MISCELLANY

Access to justice and legal aid in Jersey

1 Few would disagree with the proposition that access to justice is an important concomitant of a civilised society. The Royal Court has often indicated that a putative litigant's right of access to the courts is a significant matter.[1] Since 1991 the International Bar Association has asserted that legal aid is an essential element of access to justice, an assertion echoed in a resolution of the UN General Assembly in 2012.[2]

2 On 23 January 2014, the States of Jersey adopted a proposition of the Chief Minister[3] and agreed to establish a Review of Access to Justice and appointed four States members to an Advisory Panel. The Review was to provide, *inter alia*, a "comprehensive and factual description of the current legal aid system" and examine "the scope for alternative approaches". An interim report was to be submitted within six months and a final report in twelve months. The first interim report was presented to the States on 23 July 2014,[4] the second interim report on 29 July 2015,[5] and the third on 1 August 2016.[6] A final report has never been submitted.

3 What was presented, however, was a draft Access to Justice (Jersey) Law 201-, lodged *au Greffe* on 27 February 2018 ("the draft Law").[7]

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[1] See, *e.g.*, *Neville v Gorst* [2018] JRC 094 at para 6.

[2] Resolution 67/187 recognised that that legal aid is—

> "an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the righto a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process."

https://www.unodc.org/documents/justice-and-prison-reform/GA_67.187_English.pdf

[3] P.158/2013.

[4] https://statesassembly.gov.je/AssemblyPropositions/2013/P.158-2013.pdf?_ga=2.17088121.153618948.1543230336-1558807566.1543230336

[5] https://statesassembly.gov.je/AssemblyReports/2015/R.89-2015.pdf?_ga=2.41875426.153618948.1543230336-1558807566.1543230336

[6] https://www.gov.je/SiteCollectionDocuments/Crime%20and%20justice/R%20Access%20to%20Justice%20Review%20Third%20Interim%20Report%20%20161020%20DS.pdf

[7] P.50/2018.

The draft Law purported to establish, for the first time, "a legislative basis for legal aid in Jersey". In fact, the succinct legislative basis for the existing legal aid scheme rests upon the Code of 1771,[8] where the oath of advocates contains the obligation to give assistance "*aux Veuves, Pauvres, Orphélins, et Personnes Indefendues*".[9] That legal duty is owed by all advocates, notwithstanding the resolution of the Bar of 20 August 1904 which agreed that the legal aid obligation should be fulfilled by advocates of less than 15 years' standing *à tour de rôle*.[10] The same statutory obligation rests upon solicitors of the Royal Court.[11] It should be recorded, *en passant*, that the administration of the scheme is the responsibility of the Bâtonnier, whose lawful directions advocates are legally bound to follow.[12]

4 The draft Law was withdrawn as being out of time by the newly elected Chief Minister on 5 July 2018, and subsequently examined by a scrutiny panel in anticipation of being re-lodged. The draft Law was subsequently enacted as the Access to Justice (Jersey) Law 2019 and registered in the Royal Court on 18 October 2019 ("the 2019 Law"). It introduces a wholly new legal aid scheme for Jersey, which merits careful examination in due course. This note is not concerned with the substance of this important reform but seeks only to keep subscribers abreast of the glacial progress of its implementation.

5 On 22 July 2021, the States, by Act,[13] brought arts 1, 6, 7, 8, and 9 into force. Those articles, *inter alia*, established the Legal Aid Guidelines Committee (LAGC) and the ability of the Chief Minister to make Legal Aid Guidelines. Such guidelines, at the current rate of progress, seem a long way from being made.

6 The 2019 Law empowers the Chief Minister to publish guidelines for the administration of the new Legal Aid Scheme but circumscribes that power tightly. He can only do so "with the assistance of the Legal Aid Guidelines Committee".[14] Establishing the LAGC is itself quite an exercise. The LAGC consists of 12 persons including the Judicial Greffier who is the Chair. The members are the Attorney General, the

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[8] States Printers (Jersey, 1968); https://www.jerseylaw.je/laws/revised/Pages/15.120.aspx

[9] *Ibid*, at 74.

[10] *In re an Advocate* 1998 JLR *N*—14; https://www.jerseylaw.je/judgments/unreported/Pages/[1998]120.aspx

[11] See oath taken by solicitors upon registration; Advocates and Solicitors (Jersey) Law 1997, Schedule 1.

[12] *In re an Advocate*, 8 June 1998, unreported.

[13] Access to Justice (Jersey) Law 2019 (Appointed day) Act 2021.

[14] Article 7 of the 2019 Law.

Magistrate's Court Clerk, the Bâtonnier, the President of the Law Society, the CEO of the Law Society, two persons nominated by the Bailiff, two other persons nominated by the Chief Minister, and two States members nominated by the States. Each of the first five on that list may nominate another person to fulfil his/her role, but before doing so must first consult with the Judicial Greffier.[15] Before the LAGC can advise the Chief Minister, it must consult the Bailiff and Magistrate and "such other persons as it considers appropriate".[16]

7 Once the Chief Minister has the advice of the LAGC he must start to prepare the guidelines. In so doing, he must publish his proposals and seek representations form the public. The manner in which he publishes his proposals and in which the public can make representations must, however, first be prescribed by Order.

8 Such an Order, the Access to Justice (Legal Aid Guidelines) (Jersey) Order 2021 ("the 2021 Order"), has recently been made by the Chief Minister and came into force on 10 August 2021. This Order provides that the Chief Minister's proposal shall also be provided to the relevant Scrutiny Panel, the Jersey Citizens Advice Bureau Ltd and the Jersey Consumer Council.[17] He must publish the proposal on a website managed by the States of Jersey and publish a notice stating that he has done so.[18] The notice shall state a period of not less than eight weeks within which members of the public (but not the other consultees) may make representations about the proposal. Other consultees have more time. Certainly, a Scrutiny Panel would usually take more than eight weeks to consider and furnish its response.

9 The Chief Minister must then consider all the representations which he has received and finalise the guidelines.[19] It is not clear whether the Bailiff and Magistrate should again be consulted but it would seem courteous to do so. But the Chief Minister is still unable to publish the guidelines and bring them into force. He must first lay them before the States, specifying the date (at least four weeks distant) on which they are to take effect. During that period, any States member may lodge a proposition requesting the annulment of the guidelines, and they shall not come into force while such a proposition is outstanding. If the guidelines are annulled, the whole process must start all over again.

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[15] Article 6(4) of the 2019 Law.
[16] Article 6(7) of the 2019 Law.
[17] Article 1(1) of the 2021 Order.
[18] Article 1(3) of the 2021 Order.
[19] Article 7(6) of the 2019 Law.

10 It is a rather different process from that described by the CEO of the Law Society and a Jersey advocate in their 2013 article on legal aid.[20] At that time, and indeed to this day, the guidelines were issued by the Law Society after consultation with the Royal Court and the Magistrate. The Society considered itself to be master of its own destiny.[21] Benbow and Hanson concluded their article by stating—

> "We contend that the ownership of the legal aid scheme and the Rules (the *Guidelines*) rests solely with the profession and that it remains within its gift to effect necessary change. However, it wishes to do so in a spirit of co-operation and fairness, working with the States of Jersey and the judiciary to craft a scheme that is fit for purpose, that offers freedom of choice, maintains a burden on lawyers that is both fair and proportionate and above all, provides effective access to justice for those in need."

Some of those wishes may have been granted, but only at the price of ownership of the legal aid scheme. The legal profession no longer controls its destiny in this respect. That is perhaps not unreasonable as lawyers are to be paid for rendering some aspects of legal aid. The 2019 Law has shifted authority to the Chief Minister who now makes the Legal Aid Guidelines which set the parameters of the scheme.[22] It can only be hoped that this function is exercised with wisdom and common sense.

Remote working and employment law protection

1 According to the *Jersey Evening Post*, consideration is being given by the Government of Jersey to the taxation consequences of "remote working" from outside Jersey. The Income Tax (Jersey) Law 1961 imposes a charge to tax on non-residents whose employment is "exercised within Jersey". The potential for remote working from outside the Island has grown but the legal provisions that address this scenario exist very much for a former age. It is true that someone who never visits Jersey does not really receive services in the Island, so there is less need for them to contribute. However, it is also true that, in a society with zero/ten rates of corporation tax, income tax is the principal

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[20] "Who pays the ferryman? Legal aid in Jersey under the spotlight" (2013) 17 *Jersey & Guernsey Law Review* 145, para 88, at 168.

[21] That destiny might be shaped ultimately by the Royal Court—see the observations of Birt, Bailiff in the Court of Appeal in *Flynn v Reid* 2012 (2) JLR 226, at para 52, but that jurisdiction has never been exercised.

[22] A legal aid scheme was introduced in Guernsey by the Legal Aid (Bailiwick of Guernsey) Law 2003.

means by which economic activity is taxed. It is unsurprising that this is an area to which consideration is being given.

2 In reviewing the position of remote working from abroad, Jersey should spare a thought for the position of employment law protection. Indeed, so too should Guernsey.

3 By "employment law protection", we mean the various social rights and obligations imposed by statute on the relationship between employers and employees. In liberal democracies, employment legislation is invariably aimed at increasing the rights of employees given the usual imbalance of bargaining power when it comes to agreeing contracts of employment.

4 Such employment protection rights are a creature of statute. The territorial limits of those rights are a matter of statutory construction.

5 In the United Kingdom, different formulations have been used in respect of the territorial scope of employment protection rights. These provisions were consolidated in s 196 of the Employment Rights Act 1996 which set out two different approaches to the question of territorial jurisdiction.

6 Section 196(1) applied certain parts of the 1996 Act:

> ". . . when the employee is engaged in work wholly or mainly outside Great Britain unless—
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> (a) the employee ordinarily works in Great Britain and the work outside Great Britain is for the same employer, or
>
> (b) the law which governs his contract of employment is the law of England and Wales or the law of Scotland."

7 Section 196(2) applied other provisions—including the crucial protection against unfair dismissal—with a slightly different territorial reach. These provisions did not apply "to employment where under the employee's contract of employment he ordinarily works outside Great Britain."

8 The fate of these provisions is set out in the House of Lords decision of *Lawson v Serco.*[1] The provisions had used "deceptively simple-looking words" which the courts had long said needed Parliamentary attention. When Parliamentary attention came in the form of the Employment Rights Act 1999, the solution was to abolish the territorial scope and leave the courts to work it out for themselves. The House of Lords responded in *Lawson v Serco* by determining that their statutory

[1] [2006] UKHL 3, at para 8.

jurisdiction over unfair dismissal arises where the employment has a greater connection to the UK than to other jurisdictions.

9 When we turn to the position of Jersey and Guernsey, we meet the vicissitudes of drafting choices. Both Islands took inspiration from s 196 of the 1996 Act, but in quite different ways.

10 In Jersey, the Employment (Jersey) Law 2003, art 101(1) sets out a simple rule: "This Law applies to an employment which requires the person to work wholly or mainly in Jersey". It is the first part of the old s 196(1) test in the Employment Rights Act 1996 but shorn of the qualifications in parts (a) and (b). This has been understandably interpreted by the Jersey Employment and Discrimination Tribunal in *Le Moignan v C-Air Transport Services* to turn on whether the employee is required to work physically in Jersey, and whether this presence satisfies the "wholly or mainly" requirement.[2]

11 In Guernsey, s 4(1)(a) of the Employment Protection (Guernsey) Law 1998 deals with the territorial scope of the unfair dismissal protections in this way:

> "This Part of this Law applies to every employment other than:—
>
> (a) employment where under his contract of employment the employee ordinarily works outside Guernsey . . ."

This adopts the approach in s 196(2) of the Employment Rights Act 1996. As in the UK, this has been given the benign interpretation of meaning that "The eligibility to claim unfair dismissal is clearly defined in the Law as only being available to those who ordinarily work in Guernsey".[3] Although there is no suggestion that this jurisdiction requires that an employee should mainly be in Guernsey—very awkward for workers who are based out of the Island—it is hard to see how it could apply to someone who has no regular attendance in the Island.

12 It is doubtless open to the legislatures of the Islands to decide that, if someone spends absolutely no time in the Islands, then local employment protection legislation should not apply to them. However, the reverse point is equally open to the legislatures: it may be a concern that an employer can avoid the burdens of employment protection legislation by avoiding the employment of local people.

13 These are policy issues. But they are policy issues that have only now come into sharp focus and are potentially important. The legal

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[2] [2017] TRE 170, at para 23.
[3] *Newark v VTSI Ltd* EDO 21/15.

position of remote workers is, according to press reports, being reviewed in the area of tax. A review in the area of employment protection should also be considered.