FROM SARK TO THE SUPREME COURT

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This article was prepared following the judgment of R (Barclay) v Secy of State for Justice and Lord Chancellor and seeks to highlight some of the important constitutional findings made in the context of the Island of Sark.

1. Introduction

1 On 30 June 2014, an important constitutional case, *R (Barclay) v Secy of State for Justice and Lord Chancellor*,[1] was heard in the Supreme Court of the United Kingdom. The appellants were the Secretary of State for Justice and the Lord Chancellor, the Committee for the Affairs of Jersey and Guernsey and Her Majesty's Privy Council. The respondents (Sir David and Sir Frederick Barclay) had withdrawn from the proceedings and did not appear, but an advocate to the court was appointed given the significant constitutional issues raised by the appeal. Interveners were the Attorney General of Jersey and States of Guernsey.

2 The central issue concerned an appeal from a decision of the Administrative Court[2] to grant a declaration that the decision of the Committee for the Affairs of Jersey and Guernsey, recommending approval of the Reform (Sark) (Amendment) (No 2) Law 2010 ("the 2010 Law") was unlawful. A provision of the Law, according to the Administrative Court, was incompatible with art 6 of the European Convention on Human Rights ("ECHR"). At the heart of the case was an issue of jurisdiction—whether the English courts have jurisdiction to rule on the compatibility with the ECHR of a law enacted by the legislature of Sark. Two additional issues namely, justiciability (*i.e.* whether the lawfulness of the legal advice was justiciable in the High Court) and the compatibility of the 2010 Law with art 6 of the ECHR were also considered by the court.

3 The Supreme Court elected to hear arguments on the jurisdiction point only and, having done so, unanimously allowed the appeal and set aside the declaration made by the Administrative Court. In its judgment, handed down on 22 October 2014, it held that the courts of

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[1] UKSC 2013/0155.
[2] [2013] EWHC 1183.

the United Kingdom do have jurisdiction to judicially review an Order in Council which is made on the advice of the UK Government acting in whole or in part in the interests of the United Kingdom. However, whilst the Administrative Court did therefore have jurisdiction to entertain the respondents' claim, it should not have exercised it in this case. Lady Hale gave the substantive judgment, with which the other Justices (Lords Neuberger, Mance, Clarke and Reed) agreed.

2. The Channel Islands

Brief history

4 The Channel Islands are an archipelago situated off the coast of Normandy. They are Dependencies of the British Crown and consist of two separate bailiwicks, the Bailiwick of Jersey and the Bailiwick of Guernsey. Guernsey and Jersey were part of the Duchy of Normandy when Duke William, following his conquest of England in 1066, became King William I of England. They have since been subject to the English Crown as successor to the Dukes of Normandy. They have never, however, become part of England administratively or legally.

The Crown Dependencies

5 The Crown Dependencies are the Bailiwick of Jersey, the Bailiwick of Guernsey and the Isle of Man. The Bailiwick of Guernsey includes the separate jurisdictions of Alderney and Sark and the Islands of Herm, Jethou and Lihou. Jersey, Guernsey and the Isle of Man are not part of the UK but are self-governing dependencies of the Crown. They have their own directly elected legislative assemblies, administrative, fiscal and legal systems and their own courts of law. The Crown Dependencies are not represented in the UK Parliament. Guernsey has a directly elected legislature (known as the States of Deliberation) and operates a system of consensus government through multi-member Departments and the Policy Council, the latter constituted by the Minister of each Department and chaired by the Chief Minister. Guernsey has responsibility for its own domestic policies.

Relationship between Crown Dependencies and the UK

6 The relationship between the UK and Guernsey (and the other Crown Dependencies) has always been close. The unwritten constitutional relationship between the Islands and the UK is the outcome of historical processes and accepted practice. However, this relationship is in right of the Crown (as successor to the Dukes of Normandy), to whom allegiance is owed; it is not in right of Parliament or Her Majesty's Government.

7 The Crown Dependencies raise their own public revenue and do not receive subsidies from or pay contributions to the UK. They do, however, make annual voluntary contributions towards the costs of their defence and international representation by the UK. The Queen is the Head of State of each Island and the Lieutenant-Governor of each Dependency is Her Majesty's personal representative. The Crown is ultimately responsible for the good government of each Island (although the limits of this responsibility have never been tested), and HMG is responsible for the defence and international representation of each Island. The Crown exercises its responsibility for the Islands through a committee of the Privy Council charged with Channel Islands affairs (the Committee for the Affairs of Jersey and Guernsey, "the Committee") and it also makes appointments to certain judicial and other posts in each Island.

International relations

8 The long-standing practice of the UK when it ratifies, accedes to, or accepts a treaty, convention or agreement is to do so on behalf of the United Kingdom of Great Britain and Northern Ireland and any of the Crown Dependencies or Overseas Territories that wish the treaty to apply to them (for which, by convention, due consultation will have taken place).

9 In certain circumstances, the Crown Dependencies may be authorised to conclude their own international agreements by a process of entrustment. For example, all the Crown Dependencies have autonomy in domestic matters including taxation[3] and, having made commitments to the OECD on the exchange of tax information, they have consequently negotiated tax information exchange agreements (TIEAs) with an increasing number of other states by way of Letters of Entrustment issued to their Governments under the signature of the appropriate UK Minister.

EU & ECHR

10 The Channel Islands are not members of the European Union, but have a special arrangement with the EU by virtue of obligations arising under Protocol 3 of the UK's Act of Accession (the precise details of which are not necessary for the purposes of this paper).

11 The ECHR provided in art 63 (now art 56, since the Eleventh Protocol) that a Contracting State could declare that the Convention should extend to all or any of the territories for whose international

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[3] See, in relation to Jersey, the Preamble to the States of Jersey Law 2005.

relations it was responsible, with the effect that the provisions of the Convention would be applied in such territories "with due regard, however, to local requirements." The Convention was extended in this way to the Bailiwick of Jersey in 1953, and the First Protocol, which contains a similar power to extend in art 4, was extended to the Bailiwick of Guernsey in 1988.

12 In the course of the passage of the Human Rights Act 1998, the House of Lords rejected an amendment to apply it to the Channel Islands and the Isle of Man, and a similar amendment was withdrawn in the House of Commons. Instead the Convention was applied to the Channel Islands by domestic legislation. The Human Rights (Bailiwick of Guernsey) Law 2000, which applies in Guernsey, Alderney and Sark, has given effect to Convention rights and came into force on 1 September 2006.

Legislation

13 The legislatures of the Channel Islands are the States of Jersey, the States of Deliberation of Guernsey, the States of Alderney and the Chief Pleas of Sark. They have exercised legislative powers in relation to their respective jurisdictions for many years. Those powers arise predominantly under customary law and Royal Charter, and further to statutory powers created by way of Orders in Council. The independence of the Channel Islands to manage their own affairs and to enact their own legislation has been recognised for centuries. In particular, further to Charters granted by successive English monarchs from the 14th to 17th centuries, important rights and privileges of the inhabitants and the laws and customs of the Islands were acknowledged and ratified by the Crown.

14 In both the Bailiwicks of Guernsey (including Alderney and Sark) and Jersey the normal legislative process insofar as "primary legislation" is concerned is for the Queen in Council, acting on the initiative of one or more of the legislatures, to approve a draft Law, or *Projet de Loi* in the case of the Bailiwick of Guernsey, following a recommendation from the Committee. UK legislation does not normally extend to the Crown Dependencies. In instances where it does extend, it may do so either by virtue of the Act itself or by Order in Council made with their agreement under an enabling provision (permissive extent clause) contained in the Act. For an Act to extend directly otherwise than by means of an Order in Council is now very unusual. By convention, Departments of Her Majesty's Government must consult the Crown Dependencies at the earliest opportunity in the event that extension or the inclusion of a permissive extent clause in an Act is under consideration.

3. Sark

Background

15 Sark is part of the Bailiwick of Guernsey and has a population of about 600 people. The main Island of Sark is about 3½ miles long and at its widest point about 1¼ miles wide. In the adjacent territorial waters are numerous islets and rocks, the largest of which is Brecqhou, which is separated from Sark by the Gouliot Passage. There is evidence that Sark was variously inhabited and invaded, from about 3,000 BC onwards. However, by the end of the 14th century, the Island appears to have been largely abandoned and there is little evidence to show that the Island was used for anything other than for the grazing of animals and as a safe harbour for mariners (including pirates) for many years thereafter.

16 The circumstances of Sark changed decisively, however, in 1563 when Royal Commissioners granted the Island of Sark to Helier de Carteret, Seigneur of the fief of St Ouen in Jersey. The grant of the Island was subsequently confirmed by Letters Patent from Queen Elizabeth I that were delivered under the Great Seal on 6 August 1565.

The Chief Pleas of Sark

17 The legislative assembly of Sark is known as the Chief Pleas of Sark. Traditionally it was the assembly of the Tenants of the original Tenements established by Helier de Carteret in 1565. One of the conditions of the grant required him to ensure that at least 40 men occupied the Island for the purposes of its defence. In order to encourage such men and their families to live on Sark, de Carteret created a number of Tenements and the Tenants of those landholdings were entitled to a seat in the Chief Pleas.

18 Currently the Chief Pleas sit at least four times per year. The Tenants, however, as from January 2009, no longer have a right to sit and Chief Pleas currently consists of 28 elected members, known as Conseillers, and the Seigneur and the President of Chief Pleas. Neither the Seigneur nor the President has the right to vote at meetings of Chief Pleas, albeit the former has the right to speak. He also enjoys certain rights of appointment and has other historical rights, one of which is touched on below.

19 The Chief Pleas can legislate in two ways, that is by Law and by Ordinance. It can legislate for Sark on any matter by *Projet de Loi*, which requires Royal Sanction before it can have legal effect. The power to legislate is in part concurrent with that of the States of Deliberation of Guernsey which may legislate for Sark on matters of criminal justice without the consent of the Chief Pleas and on any other matter with their consent. Her Majesty in Council grants Royal

Sanction (by Order in Council) to any *Projet de Loi* presented pursuant to a recommendation by the Committee. She may also dismiss any petitions requesting Her Majesty not to sanction any *Projet* which may have been submitted, if that is the recommendation of the Committee.

20 In considering whether or not to recommend approval, the Committee will in general respect the decision of the Chief Pleas to approve a particular Law and there is thought to be a presumption in favour of recommending Royal Assent. However, consideration is given to the Crown's responsibilities so that if a *Projet de Loi*, or any provision of a *Projet*, clearly violates or is incompatible with the Crown's international obligations (for example treaty obligations, such as under the European Convention on Human Rights) then a recommendation may (exceptionally) be made to withhold sanction. (It is more common, but still exceptional, for draft legislation to be returned to a Crown Dependency by the Ministry of Justice identifying whatever issue there is and inviting the relevant legislature to reconsider. This was the case with an earlier draft of Sark's reform legislation.)

21 The Chief Pleas also legislates on a range of local affairs by Ordinance (which the Seigneur may veto, albeit this only has effect as a delaying power) made in exercise of customary law making powers or powers created under Laws (including the Reform (Sark) Law 2008). The Royal Court of Guernsey may annul an Ordinance on the ground that it is *ultra vires* the Chief Pleas, but the Chief Pleas may appeal to the Privy Council against the annulment.

22 Between meetings, the business of the Chief Pleas is conducted through various Committees which function in effect as the executive government of Sark.

The Seneschal of Sark

23 In 1675, the office of Seneschal was created by the Crown. The main function of the Seneschal was to dispense justice, as Sark's chief judge. However, the Seneschal's functions also included acting as president of the Island's legislature. The so-called "dual role" of the Seneschal (as sole resident judge and president of Sark's elected assembly) was held by the English Court of Appeal to be incompatible with art 6 of the ECHR in judicial review proceedings commenced in 2008 by Sir David and Sir Frederick Barclay. Following the court decision, the Chief Pleas decided to split the dual role and enacted the 2010 Reform Law which was designed to achieve an appropriate division of functions. The legislation was implemented in February 2013 when the current Seneschal was sworn in as Seneschal with almost exclusively judicial functions and the former Seneschal was

elected unopposed to the newly created office of President of the Chief Pleas of Sark on 27 February.

24 The court of the Seneschal has unlimited jurisdiction in civil matters, but a more limited jurisdiction in criminal matters. There is a right of appeal to the Royal Court of Guernsey, which also has concurrent first instance jurisdiction in civil matters and sole jurisdiction over more serious criminal matters. Appeals from the Royal Court lie to the Court of Appeal for Guernsey, and from that Court to the Judicial Committee of the Privy Council.

4. The central issues of the case

Background to the appeals

25 Far-reaching reforms to the traditional constitution of Sark were made by the Reform (Sark) Law 2008 ("the 2008 Reform Law") which, as mentioned above, was successfully challenged by the respondents to the current proceedings, Sir David and Sir Frederick Barclay, on the ground that the dual role of the office of Seneschal, as President of the Chief Pleas and chief judge, was incompatible with art 6 of the ECHR, in *R (Barclay) v Lord Chancellor and Secy of State for Justice*[4] ("*Barclay (No 1)*"). The 2010 Law was enacted in response, removing the right of the Seneschal to serve as President or member of the Chief Pleas and making provisions for office as chief judge alone. The respondents considered that these provisions were still incompatible with the principle of the impartiality and independence of the judiciary, required by art 6.

26 The respondents applied to the Administrative Court of England and Wales for an order declaring that the Order in Council made on 12 October 2011, by which Royal Assent was given to the 2010 Law, was unlawful because the Law was incompatible with the ECHR. The Administrative Court granted the declaration to the limited extent of declaring that a provision relating to the Sensechal's salary was incompatible with art 6 of the ECHR. The appellants therefore appealed to the Supreme Court on the grounds that the Administrative Court had no jurisdiction to do so or, if it had, that the jurisdiction should not have been exercised. A "leapfrog" appeal was permitted given the decision in *Barclay (No 1)* which had taken as its premise that there was in fact the jurisdiction now, for the first time, being disputed by the appellants.

27 In giving its judgment, the Supreme Court clearly affirmed that the UK courts do have jurisdiction to judicially review an Order in

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[4] [2010] 1 AC 464.

Council which is made on the advice of the UK Government acting in whole or in part in the interests of the United Kingdom.

The hearing—points to note

28 The Supreme Court decided on the first day of the hearing that it only wished to hear the parties' arguments relating to jurisdiction. Therefore, the arguments put forward by the parties in relation to justiciability and the art 6 ECHR point were not considered by the Court, albeit that, as the arguments progressed, it proved difficult at times to dissociate some of the jurisdiction points from issues of justiciability.

The judgment—key findings of the Supreme Court

29 It is not possible to state a general rule as to whether an Order made by Her Majesty in Council is amenable to judicial review in the courts of England and Wales, given the wide variety of circumstances in which such orders are made (para 26)

30 The Human Rights Act 1998 ("the HRA") does not apply to Channel Islands legislation as it applies in the Channel Islands, and does not include an Order in Council made in exercise of the royal prerogative in the definition of primary legislation subject to the HRA. For the courts of England and Wales to entertain challenges to the compatibility of Island legislation with Convention rights would clearly be to subvert the scheme of the Islands' own human rights legislation. A challenge to Sark legislation on the ground of incompatibility with the ECHR should therefore be brought in the Island courts under the Human Rights (Bailiwick of Guernsey) Law 2000, from which an appeal would ultimately lie to the Judicial Committee of the Privy Council. It is not for the courts of England and Wales to interpret the law of the Channel Islands or decide what is law there. The courts of the Bailiwick are infinitely better placed to assess whether legislation strikes a fair balance between the protection of individual rights and the general interests of the community and the appropriate forum for this claim for the purpose of ECHR. The courts of England and Wales should not have entertained the challenge in *Barclay (No 1)* (see paras 31–40).

31 The appellants had argued (with reference to the case of *Bancoult (No 2)*[5]), that the courts of England and Wales have no jurisdiction to judicially review the process whereby the Privy Council gives Royal

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[5] *R (Bancoult) v Secy of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 [2009] 1 AC 453.

Assent to Island legislation. Sark has a functioning legislature and its own system of laws and courts (unlike other Overseas Colonies), and this is a very powerful reason for the courts of England and Wales not to interfere with the business of the people of Sark. It does not follow, however, that there is no jurisdiction to entertain a challenge in a more appropriate case (see paras 46–47).

32 It is the clear responsibility of the UK government in international law to ensure that the Islands comply with such international obligations as apply to them. It is to be expected that any dispute will be decided by negotiation with the Island authorities but, if this proves impossible, a challenge could be made in the courts of England and Wales (paras 48–49). The reality is that the appellants advise Her Majesty both in right of the Bailiwick of Guernsey and of Sark and in right of the UK because of the UK's continuing responsibility for the international relations of the Bailiwick, but, unlike the position in *Bancoult No 2*, it is not enough to ask whether a person is acting "in right of" the United Kingdom or of a colony or dependency: the consequence will depend upon why that question is being asked.

33 The appellants are legally accountable to the UK Parliament, and to the UK courts in an appropriate case (this was not one such case). The question of whether they might also be accountable to the courts of the Bailiwick was left open as it was not argued before the court (para 57).

34 As a general proposition, the courts of the United Kingdom do have jurisdiction to judicially review an Order in Council which is made on the advice of the Government of the United Kingdom acting in whole or in part in the interests of the United Kingdom. Hence the Administrative Court did have jurisdiction to entertain this claim. Nevertheless, there are circumstances in which that jurisdiction should not be exercised. This was one such case (para 58).

35 Therefore, the appeal was allowed and the declaration made by the Administrative Court (that the decision recommending approval of the Reform (Sark) (Amendment) (No 2) Law 2010 was unlawful because the provision in that Law relating to the remuneration of the office of the Seneschal was incompatible with art 6 of the ECHR) was set aside.

5. Conclusions

36 The case confirms that the courts of the UK do have jurisdiction to judicially review an Order in Council made on the advice of HMG acting in whole or in part in the interests of the UK. This leaves open an avenue for some form of redress/review *inter alia* where Royal Assent is refused.

37 The court found that when advising Her Majesty, whether or not it is appropriate to make an Order giving effect to a Bailiwick or Sark *Projet de Loi*, the Lord Chancellor and other members of the Privy Council involved are advising Her Majesty both in right of the Bailiwick of Guernsey and of Sark and in right of the United Kingdom.

38 The court noted the common ground between the Ministry of Justice and the Crown Dependencies that there is a strong presumption in favour of granting Royal Assent to a measure which has been passed by an Island legislature.

39 The court did not hear the arguments concerning justiciability and made no decision about the grounds upon which Royal Assent might lawfully be withheld, but did state that any statement in the judgments in the *Barclay (No 1)* case as to the scope for withholding Royal Assent cannot be treated as authoritative.

40 In the longer term, it remains to be seen if any challenges to future (or extant legislation) on HR grounds are made in the Bailiwick courts. The Supreme Court case has not decided the ECHR point (as the arguments were not heard) but clearly, should that point be pursued, it is beyond doubt that the matter would be so pursued within the Bailiwick courts.

41 Finally, appeals to the Supreme Court will only be heard if they "raise an arguable point of law of general public importance". This case clearly did so, and whilst the specific issues in the case relate to Sark, the decision is of significance to all four of the governments within the Channel Islands (if not also to Overseas Territories and all constitutional lawyers). It was the very significant constitutional implications of the matter for Jersey and Guernsey which prompted the Attorney General of Jersey and the States of Guernsey to intervene as parties in the Supreme Court appeal proceedings.

Megan Pullum, QC is HM Comptroller (Solicitor General) and Robert Titterington is a Crown Advocate and Director of Legislative Drafting; Law Officers of the Crown, Guernsey. Together they instructed Counsel in the above case, on behalf of the States of Guernsey