Review of the Roles of the Crown Officers in Jersey

OPINION

Introduction and Summary of Advice

1. I am asked to advise the Independent Review Panel (chaired by Lord Carswell) which has been established by the States of Jersey, by resolution dated 4 February 2009, to examine the roles of the Crown Officers (in particular the Bailiff and Deputy Bailiff).

2. For the reasons set out below, my opinion is that:

   (1) On the current state of the authorities, in principle there would be no breach of Article 6 of the European Convention on Human Rights ("ECHR") if the status quo were to be maintained.

   (2) However, the international trend suggests that the law will change in due course. Within the next 10 years, my view is that the present arrangements will come to be regarded as incompatible with the concept of judicial independence as embodied in Article 6, in particular because the Bailiff and his deputy are both judges and presiding members of the legislature.

Background

3. There has been interest in the possible reform of the roles of the Crown Officers in Jersey for some time. The Royal Commissioners of 1861, the

Privy Council Committee of 1946 and the Royal Commission on the Constitution in 1973 all recommended no change in the roles of the Bailiff. In 1999 the States appointed a committee chaired by Sir Cecil Clothier KCB QC, whose report in December 2000 recommended fundamental changes to the governance of Jersey, many of which were accepted and implemented by the States of Jersey Law 2005. However, one important recommendation was not accepted. This was that the Bailiff should cease to act as the president of the States or to take any political part in the governance of Jersey: see chapter 8 of the Clothier Report. The only change made to the role of the Bailiff in the States was the removal of his casting vote.

4. The office of Bailiff has its origins in the 13th Century, when the Bailiff, appointed by the Monarch, became responsible for the civil administration of Jersey. In due course, there developed both the Royal Court and the States of Jersey to assist the Bailiff. The three present roles of the Bailiff are: (i) to act as Chief Judge of the Royal Court; (ii) to act as President of the States of Jersey; and (iii) to act as civic head of Jersey.

5. In his capacity as Chief Judge, the Bailiff sits in both criminal and civil cases and on occasion presides in the Court of Appeal. In addition, as Chief Judge, he carries out a number of administrative duties, of a kind which are appropriate for a chief justice.

6. The Bailiff and his deputy are non-voting members of the States of Jersey. The casting vote was abolished by the law enacted in 2005. However, it should be noted that that law confirmed that the presidency of the States is to be held by the Bailiff. The former Bailiff, Sir Philip Bailhache, has estimated that approximately two-thirds of his time was spent in his role as Chief Judge and on related administrative duties, and one-third was spent in the States.

7. When acting as President of the States, the Bailiff's role is to act as an impartial speaker, ensuring in particular that Standing Orders are observed.

Material treaty and legislative provisions

8. Although Jersey is not part of the United Kingdom, it is not a state for the purposes of international law. The UK is responsible for the conduct of international relations and in particular is responsible for the compliance by Jersey with the UK's obligations under the ECHR.

9. The Jersey Human Rights Law 2000 gives effect in Jersey to the main provisions of the ECHR in a manner which is similar to the UK's Human Rights Act 1998.

10. Article 6(1) of the ECHR, so far as material, provides that:

> "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 …"

ECHR jurisprudence

11. The principal authority in the jurisprudence of the European Court of Human Rights is *McGonnell v United Kingdom* (2000) 30 EHRR 289. That case concerned the Bailiff of Guernsey, whose functions were similar to those of the Bailiff of Jersey. The applicant in that case had his judicial proceedings concerning planning matters determined by the Bailiff.

12. The European Commission of Human Rights, which has since been abolished, decided by a majority of 25 to 5 that there had been a violation of Article 6(1) ECHR. It did so on a broad basis. At paras. 60-61 of its Opinion the Commission stated that:

> "[60] The Commission notes the plethora of important positions held by the Bailiff in Guernsey. The Bailiff presides over the States of Election, (where he has a casting vote), the States of Deliberation, (the Island legislature, where he also has a casting vote), the Royal Court and the Court of Appeal. He is also the head of the administration of the Island and presides over four States Committees including the Appointments Board, the Legislation Committee (which deals with the drafting of legislation), and the Rules of Procedure Committee. The Commission also notes that the Jurats, who decide the cases before the Royal Court, are appointed by the States of Election and that the Bailiff is the President of the States of Election and has a casting vote in the event of an equality of votes. The Commission further notes that no appeal lay against the decision of the IDC [Island Development Committee] beyond that of the Royal Court and that therefore the Royal Court was the final – and, indeed, the sole – court of the applicant's case.
> [61] The position in the present case was therefore that when the applicant appeared before the Royal Court on 6 June 1995, the principal judicial officer who sat on his case, the Bailiff, was not only a senior member of the judiciary of the Island, but was also a senior member of the legislature – as President of the States of Deliberation – and, in addition, a senior member of the executive – as titular head of the administration presiding over a number of important committees. It is true, as the Government points out, that the Bailiff's other functions did not directly impinge on his judicial duties in the case and that the Bailiff spends most of his time in judicial functions, but the Commission considers that it is incompatible with the requisite appearances of independence and impartiality for a judge to have

> legislative and executive functions as substantial as those in the present case. The Commission finds, taking into account the Bailiff's roles in the administration of Guernsey, that the fact that he has executive and legislative functions means that his independence and impartiality are capable of appearing open to doubt."

13. A short Concurring Opinion was given by Mr Nicolas Bratza, as he then was. He made it clear that his concurring view was confined to cases where the Bailiff sits in judicial proceedings which relate to acts or decisions of the executive; and that different considerations would apply in cases where he sat in disputes between private parties, "in which there was no lack of the requisite appearance of independence."

14. When the case went to the European Court of Human Rights, that Court too found there had been a violation of Article 6(1) ECHR but did so on a narrower ground than the Commission. At para. 47 of its Judgment, the Court noted the Government's submission that the Convention does not require compliance with any particular doctrine of the separation of powers. At para. 51 the Court then stated that:

> "The Court can agree with the Government that neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts as such. The question is always whether, in a given case, the requirements of the Convention are met. The present case does not, therefore, require the application of any particular doctrine of constitutional law to the position in Guernsey: the Court is faced solely with questions of whether the Bailiff had the required 'appearance' of independence, or the required 'objective' impartiality."

15. The Court then considered the particular facts of the case before it and noted at para. 53 that the Bailiff had had personal involvement in the applicant's case on two separate occasions, once as Deputy Bailiff in 1990,

when he presided over the States of Deliberation when it adopted DDP6 (Detailed Development Plan 6); and the second when he presided over the Royal Court in judicial proceedings flowing from the applicant's planning appeal. At para. 57 the Court expressed the basis for its conclusion as follows:

> "The Court thus considers that the mere fact that the Deputy Bailiff presided over the States of Deliberation when DDP6 was adopted in 1990 is capable of casting doubt on his impartiality when he subsequently determined, as the sole judge of the law in the case, the applicant's planning appeal. The applicant therefore had legitimate grounds for fearing that the Bailiff may have been influenced by his prior participation in the adoption of DDP6. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the Royal Court, and it is therefore unnecessary for the Court to look into the other aspects of the complaint."

16. It will be noted that, in effect, the reasoning of the Court treated the requirement of independence in Article 6 ECHR as being the same as the requirement of (objective) impartiality. It was the fact that the Bailiff had previously had a personal involvement in the matter when acting as President of the States of Deliberation which led to a legitimate doubt about his objective impartiality in the particular case before him. The Court was not concerned, as the Commission had been, with more abstract concerns about whether a judge should be a member of the legislature and executive.

17. In this case Sir John Laws sat as an *ad hoc* member of the Court and gave a short Concurring Opinion. He emphasised that "the only basis upon which, on the facts of this case, a violation of Article 6(1) may properly be found depends ... entirely upon the fact that the Bailiff who presided over

the Royal Court in the legal proceedings giving rise to this case presided also (as Deputy Bailiff) over the States of Deliberation in 1990 when DDP6 was adopted." He went on to say that:

> "If it were thought arguable that a violation might be shown on any wider basis, having regard to the Bailiff's multiple roles, I would express my firm dissent from any such view. Where there is no question of actual bias, our task under Article 6(1) must be to determine whether the reasonable bystander – a fully informed layman who has no axe to grind – would on objective grounds fear that the Royal Court lacks independence and impartiality. I am clear that but for the coincidence of the Bailiff's presidency over the States in 1990, and over the Royal Court in 1995, there are no such objective grounds whatsoever."

18. Again, it will be seen that Sir John Laws in effect treated the requirement of independence in Article 6(1) as being the same as the requirement of objective impartiality and not as requiring any separation in principle from the legislature or executive.

19. In the light of the Court's judgment the Royal Court in Guernsey adopted a Practice Direction in 2001 with the effect that the Bailiff was no longer the president or a member of three committees of the States: the Appointments Board, the Legislation Committee and the Rules of Procedure Committee. In addition, it was made clear that at the beginning of administrative proceedings in the Royal Court counsel would have to raise any objection to the presiding judge sitting in that particular case and the grounds for such objection. The judge would also inform the parties in writing before the hearing of any previous involvement by him in issues to be considered by the court.

20. The Committee of Ministers of the Council of Europe, which has the function of supervising the implementation of judgments of the Court of Human Rights, was informed of these developments; and by resolution ResDH(2001) 120 dated 8 February 2000 decided that this information was sufficient to comply with the judgment in *McGonnell* and constituted measures taken "preventing new violations of the same kind."

21. The Court's approach in *McGonnell* was followed in the later case of *Pabla KY v Finland* (2006) 42 EHRR 688. At para. 28 of its Judgment the Court again emphasised that the concepts of independence and objective impartiality are closely linked. At para. 29 the Court observed that, although the notion of separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case law, "neither Article 6 nor any other provision in the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers' interaction." The facts of *Pabla KY* concerned an expert member of the Court of Appeal who was also a member of parliament in Finland. The Court did not consider that the political affiliation of the MP in question had had any bearing on the case before him. Nor had the MP had any prior involvement in respect of the legislation in issue. At para. 34, therefore, the Court concluded that:

> "unlike the situation examined by it in the cases of *Procola v Luxembourg* ... and *McGonnell v UK* ... [the MP] had not exercised any prior legislative, executive or advisory function in respect of the subject-matter or legal issues before the Court of Appeal for decision in the applicant's appeal. The judicial proceedings therefore cannot be regarded as involving 'the same case' or 'the same decision' in the

sense which was found to infringe Article 6(1) in the two judgments cited above. The Court is not persuaded that the mere fact that the MP was a member of the legislature at the time when he sat on the applicant's appeal is sufficient to raise doubts as to the independence and impartiality of the Court of Appeal. While the applicant relies on the theory of separation of powers, this principle is not decisive in the abstract."

Domestic jurisprudence

22. The above European jurisprudence has been applied in the domestic legal context. In *Davidson v Scottish Ministers* [2004] UKHL 34, the particular facts raised the question whether a judge had been apparently biased (on the objective test) in circumstances where he had previously been Lord Advocate and had spoken about proposed legislation which was in issue before him in court. The House held that on the facts there had been apparent bias. Of particular interest for present purposes is the following statement by Lord Hope of Craighead, at para 53:

> "Applied to our own constitutional arrangements, *Pabla KY v Finland* teaches us that there is no fundamental objection to members of either House of Parliament serving, while still members of the House, as members of a court. Arguments based on the theory of the separation of powers alone will not suffice. It all depends on what they say and do in Parliament and how that relates to the issue which they have to decide as members of that tribunal. ... the objection has to be justified on the facts of the case, not by relying on a theoretical principle. There must be a sufficiently close relationship between the previous words or conduct and the issue which was before the tribunal to justify the conclusion that when it came to decide that issue the tribunal was not impartial or, as the common law puts it, that there was a real possibility that it was biased ..."

23. Again, it will be seen that the way Lord Hope expresses the principle in a way which treats the requirement of independence as being in effect the same as the requirement of objective impartiality and not a matter of theoretical constitutional doctrine.

24. There are indications, however, that the requirements of independence and impartiality are not necessarily the same. In *Starrs v Ruxton* 2000 JC 208, at 232, Lord Prosser, considering the position of temporary sheriffs in the administration of criminal justice in Scotland, observed that:

> "I am inclined to see independence – the need for a judge not to be dependent on others – as an additional substantive requirement, rather than simply a means of achieving impartiality or a perception of impartiality. Independence will guarantee not only that the judge is disinterested in relation to the parties and the cause, but also that in fulfilling his judicial function, generally as well as in individual cases, he is and can be seen to be free of links with others (whether it is the executive, or indeed the judiciary, or in outside life) which might, or might be thought to, affect his assessment of the matters entrusted to him."

25. This passage was cited with approval by Pill LJ in the English Court of Appeal in *R (Barclay) v Lord Chancellor* [2009] 2 WLR 1205 (that case went to the House of Lords but not on this issue).

26. In that case the Court of Appeal held that the position of the Seneschal of Sark was materially different from that of others whose positions had been considered in cases such as *Pabla KY* and that he did not comply with the requirement of independence in Article 6. However, that case does not, in my view, assist in relation to the position in Jersey, as the Seneschal is not legally qualified and the decision turned on the very particular nature of the various roles played by the Seneschal in Sark: see paras. 52-69 in the judgment of Pill LJ. Again, at para. 67, Pill was at pains to stress that there is no requirement in law for "slavish adherence to an abstract notion of separation of powers".

Discussion

27. In the light of the above authorities, it is clear, in my view, that the present state of the law does not require a fundamental alteration to the roles of the Bailiff in Jersey. On the present state of the authorities, the broad basis for the conclusion in *McGonnell* which found favour with the Commission did not find favour with the Court (as the Concurring Opinion of Sir John Laws in particular made clear). The narrower reasoning of the Court has subsequently been applied by the European Court in *Pabla KY* and by the domestic courts in cases such as *Davidson*.

28. On the present state of the authorities, therefore, there can be no objection in principle to the Bailiff having the role of both chief judge and president of the States of Jersey. Whether there is a breach of Article 6 ECHR will depend on a close analysis of the particular facts of a given case, including what (if any) role the Bailiff played in relation to legislation that may be in issue in judicial proceedings before him. In effect, as I have said earlier, the principal authorities appear to treat the requirement of independence as being the same as the requirement of objective impartiality.

29. However, it is also my view that the present Review offers the opportunity to take a longer-term view, even though the current state of the authorities does not require it. In my view, there are indications that the requirement of independence is in truth a separate and additional requirement to that of impartiality. This is for the following reasons.

30. First, the text of Article 6 ECHR itself requires both independence and impartiality.

31. Secondly, the passage I have cited from *Starrs* above contains the important insight by Lord Prosser that the requirement of independence means something more than the requirement that a judge should be disinterested in relation to the parties and the cause before him.

32. Thirdly, the authorities to date appear not to have considered the impact of emerging international thinking on this question, in particular the Bangalore Principles of Judicial Conduct 2002, which were approved on 29 April 2003 by the UN Commission on Human Rights. At the time that *McGonnell* was decided, of course, this statement of international opinion was not available. The Bangalore Principles make it clear that the value of judicial independence (called in that declaration value 1) is separate from and additional to the value of impartiality (called value 2). The principle of independence is defined as follows: "Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence *in both its individual and institutional aspects*." (Emphasis added) Principle 1.3 then sets out a specific application of this principle as follows: "A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom." (This does beg the

question of what are "inappropriate" connections with the legislature but it is doubtful whether membership of the legislature would be regarded as an appropriate connection.)

33. The Bangalore Principles then have as value 4 the principle of propriety. Principle 4.11.3 is of some interest in the present context and states that a judge may "serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge." This would clearly permit, for example, membership of a law reform body but it is unlikely, in my view, to permit membership of the legislature, which is not expressly mentioned in this context.

34. Fourthly, the trend in the UK appears to support the view expressed in chapter 8 of the Clothier Report, which may in due course come to be accepted as reflecting modern sensibilities. As recently as 2000 the Lord Chancellor was the head of the judiciary in England and Wales, sat as a judge in the Appellate Committee of the House of Lords and made judicial appointments. Since then, partly as a consequence of the Constitutional Reform Act 2005, the Lord Chancellor has been replaced as head of the judiciary by the Lord Chief justice; no longer sits as a judge and makes appointments on the recommendation of the Judicial Appointments Commission. Moreover, the Law Lords have been removed from the legislature by the Constitutional Reform Act 2005 and are now Justices of the Supreme Court. Even though there was no ground to fear that they

were behaving inappropriately as members of the House of Lords, public policy has moved away from having judges as members of the legislature and there is now a clearer separation of powers in the UK than there was just 10 years ago.

35. If the issue were to be litigated again in the European Court of Human Rights, in another 10 years time, I consider that the reasoning of the Commission in *McGonnell* might well find favour with the Court. The Court does not have a strict doctrine of precedent and often departs from its own decisions or its own reasoning, in particular to keep up with changing social norms, as the Convention is a "living instrument."

Conclusion

36. For the reasons set out above, my opinion is that there is no reason in law why the present constitutional arrangements in respect of the Bailiff should be altered. However, the trend suggests that the tide of history is in favour of reform and that the legal position will be different in 10 years time.

37. If I can be of further assistance, those instructing me should not hesitate to contact me again.

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