its 2021 judgments, it is hard to deny that the Supreme Court is adopting a more restrained approach to its decision-making than was the case just a few years ago. With the likes of Lady Hale and Lord Kerr no longer on the court, it is not as activist as before. Apart from examples already given, one can point to the ruling that the recognition of foreign states, governments and heads of states is a matter entirely for the executive, to whom the courts must defer: *'Maduro Board' of the Central Bank of Venezuela v 'Guaidó Board' of the Central Bank of Venezuela* [2021] UKSC 57 [2021] All ER (D) 72 (Dec).

One can also refer to the long collective judgment of four justices (with whom three more agreed) in the *McQuillan* case (above), which looked at the effect of the Human Rights Act on investigations into killings and ill-treatment in Northern Ireland many years earlier. The court had previously held that a killing in 1989 required to be investigated in accordance with the requirements of Article 2 of the ECHR (*Application by Geraldine Finucane for Judicial Review* [2019] UKSC 7), but in *McQuillan* the justices made it clear that going back beyond that date would now very rarely be possible. This will give succour to the government, which is soon to publish a draft Bill on dealing with the past in Northern Ireland that will impose a limitation period on investigations and prosecutions into troubles-related crimes committed before 1998.

Differences between groups of justices on how to develop the common law also emerged in the Privy Council, where Lords Reed and Hodge sided with Sir Geoffrey Vos MR in adopting a more conservative approach to the handling of precedent in a case about freezing orders: *Broad Idea International Ltd v Convoys Collateral Ltd (British Virgin Islands); Convoys Collateral Ltd v Cho Kwai Chee (also known as Cho Kwai Chee Roy) (British Virgin Islands)* [2021] UKPC 24.

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