

REVIEW OF THE ROLES OF THE CROWN OFFICERS

Lord Carswell (Chairman)
Mrs Marie-Louise Backhurst
Mr Geoffrey Crill
Dr Sandra Mountford
Mr Ian Strang
Project Manager: William Millow

**ADVOCATE SINEL'S SUBMISSIONS AS TO THE INCOMPATIBILITY BETWEEN
ARTICLE 6 OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS AND THE CONSTITUTION OF THE ISLAND
OF JERSEY**

1. I have as requested now prepared and submitted a set of submissions relative to the deliberations of the panel. I had and indeed still have doubts as to the efficacy of the process in question. I will explain why under separate head.
2. Simply holding the views that I do, has I believe had a direct cost to me of over £100,000; there will doubtless be further repercussions involving direct and indirect abuses of power by those whose position would be threatened most by the radical constitutional reform which this Island both needs and deserves. I will expand upon the above points under separate head.
3. These submissions deal with the Island's constitution from a lawyer's perspective. I have endeavoured not to point the finger in relation to individuals but rather to deal with the obvious structural flaws in the constitution as it stands.
4. For the reasons following I believe that:
 - 4.1. Jersey's legal system is, in its entirety, fundamentally incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention");

- 4.2. The attitude of Jersey's authorities, in relation to the non compliance by the Island with the Convention is one of calculated defiance;
- 4.3. The Appellate procedure, for residents of the Island of Jersey, is insufficient, unsatisfactory and fundamentally tainted by the unlawful nature of the process below. Additionally there are in existence a number of additional aggravating factors in relation to the composition and appointment of the Court of Appeal such as render its process unlawful;
- 4.4. There are also defects in the methodology adopted by the Privy Council in entertaining appeals from Jersey's Court of Appeal, which mean that the Privy Council consequently acts in breach of Article 6 of the Convention;
- 4.5. The consequence of points 4.1 to 4.4 above being almost inevitable denials of justice.
- 4.6. There are no advantages but many disadvantages to the Island from the present constitution.

§ The Incompatibility of Jersey's Constitution and Legal System with the Convention

5. The fundamental problem is that the judiciary, executive and legislature are deeply entwined. This subject is expanded upon in the paragraphs below. For the present purposes it should be noted that the Head of the Island's Judiciary, the Bailiff, is also the Civic Head of the Executive and Head of the Legislature. The Bailiff is also president of the Court of Appeal.
6. Jersey's constitution has yet to be considered by the Court in Strasbourg, however there have been a number of analogous European and indeed English cases dealing with the Bailiwick of Guernsey and the Island of Sark.
7. In McGonnell v United Kingdom (App. No. 28488/95) [2000] ECHR 28488/95 ("the McGonnell case") the complaint concerned the dual function of Guernsey's Deputy Bailiff as both Legislator and Judge. The former was found by the Court in Strasbourg to make the Deputy Bailiff's role as a Judge untenable. Guernsey has a materially identical constitution to that of Jersey.

8. It is interesting to note that in that case, which examined in some detail the dual functions of the Bailiff of Guernsey, the mere fact that the Deputy Bailiff had presided over the States of Deliberation (Guernsey's equivalent of our legislative assembly) when the relevant statute was adopted in 1990, was capable of casting doubt upon his impartiality when subsequently sitting as sole judge of the law in a case concerning the Applicant's planning appeal. The Applicant in that case was found to have had legitimate grounds to contend that the Deputy Bailiff may have been influenced by his prior participation in the adoption of the statute in question. It was held:

"...That doubt in itself, however slight its justification, was sufficient to vitiate the impartiality of the royal court, and it was therefore unnecessary for the Court to look into the other aspects of the complaint."

9. It is perhaps unfortunate that that case did not go on to analyse the wider arguments arising from Guernsey's constitution.
10. The Bailiff and Deputy Bailiff in Jersey play almost identical roles in relation to the adoption of legislation to those played by their counterparts in Guernsey.
11. The case of *The Queen on the application of Barclay & Ors v The Secretary of State for Justice & Ors* [2008] EWCA Civ 1319, ("the Barclay case") is of great relevance. It is not a Strasbourg case but a decision of the English Court of Appeal in relation to the obligations of that country under the Convention. The matter then went on to the House of Lords but on a different point that is not relevant for today's purposes. In relation to the fundamental incompatibility between the constitution of Sark and the obligations of the United Kingdom under the Convention, there was no appeal. The matter was decided against the Secretary of State for Justice by the Court of Appeal and no further appeal was brought by the Secretary of State for Justice.
12. In the aforementioned case, the Court concluded that Sark's judicial system which is headed by the Seneschal, who was the ex officio President of the Chief Pleas (Sark's legislative assembly) and the Chief Judge fulfilled a

number of legislative and executive posts as well as judicial functions, which meant that the exercise of his judicial function breached Article 6 of the Convention. It is noteworthy that Sark's "new constitution", which was the subject of the challenge in that case, is considerably more advanced than that of Jersey.

13. In the Barclay case the Court said this:

"52. Article 6(1) of the Convention provides, in so far as is material:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law."

The Seneschal's position as Chief Judge must be seen in the context of his duties in Chief Pleas and also the existence of the power to make other judicial appointments for Sark.

.....

55. *The need to ensure impartial and independent adjudication, and to preserve the appearance of it, is heightened in a small community such as that of Sark, it is submitted by the appellants...*

56. *The Seneschal is protected, in judicial terms, it is submitted by the respondents, because his appointment, formerly for 3 years, is now for life and he may be removed from office only by the direction of the Lieutenant Governor and "for good cause" (section 6(2)). The appellants submit that, in the circumstances, the life appointment has made the position worse. The Seneschal's multiplicity of roles enjoyed without limit of time, make it impossible for him also to be Chief Judge.*

57. *Whatever the outcome of ground 1, it is submitted that the Seneschal's position as judge is inconsistent, in article 6 terms, with his legislative*

and executive duties. His influential political position, it is submitted, will inevitably and legitimately arouse in litigants appearing before him fears about his independence and impartiality.

.....

65. ... I do, however, see the combination in Sark of the judicial with the other functions of the Seneschal as inconsistent with the article 6 requirement to establish by law an independent and impartial tribunal. Subject to the limitations noted, Sark is a separate jurisdiction. ...
66. ... A judge independent of the legislature and executive is in my judgment required even for the comparatively modest litigation described in the Seneschal's diary.... (emphasis supplied)
67. ... The same people and issues with which he is likely to be dealing when presiding at Chief pleas, including issues arising from the Reform Law itself and the Guernsey Human Rights Law, may be the subject of litigation in his court. My conclusion on this aspect of the appeal in no way impugns the good faith or competence of the present Seneschal.
68. The law must provide a structure in which those who do, or who may, come before the court can be confident in the independence and impartiality of the judge. Given the Seneschal's position provided by section 5 of the Reform Law, provision in the law for the appointment of Deputies and Lieutenants, giving the Seneschal the power to recuse himself, though constructive and advantageous in itself, does not rectify the situation. The position of the Seneschal, sitting alone, as constituting the sole court of justice in Sark (section 5) in my view falls on the wrong side of the line of what is Convention compliant.

.....

69. *Unlike the Bailiff in McGonnell, the Seneschal cannot vote on legislation or rules in Chief Pleas but his close involvement in all proceedings there, which may well give rise to litigation, makes a concurrent role as Chief Judge on the Island inappropriate...*

.....

162. *The infringements of the Convention I have mentioned would be avoided if the Seneschal ceased to have any functions as President of the Chief Pleas, including the requirement to give his consent for extraordinary meetings. That would still leave him with an impressive variety of public functions. In particular, in addition to being the senior Judge on Sark, he would remain one of the four trustees in relation to property of the Chief Pleas and the Returning Officer for the purposes of elections held under the Reform Law. Those remaining functions, as a group, have a coherence in reflecting the kind of public service for which judicial independence and integrity are desirable."*

14. I turn now to the differences between Sark and Jersey. Mention is made at paragraph 66 of the aforementioned judgment of the size of Sark, with a population of some 600 people, giving rise to relatively limited amounts of litigation. Jersey has 90,000 people, it has a thriving finance industry and highly active civil and criminal courts. The Seneschal's mixed roles, in so far as was found relevant to his ability to fulfil a judicial capacity, was that as speaker in the Chief Pleas, non-voting, a position which he holds for life. The position of the Bailiff in Jersey is far worse.

15. The position of the Bailiff and that of the Deputy Bailiff in Jersey are almost identical. Accordingly it is convenient to deal with them together. They are the Chief Judges in Jersey, as such they preside over the majority of trials, both civil and criminal. They also control the appointment of other members of the judiciary, "the Commissioners" and are highly influential in the appointment of Jersey's lay assessors of fact "the Jurats", as well as presiding over and controlling appointments to the Court of Appeal.

16. Jersey operates a bugginses turn system of promotion. Ascension from Solicitor General to Attorney General, from Attorney General to Deputy Bailiff and then from Deputy Bailiff to Bailiff, being all but automatic. This system is not based on merit and a man ideally suited to being Attorney General may not be well suited to a judicial role and vice versa. These are not appointments made from within Jersey, the "appointments" in question are made by Her Majesty which is a euphemism for the English Minister for Justice. The appointments are effectively for life, expiring at the age of 70. In practice nobody at Whitehall has any real interest in the proper discharge or function by any Crown Officer in Jersey, provided that they do not provide too much embarrassment for those at Whitehall. In other words, they are without regulation, there are no checks and balances or quality control. No guidance is given internally or externally as to the proper discharge of their functions.
17. Both the present Bailiff and Deputy Bailiff were formerly the Attorney General of the Island of Jersey, during which period they had of necessity to become inured to the conflicts of interest inherent within their office, of equal necessity they formed what could only be termed wholly inappropriate relationships with the Island's politicians, civil servants and law enforcers. Given their antecedents and bearing in mind the comments made at paragraphs 57 and 67 of the Barclay case it is helpful to look further at what happens before the Bailiff assumes judicial office as well as examining the office itself.
18. The Attorney General acts as Chief Law Officer of the Island of Jersey. What this means in practice is that he is the legal advisor to the Crown, to the States Assembly, to the Ministers, and to the Scrutiny Panels, which should properly scrutinise the Ministers, and to all other public bodies, the latter two functions being clearly mutually incompatible. He is also expected to assist individual States members in the exercise of their public functions.
19. In short, the Attorney General is the Government's lawyer. In that capacity, he defends the Government from criticism and attack.

20. Further, the Attorney General controls the States Privileges and Procedures Committee, which can discipline States Members and he is also the Head of the Honorary Police in Jersey (Jersey having 12 Honorary Police Forces), which is distinct from the professional Police Force. It is noteworthy that the Honorary Police Force have the powers to charge people with arrestable offences, however, as the Head of the said Police Force the Attorney General can direct whether charges should be made or not. In his policing role, the Attorney General has under his control 12 Parish Constables, each representing the 12 Parishes of Jersey, who have ex-officio voting seats in the States Assembly and retain some policing powers. They are answerable to the Attorney General and arguably they are also influenced by him.
21. The Attorney General is a non voting member of the States of Jersey. He attends most if not all of the meetings of the States, the Solicitor General attending in his absence, he speaks in the States of Jersey and influences the outcome of debates accordingly. There are no statutory or constitutional restraints upon the Attorney General who is free to give speeches and advice that are politically rather than legally motivated.
22. The Attorney General is responsible for all prosecutions in the Island of Jersey. It is impossible to bring a private prosecution in Jersey as they are forbidden by statute.
23. Thus we have the impossible position, for example in relation to the ongoing child abuse scandal where the Attorney General is responsible for the proper function of the organs of state, he defends their reputation and defends them from attack, be it civil or criminal. Additionally, he advises the Crown in relation to claims against it for compensation by abused children. Simultaneously, he is responsible for the prosecution of child abusers.
24. To add to the difficulties inherent in the above mentioned positions, as stated above the Attorney General is also Head of the Island's Honorary Police. In Jersey, all charges are laid and all prosecutions are brought by the Honorary

Police, the paid/professional Police not having the ability to do this. Therefore there is an inherent conflict in the role of the Attorney General being the Chief Prosecutor as well as the Head of the Police Force.

25. By the time the Attorney General reaches the position of his all but automatic ascension to the position of Bailiff he will have spent many years fulfilling simultaneously an unelected political role while simultaneously functioning as the government's lawyer, as noted he also heads up and manages the Island's prosecution team in the shape of its police and Crown Officers. He has also built up a number of intimate relationships with the Island's politicians and senior civil servants, as well as playing a pivotal role in promoting legislation. Thus he cannot bring either the appearance or actuality of distance or impartiality to the discharge of any judicial function.
26. One of the primary functions of a judge in a functioning democracy is to act as arbiter between the State on the one hand and the individual on the other. The Bailiffs' prior role as Attorney General makes any incumbent uniquely unsuitable for that position. For the reasons set out below the position worsens upon appointment as Bailiff/Deputy Bailiff. Looking back for one moment to the McGonnell case, one of the functions of the Bailiff being to interpret and adjudicate upon the self same legislation which he has promulgated as Attorney General.
27. As already observed the Bailiff holds office until the age of 70. He is appointed by Whitehall and there are no theoretical let alone practical mechanisms for his supervision. There are as stated no operational checks and balances either locally or abroad, given that the job is by definition an impossible one that is most unfortunate.
28. No mechanism exists for chastisement, criticism or censure of the Bailiff in Jersey, theoretically that power rests with those in Whitehall who are in practice almost wholly disinterested in the wellbeing of the Island.

29. The Bailiff is also President of the States Assembly. That is to say that he convenes all meeting of the States and presides over all sittings. He controls the debates and in particular controls the contents of questions which can be asked of the Government.
30. In practice the position as President of the States is one of enormous political power. He controls what questions may be asked in the States, he is able to refuse to table questions such as might embarrass the Government, which he heads, himself or his supporters.
31. The Bailiff is by virtue of his position as President of the States of Jersey the Island's Chief Citizen. He represents the Island at home and abroad. When making visits on behalf of the Island or indeed receiving visits from Dignitaries, Politicians, Ministers and related.
32. When matters arise in relation to the Island and its relationship with Her Majesty's Government and it is necessary for a delegation to attend upon the relevant Minister it is usually the Bailiff who leads that delegation.
33. The Bailiff acts as the channel of communication between the insular authorities and Her Majesty's Government. In the words of the former Bailiff *"In the absence of a cabinet or central executive committee charged with the responsibility for governmental relationships with the United Kingdom, the Bailiff is the universal joint which enables the machinery of government to operate. He is the conduit through which official correspondence between the Insular Authorities and the Home Office is conducted [33]. Government by committee will not function unless some central authority exists."* Although this position has changed somewhat, as there is now in place a Cabinet and Ministers, Headed by the Chief Minister, the Bailiff's role is in reality has not changed and he still acts as the *"conduit through which official correspondence between Insular Authorities and the Home Office is conducted"* in conjunction with the Chief Minister.

34. The negotiating position of the insular authorities is always expressed in a formal letter from the Bailiff to the Lieutenant Governor.
35. The Bailiff exercises the power of control over public entertainment which may not take place without his permission. Thus an applicant for a permit is required to satisfy the Bailiff that the Fire Service, Public Health and other relevant authorities have no reasonable objection to the arrangements. Also it is up to him to assess whether or not the public entertainment conforms to a reasonable standard of public decency.
36. All of this is of course completely antithetical, not only to the democratic ideal but to any notion of judicial independence.
37. The unsatisfactory position is highlighted by the provisions of the Royal Court Rules 2004, Part 16. This Part deals with appeals against decisions of public bodies or authorities. All such appeals lie with the Royal Court. A number of statutes confer a right of appeal, for example from decisions of the Minister for Housing or the Minister for Planning and Environment. In other cases where no such right of appeal has been conferred by statute the provisions at Part 16 of the Royal Court Rules 2004 apply.
38. Part 16 of the said Royal Court Rules provides that no application for a judicial review may be made without obtaining leave from the Bailiff. That is to say the same man who has spent much of his working life advising the Government and indeed acting for the Government then becomes the head of the Government supervises the enactment of legislation and then sits on appeals from decisions of that self same Government or gives leave in order to do so, i.e., he can deny applicants the right to challenge decisions of the Government, as well as determining any appeals he may allow. This is a nonsensical position.
39. Insofar as concerns the Court of Appeal, the Bailiff is, by law, the President of the Court of Appeal. He is also responsible for convening the Court of Appeal

(see articles 9(1), 9(2) and 9(3) of the Court of Appeal (Jersey) Law 1961). Of equal concern is the fact that applications for membership of the Court of Appeal are processed through the offices of the Bailiff in Jersey. Thus it is that although many Members of the Court of Appeal are ostensibly appointed at Whitehall this is done upon a recommendation from the Island of Jersey by the Bailiff.

40. In so far as concerns the Court of Appeal in Jersey the case of *Findlay v United Kingdom* [1997] ECHR 22107/93 (“the Findlay case”) is of relevance here, dealing as it does with the need for a tribunal to be independent. In this case the convening officer was responsible for the appointment of the members of the court-martial. Those appointed were all subordinate in rank to the convening officer and fell within his chain of command. The Court here held as follows:

59. *The Commission declared the application admissible on 23 February 1995. In its report of 5 September 1995 (art.31), it expressed the unanimous opinion that there had been a violation of Article 6 para. 1 of the Convention (art. 6-1), in that the applicant was not given a fair hearing by an independent and impartial tribunal, and that it was unnecessary to examine the further specific complaints as to the fairness of the court-martial proceedings and the subsequent reviews or the reasonableness of the decisions taken against him and the available sentencing options.*

.....

68. *The applicant claimed that his trial by court martial failed to meet the requirements of Article 6 para.1 of the Convention (art. 6-1), which provides (so far as is relevant):*

“In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law ... ”

The Commission found that there had been a violation, in that the applicant was not given a fair hearing by an independent and impartial tribunal, and the Government did not contest this conclusion.

.....

73. *The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence (see the Bryan v United Kingdom judgment of 22 November 1995, Series A no. 335-A, p.15, para 37).*

As to the question of "impartiality", there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see Pulfar v United Kingdom judgment of 10 June 1996, Reports 1996-111, p.792, para.30).

The concepts of independence and objective impartiality are closely linked and the Court will consider them together as they relate to the present case."

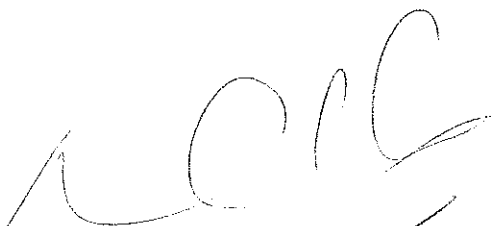
41. Thus the Court of Appeal is unable to satisfy the criteria of Article 6 for the provision of a fair and independent tribunal. In my view it has consistently failed to provide the Royal Court with an appropriate level of leadership and correction.
42. The Privy Council being in relation to the Channel Islands our third tier Court appeal also fails to act in compliance with Article 6.

43. No clear definition is available as to when leave to appeal to the Privy Council or more importantly special leave needs to be obtained. There are some esoteric definitions as to what is or is not a final decision of the Court, i.e., whether it is on interlocutory decisions and special leave is needed or whether the appeal may be brought as of right. The definitions are arbitrary and incomprehensible to the layman. Indeed I would go further and say that in many circumstances the procedure to be adopted cannot be ascertained with certainty notwithstanding the expenditure of considerable quantities of time and money.
44. There are no criteria as to when an application for special leave will be granted, applications for leave are frequently dealt with en masse, i.e., a large number in one day. The Court listens to the application and then in nearly all cases simply says that it will not entertain the appeal. There is no pretence that the Privy Council is dealing at this stage with appeals on the basis of merit.
45. No criteria are published but experience shows that the Privy Council will deal only with cases which it "deems to be of special interest to Her Majesty". This is a euphemism for when the Court would like to deal with it. As there are no published criteria, we can therefore only guess at what the criteria are that are going to be applied to the application before the Court. As it is, a great deal of time and money is spent by the applicant in applying to the Privy Council not knowing what he has to show in order to win, often an applicant is not told during let alone prior to the course of an application for special leave where the goal posts are, in other words the application can simply be dismissed without further mention.
46. In no way is such a system compliant with the word or spirit of Article 6 of the Convention. This is simply not a fair hearing, it is a lottery and as such has no proper place in a functioning judicial system.
47. No further appeal to Strasbourg is possible until the applicant has bought an expensive lottery ticket in the Privy Council.

48. It was apparent when the Court in Strasbourg delivered its judgment in McGonnell that time for the separation of powers was overdue in both of the Bailiwicks. However the McGonnell judgment has not had the effect locally which it should have done. The attitude of the authorities has been simply to explain it away or to circumvent it in some fashion. If McGonnell was the death knell in of the position of the Bailiff then the Barclay case was its Armageddon.

49. The Island has a constitution which:

- (i) places all incumbents be they Solicitor General, Attorney General, Deputy Bailiff or Bailiff in an untenable position; and
- (ii) is as far removed from the democratic and judicial ideals as possible; and
- (iii) is incapable of rational justification; and
- (iv) is unlawful.



.....
Advocate P C Sinel