



22 October 2014

## PRESS SUMMARY

**R (on the application of Barclay and another) (Respondents) v Secretary of State for Justice and the Lord Chancellor and others (Appellants) [2014] UKSC 54**  
*On appeal from [2013] EWHC 1183*

**JUSTICES:** Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Clarke, Lord Reed

### BACKGROUND TO THE APPEALS

The principal issue in this appeal concerns the role, if any, of the courts of England and Wales (including the Supreme Court of the United Kingdom) in the legislative process of the island of Sark, part of the Crown Dependency of the Bailiwick of Guernsey.

The Channel Islands are not part of the United Kingdom but as Crown Dependencies enjoy a unique relationship with the United Kingdom through the Crown, in the person of the Sovereign. The UK government is responsible for their international relations and for their defence. The UK Parliament has power to legislate for the Islands but Acts of Parliament do not extend to the Islands automatically. Usually, the Act gives power to extend the application of the Act to the Islands by Order in Council, which will be preceded by consultation. For the most part the Islands legislate for themselves. The States of Guernsey have power to legislate for the whole Bailiwick, including the islands of Alderney and Sark, and the Human Rights (Bailiwick of Guernsey) Law 2000 applies throughout the Bailiwick. Sark has its own legislature (the Chief Pleas), which generally legislates by passing a *Projet de Loi*. This then requires Royal Assent, which is given by Order in Council on the recommendation of a Standing Committee of the Privy Council dealing with the affairs of Jersey and Guernsey.

Reform to the constitution of Sark had been made by the Reform (Sark) Law 2008 ('the 2008 Reform Law'). The 2008 Reform Law was successfully challenged by the respondents, 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 article 6 of the European Convention on Human Rights ('ECHR'), in *R (Barclay) v Lord Chancellor and Secretary of State for Justice* [2010] 1 AC 464 ('*Barclay (No 1)*'). The Reform (Sark) (Amendment) (No 2) Law ('the 2010 Reform 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 his office as chief judge. The respondents considered that these provisions were incompatible with the impartiality and independence of the judiciary, required by article 6 ECHR.

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 Reform Law, was unlawful because the 2010 Reform Law was incompatible with the ECHR. The Administrative Court granted the declaration. The appellants appealed to the Supreme Court on the ground that the Administrative Court had no jurisdiction to do so or, if it had, that the jurisdiction should not have been exercised.

## JUDGMENT

The Supreme Court unanimously allows the appeal and sets aside the declaration made by the Administrative Court. It holds that the courts of the United Kingdom do have jurisdiction judicially to 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. However, although the Administrative Court did therefore have jurisdiction to entertain the respondents' claim, it should not have exercised it in this case. Lady Hale gives the substantive judgment, with which the other Justices all agree.

## REASONS FOR THE JUDGMENT

It is not possible to state a general rule as to whether or not 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 [28].

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. Otherwise the method by which the ECHR had been extended to the Channel Islands would be subverted. A challenge to Sark legislation on the ground of incompatibility with the ECHR should be brought in the Island courts under the Human Rights (Bailiwick of Guernsey) Law 2000, from which an appeal will ultimately lie to the Judicial Committee of the Privy Council. The courts of the Bailiwick are 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. The courts of England and Wales should not have entertained the challenge in *Barclay (No 1)* and will not do so in this case [27-39].

The appellants had gone further and argued that the courts of England and Wales have no jurisdiction judicially to review the process whereby the Privy Council gives Royal Assent to Island legislation. The fact that, unlike former colonies without legislatures in respect of which Orders in Council are made, Sark has a functioning legislature and its own system of laws and courts, is a very powerful reason why the courts of England and Wales should not 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 [47]. 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 [48]. 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. 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. They are legally accountable to the UK Parliament, and to the UK courts in an appropriate case, which this is not. The question of whether they might also be accountable to the courts of the Bailiwick is left open as it had not been argued [57].

*References in square brackets are to paragraphs in the judgment*

## NOTE

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

<http://supremecourt.uk/decided-cases/index.shtml>