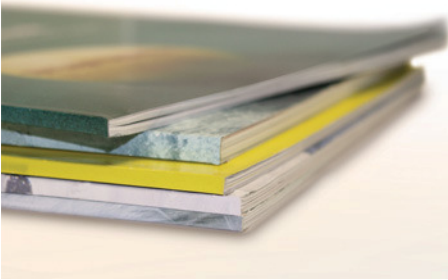


A Lark in Sark

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Jersey, like the rest of the Channel Islands, enjoys a unique constitutional relationship with the UK. As a self governing crown dependency, Jersey has many political and judicial features which will be familiar to those in the UK and other common law jurisdictions. It also has many features which will be less familiar, drawing as it does from its historical connections with other jurisdictions.

Although Jersey domestic legislation is debated and passed by its own elected legislature, Acts of the States of Jersey do not come into force as laws until they have received Royal Assent and have been registered by the Royal Court. The recent judgment of the Supreme Court in **R (on the application of Barclay and others) v. Secretary of State for Justice and Others** [2009] UKSC 9 (the “Barclay Case”), considered, amongst other things, the ability of the English courts to judicially review a recommendation of the Privy Council and its Committee for the Affairs of Jersey and Guernsey to give Royal Assent.

The Barclay Case related to the legislature of the Island of Sark. Sark is an island within the Bailiwick of Guernsey with a small legislature and the power to reform its own constitutional system. Although Sark has its own legislature, its legislation must (like that of Jersey) be assented to by Her Majesty on the advice of the Privy Council. The Barclay Case related to the decision of the Privy Council and its Committee for

the Affairs of Jersey and Guernsey to give Royal Assent to the **Sark (Reform) Law 2008** (the “Reform Law”).

The Barclay Case was brought by the wealthy Barclay brothers who own the Island of Brecqhou which lies just off the coast of Sark. The Barclay brothers have championed a well publicised campaign to make Sark hold democratic elections. This culminated in elections being held in December 2008 to elect the first democratically elected government in nearly 450 years.

The 28 landowners who previously made up the unelected members of Chief Pleas (Sark’s legislature) have now been replaced by 28 elected members. Despite the positive steps taken by the Reform Law, two unelected members of Chief Pleas remain in place under the new system. These are the hereditary Seigneur of the Island and the Seneschal (who is appointed by the Seigneur).

No Vote in Chief Pleas

Under the Reform Law the Seigneur lost his right to vote in Chief Pleas but retained his right to sit as an unelected member, to speak in Chief Pleas and temporarily to veto ordinances. The Seneschal retained his right to sit as an unelected member but lost his right to speak and to vote in Chief Pleas.

The grounds on which the Barclay brothers' appeal to the Supreme Court proceeded included an argument that under the 2008 Law the membership of the Seigneur and Seneschal of Chief Pleas was incompatible with article 3 of the First Protocol to the **European Convention on Human Rights** which guarantees the right to free elections under conditions ensuring the free expression of the opinion of the people in the choice of the legislature.

The Respondents to the appeal accepted that the Supreme Court had jurisdiction to conduct a judicial review of the recommendation made by the Privy Council and its Committee to give Royal Assent to the Reform Law.

The Supreme Court went on to hold, however, that the presence of two unelected, non-voting members in the legislature of Sark (which had 28 voting members democratically elected by an electorate of under 500) was not incompatible with article 3 of the First Protocol to the European Convention on Human Rights. The court went on to decide that having regard to the constitutional history and political factors relating to Sark, the constitutional arrangements

imposed by the Reform Law were well within the "margin of appreciation" afforded by article 3.

Human Rights

An additional argument which was run in the case on appeal was that the **Human Rights Act 1998** applied directly to the decision of the Privy Council and its Committee. In the event, the Supreme Court declined to make a decision on this since it was, in the circumstances, academic.

Historical and Constitutional Perspective

The Barclay Case is interesting from an historical and a constitutional perspective. It is also instructive, however, in demonstrating the ability of those with sufficient interest and money to challenge, through the English Courts, laws passed by an apparently autonomous legislature in another jurisdiction. Litigation of this sort will probably remain the preserve of billionaires living on their own islands, but who knows!

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