ADVOCACY IN THE SUPREME COURT

MASTER DAVID KITCHIN

I have been asked to say a little about advocacy in the Supreme Court. This is the latest in a series of articles published in *Graya News* in which their authors have offered guidance about effective advocacy in different courts and settings. I do so with some diffidence because many advocates appear in the Supreme Court regularly and do so with conspicuous ability and distinction, and they need no advice from me on this subject. But for others who have not yet appeared in the Supreme Court, or who have only done so only from time to time, this may be of interest, and so I offer, for what it is worth, this personal perspective, and I do so in the hope it may complete a little more of the landscape which other authors have been painting with such skill and lightness of touch in the other articles in this series.

I am going to focus on two aspects of advocacy before the Supreme Court: the written case and the oral argument. They are of considerable importance, and that is so whether the hearing takes place remotely or in person. As a result of the Covid-19 pandemic, all hearings in the Supreme Court were being held remotely until very recently. As I write, hearings are now once again taking place in person.

General observations

I start with a few general observations to set the scene and provide a little context. First, appeals to the Supreme Court are usually heard by a panel of five Justices. Some of these Justices may have more extensive experience of the particular area of law the subject of the appeal than others. But all of the Justices will be concerned to grapple with the issues to which the appeal gives rise, and your task as advocate is to persuade them or at least a majority of them, so far as you properly can, of the merit of the case you are advancing.

Secondly, the Justices do a good deal of reading and preparation before the appeal hearing. The core documents to which they turn include the statement of facts and issues, the written cases and the judgments of the courts below. Inevitably, as they read, the Justices will start to form preliminary views about the parameters of the appeal, the strength and depth of the reasoning of the lower courts and the wider implications of the issues raised by the appeal.

These preliminary views are rarely formed in a vacuum. The Justices may wish to remind themselves of the leading authorities. They may also be interested in any relevant jurisprudence of foreign courts, so far as it may shed light on the points they have to decide. If the appeal turns on the meaning of a domestic statute, the Justices may equip themselves with any permissible aids to its interpretation. Justices also welcome having their attention drawn to any published learning on the issues the subject of the appeal, including any commentary in reputable journals and in leading practitioner texts.

The written case

The relevance of the written case is now clear. This is your opportunity to develop your argument in writing, to present it in the most persuasive way and to minimise any risk of it being misunderstood. It is a document which the Justices will read before the appeal hearing begins, and it is one to which they will refer as the hearing progresses and to which they will return as they reach their conclusions and write their judgments. Experienced advocates often have their own way of preparing a written case, but some of the points I mention below may assist, give pause for thought or simply reinforce what you already know.

Structure

First, develop a structure. Consider carefully what you want to say and how best to develop your argument. You may wish to begin with an introduction or overview and a roadmap of your submissions. It is often helpful to include a summary of the key facts. Even at this level, the essential facts matter and can be determinative. But remember, the Court will also have (and will have read) the statement of facts and issues, so this is not an invitation to repeat what is already said there; nor is it an opportunity to re-argue the case on the facts. You must also address the points of law to which the appeal gives rise and the application of the law to the facts, and explain where, if it be your client's case, the lower courts fell into error. The way you deal with these issues and the order in which you take them are matters for you, but it is important that you have a plan and that a reader can follow it. A coherent argument is much easier to accept than one which is rambling and diffuse.

Concision

Concision is a virtue. A written case should not, without the permission of the Court, exceed 50 pages. This is a limit and it applies to all appeals, however complex and irrespective of the number of issues they raise. A word of warning: this is not an invitation to ask for a relaxation of the limit in the most difficult and intricate appeals (though that is certainly done from time to time, and such requests are acceded to where appropriate); it is instead a good reason to file a much shorter written case where the nature of the appeal and the precision of your argument allow you to do so. A case which says the same thing as one twice its length is likely to be much more effective. Do not forget that, even at this level, appeals often turn on one or two points, and the most accomplished advocates have an ability to identify what those pivotal points are likely to be, and to focus their submissions upon them.

Clarity and simplicity

Make your argument as simple as possible. Of course, over-simplification will not assist the Court. But it is much more common, even today, with page and time limits on written and oral submissions, respectively, to find that the written cases are unnecessarily complicated. A tendency to over-elaborate is perfectly understandable, but it will not make the argument more persuasive.

Citations

Resist the temptation to cite all the authorities you can find in the books or in the databases. It is much more important to identify the key authorities that bear on the issues raised by the appeal. Are they persuasive or distinguishable? You may have to grasp the nettle and explain why, for example, the reasoning of a strong appellate court is flawed, and invite the Supreme Court to find and declare that the case was wrongly decided.

Departing from an earlier decision

If you intend to invite the Supreme Court to depart from one of its own decisions or a decision of the House of Lords, you must make that clear in your written case. Similarly, permission must be sought if you intend to introduce a new point not taken in the courts below. Clarity on such points will promote the efficient use of the Court's time and avoid unnecessary confusion and distracting argument at the hearing.

Interventions

Interveners can bring a different, often broader, perspective to an issue that the Court is asked to decide. If you are instructed on behalf of an intervener, make sure your written case complies with the rules and any directions that apply to it (including, for example, the 20 page limit on its length).

No wigs and gowns in the Supreme Court.

Electronic bundles
Last but by no means least, familiarise yourself with the rules, directions and guidance concerning the filing and use of electronic bundles, including pagination and appropriate hyper-linking. Well-ordered and co-operatively prepared electronic bundles can bring enormous savings in time and cost. Conversely a disordered or incorrectly paginated bundle can be confusing and frustrating.

The hearing, whether held remotely or in person

This is your opportunity to develop your argument before the Court, to expand upon the points you believe to be most important, to answer the arguments made by the other side and to persuade a majority of the Justices to your point of view. Remember, you will be making your submissions when they can have a real impact.

Many of the points I have made above concerning structure, concision and clarity of thought are as relevant here as they are to the written case, and I will say no more about them. I am going to focus instead on a number of additional points that arise only or at least primarily in the context of the oral hearing.

Think it through
Keep firmly in mind a list of the propositions which are essential to your argument and try and shape your submissions and the debate around them. If you can identify these propositions for the Court, preferably early in your submissions, so much the better.

Build your argument on principle
Success may well depend on persuading a majority of the Justices that the points of law to which the appeal gives rise should be decided in your client's favour, and for that they may need to be satisfied that your argument has a sound foundation in principle.

Take the Court to the essential materials
If there is something in the record or in an authority which you think is particularly important for your argument, take the Court to it (unless you are directed to take a different course). It may not have the same impact if Justices are invited to read it later in their own time.

Do not read your notes
So far as possible, avoid reading long extracts from your written case or from your notes. It is usually apparent when an advocate is doing this and there are few things more likely to diminish the interest of the Court in the point the advocate is trying to make.

Engage with the Court
Take every opportunity to engage with the Court. I recognise that this may be easier to do when the hearing takes place in person, but it is no less important when the Court is sitting remotely. Lord Bingham of Cornhill referred in this context to an observation of the philosopher, Piero Calamandrei (*A Eulogy for Judges*, American Law Institute, 1992):

> 'The judicial process will have approached perfection when the discussion between judge and lawyer is as free and natural as that between persons, mutually respecting each other, who try to explain their points of view for the common good. Such an arrangement would be a loss for forensic oratory but a gain for justice.'

This aspiration reflects an undoubted truth: you are likely to be at your most persuasive when you have the full attention of all of the Justices on the panel, and a way to capture and retain their attention is to consider any hypothetical scenario that a Justice may put to you; to respond as directly as you can to any question you may be asked; and to address any issue that appears to be causing concern.

Remember too that the Court will want to understand the potential implications of your argument for the full spectrum of fact patterns that may engage the principles in issue, and also any related areas of law on which they may impinge.

Timing
Think carefully how to make the best use of the time you have been allowed for your submissions. It is not uncommon for an advocate to spend so long on one point that it leaves little time to address the points of most interest to the Court. Do not assume that any time your opponent has saved by concluding earlier than planned is 'ceded' to you: unless otherwise directed by the Court, the presumption will be that you have the time which has been allotted for your submissions, and no more.

A final word
As others have said, relish the occasion. If you are well prepared, as I am sure you will be, an appearance before the Supreme Court can be an exhilarating and rewarding experience, so enjoy it as much as you can. ■

The Supreme Court has a 'supreme' location in Parliament Square.