

Scottish independence

The road to a second referendum?

On 18 September 2014, the Scottish electorate voted on whether Scotland should become an independent country. The result was 55/45 in favour of remaining part of the United Kingdom but in the aftermath of Brexit support for Scottish independence has increased.

Recent opinion polls have shown that Scots are evenly split on the issue of independence. In the run-up to the Scottish Parliament elections on 6 May 2021, the two main pro-independence parties, the Scottish National Party (SNP) and the Scottish Greens, campaigned for a mandate to hold a second independence referendum whilst the pro-Union parties campaigned against a further referendum. Whilst the SNP were one seat short of an overall majority, the election produced a clear pro-independence majority in the Scottish Parliament with 72 out of 129 seats. The First Minister, Nicola Sturgeon, has made it clear that she views the election result as being a mandate for holding an independence referendum during the lifetime of the current Scottish Parliament.

Naming the date

The First Minister announced that the Scottish Government would aim to hold a referendum on 19 October 2023; however any such referendum would be subject to either the UK Government consenting to it or the Scottish Government being satisfied that it had the power to hold a consultative referendum.

Section 30 Order

The Scottish Parliament has legislative competence over all areas except for those which are specifically “reserved” to the Westminster Parliament. Two of the reserved areas are the “Union of the Kingdoms of Scotland and England” and the “Parliament of the United Kingdom”.

The competence of legislating for an independence referendum was not an issue in 2014 as the UK Government granted an order under Section 30 of the Scotland Act 1998 (Section 30 Order) that temporarily gave the Scottish Parliament power to legislate for, and hold, an independence referendum.

The Scottish Government requested a similar Section 30 Order from the UK Government in 2017 in the immediate aftermath of the UK serving notice of its intention to leave the EU. The then UK Prime Minister, Theresa May, rejected the request stating that “now is not the time”.

The First Minister has stated that any referendum must be legal and beyond challenge. She has emphasised that there will be no “wildcat” referendum and it is assumed that any vote must be one that is recognised by the international community, no doubt with a view to re-joining the EU and avoiding a possible Spanish veto if the referendum was held illegally. However, the UK Government has stated consistently that it would not grant a further Section 30 Order and Boris Johnson, whilst Prime Minister, talked of a 40-year gap between Scottish independence referendums. The Labour Party, which is the official opposition in the UK Parliament, has also signalled that, if it formed a UK Government, it would not consent to an independence referendum. Therefore, at present, it seems unlikely that a Section 30 Order would be granted by the UK Government.

Supreme Court Decision

In the absence of a Section 30 Order, the Scottish Government decided to pursue a consultative referendum without UK Government consent and proposed introducing a bill in the Scottish Parliament to legislate for such a referendum. In order to do so, the Scottish Government sought a decision from the UK Supreme Court on whether legislating for an independence referendum was within the powers of the Scottish Parliament. The Scottish Government argued that whilst a referendum related to the Union and the sovereignty of the UK Parliament, it would not have a direct effect on them as the referendum was consultative, it would not be “self-executing” and a Yes vote would neither end the Union nor the sovereignty of the UK Parliament over Scotland.

The UK Supreme Court issued a judgement on 23 November 2022 in which it decided that holding a consultative referendum was outside the powers of the Scottish Parliament. It concluded that whilst a referendum would not have the legal effect of ending the Union or the sovereignty of the UK Parliament, it was related to the Union and the UK Parliament and the result of the referendum would, depending upon the result, either strengthen or weaken the democratic legitimacy of the Union and that would have important political consequences for the Union and the UK Parliament. The UK Supreme Court also ruled that Scotland does not have a legal right to self-determination.

Impasse

The UK Supreme Court decision creates an impasse between the Scottish Government and the UK Government. The Scottish Government’s position is that it has a democratic mandate to organise a referendum, but it requires the consent of the UK Government which has stated that it will not grant it. Within the independence movement, there may be frustration that the obvious routes to independence are blocked but it is open to them to argue that the Union is no longer a voluntary relationship and that a democratic deficit exists in Scotland.

Next steps?

What are the options available to the Scottish Government in light of the UK Supreme Court decision?

Any “wildcat” illegal referendum organised by the Scottish Government can be ruled out and Nicola Sturgeon was clear that whilst she was disappointed, she respected the decision.

It is, of course, possible that the UK Government could relent and consent to a Section 30 Order, possibly with conditions attached relating to the franchise for, and mechanics of, such referendum but this seems unlikely although it is possible that this could change in the aftermath of the next UK parliament election which must be held by December 2024.

However, it is more likely that the Scottish Government will use the unwillingness of the UK Government to consent to an independence referendum as proving that Scotland lacks power within the Union. The First Minister has already said that she views the next UK election as being an unofficial referendum on independence and a good result for the SNP would be presented as support for independence. In the meantime, the Scottish Government will continue to develop and present its arguments for independence.

Going forward

There is little certainty about whether there will be a referendum in the next few years and, if there is, when it will be. We will continue to monitor the situation and share future updates on the issues of importance to the independence debate.

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