In Memoriam: Lord Rodger of Earlsferry (1944-2011)

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‘Non nobis solum nati sumus ortusque nostri partem patria vindicat, partem amici’¹

In delivering the address at a memorial service for the late Lord Davidson in July 2009, Lord Rodger commented: ‘What to say about Kemp Davidson when so much has already been written and said since his death? More especially, what to say when he himself would have wished so little to be said?’² By the same token, one must remain acutely aware that very little can either be written or said about Lord Rodger that has not already been imparted in adoration elsewhere and, perhaps, that the subject himself would humbly wish to receive. Nonetheless, the ASLR would like to add a modest contribution to mark the passing of an individual who had a substantive impact upon not only the legal profession but the development of the law in the United Kingdom and for that, his presence in the Supreme Court will be sorely missed.

When reflecting upon a life, it appears trite to list professional achievements. However, when confronted with such an extraordinary career it would be remiss not to highlight the successes of an academic, legal and judicial life so lamentably cut short. A Glaswegian by birth, Alan Rodger graduated with an MA from the University of Glasgow where he remained to read Law. Following a D.Phil. at the University of Oxford,³ under the supervision of the eminent Roman law scholar Professor David Daube, he was called to the Bar in 1974 and held the position of Clerk of the Faculty of Advocates from 1976-1979. Taking Silk in 1985, he was appointed Advocate Depute before becoming Solicitor General for Scotland in 1989 and, finally, Lord Advocate in 1992. His rise to the bench was swift, seeing appointment as a Senator of the College of Justice in 1995, ultimately assuming the role of Lord Justice General and Lord President in 1996. In 2001, he was made a Lord of Appeal in Ordinary and following the dissolution of the Appellate Committee of the House of Lords and constitution of the Supreme Court, subsequently became a Justice of the United Kingdom Supreme Court. These professional achievements were complimented by a number of honorary doctorates - from Glasgow, Aberdeen and Edinburgh - in addition to his appointment as a Fellow of the British Academy and the Royal Society of Edinburgh.

As both academic and judge, Lord Rodger excelled; selecting writings and cases from which to quote is an onerous task as they can only, at best, allude to the

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1 ‘We are not born, we do not live for ourselves alone; our country, our friends, have a share in us’, Cicero de officis, 1, 22. This text appeared on the cover for the Order of Service at a memorial service held for Lord Rodger on Friday 26 November 2011 at St Giles’ Cathedral, Edinburgh.
3 ‘Owners and Neighbours in Roman Law’.
abilities of their author. He was equally respected for his research and writing in the field of Roman law as he was for his career in the legal profession. Reflecting upon his expansive judicial legacy, law students can likely recount the significance of the cases of *Paterson v Lees*,4 *Drury v HM Advocate*,5 and *Galbraith v HM Advocate*6 in the field of criminal law. More recently, he delivered the unanimous judgement of the Supreme Court in *Re Guardian News Media*7 and was also part of the bench in *HJ & HT v Secretary of State for the Home Department*.8 The latter case serves to illustrate his capacity for ‘lively judicial commentary’,9 for, in addressing the deportation of gay and lesbian asylum seekers in the face of the ‘reasonable tolerability test’, he commented:10

(...) just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates.

Of course, these cases are to name but a few and can only superficially reflect his capacity for debate and his justly earned reputation on the bench. The practice of extra-judicial writing which has developed in the United Kingdom in recent decades saw Lord Rodger reflecting upon the utility of humour in the judicial opinion;11 the need for clarity when passing down judgements;12 and the requirement for civil justice reform in Scotland.13 Again, these are but select highlights of an expansive career but confirm the belief that Lord Rodger did not place the law and particularly Scots law, on a pedestal but recognised the need for continuing improvement and reform. Above all, he was conscious that in an era of devolution where statutes may be unique to Scotland, courts should be encouraged to provide the requisite guidance on their interpretation: ‘If the Scottish courts are not to provide that guidance, where in the world is it to come from?’14

Lord Rodger’s final contribution to the development of the law of Scotland would become the judgement of the Supreme Court in *Fraser*.15 The adversarial scene within which this judgement is set draws its background from the Court’s decision in

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4 1999 JC 159.
5 2001 SCCR 583.
6 2001 SCCR 551.
10 *HJ & HT* (n 8) [78] (Lord Rodger).
14 ibid.
Cadder. As the two Scottish Justices of the Supreme Court, Lord Hope and Lord Rodger were acutely aware of the likely impact of their decision. Per Lord Hope:

In one of my last emails to him I wrote my comment in Latin about what we should expect after it was given: ruat caelum, fiat just itia – let the skies fall in, justice must prevail. He did not reply, but I am sure that those words express exactly how he felt. He was not one for making the slightest compromise on the principles that he believed in.

We can indeed only speculate as to how Lord Rodger would have responded to the scathing political reception which Fraser was granted in Scotland. However, his comments in concurring with the judgement of Lord Phillips in Home Secretary v AF hint that he would, as Lord Hope notes, have been unperturbed: ‘Argentoratum locutum, iudicium finitum: Strasbourg has spoken, the case is closed’. Even within such brief sentiments an appreciation can be gleaned of the ‘clarity of thought’ and ‘rigorous intellect’ of which his fellow Justices speak in their tributes to him and, ultimately, the fearsome intellect which he brought to the bench.

In closing, I refer back to the comments of Lord Hope regarding the Fraser case: ruat caelum, fiat just itia. It is easy to be dismissive of such sentiments as either the lofty truths of those housed in ivory towers or the idealism of young lawyers. However, it is a principle which all lawyers should be unafraid to adhere to and one which Lord Rodger’s judgements were undoubtedly governed by. For that and his many other personal and professional qualities, his death truly is a profound loss to the legal community in both Scotland and the wider United Kingdom. In the words of Lord Hope:

It goes without saying that his contribution to the work of the Court is sorely missed. But I think that we can feel that the main steps forward that had to be taken have been taken. The pattern of our jurisprudence has been settled, and so have the tests that have to be applied. That is not to say that there is not more work to be done. But the path should be easier from now on. We must all be grateful to Lord Rodger for all that he has done to point us in the right direction.

We mourn his loss.

Alan Ferguson Rodger, Justice of the United Kingdom Supreme Court, was born on 18 September, 1944. He died on 26 June, 2011, aged 66.

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19 ibid [98] (Lord Rodger).
21 Let the skies fall in, justice must prevail.
22 Lord Hope (n 17) 25.