Michaelmas Term
[2009] UKSC 9
On appeal from: [2008] EWCA Civ 1319

JUDGMENT

R (on the application of Barclay and others) (Appellants) *v* Secretary of State for Justice and others (Respondents)

before

Lord Hope, Deputy President
Lord Scott
Lord Brown
Lord Neuberger
Lord Collins

JUDGMENT GIVEN ON

1 December 2009

Heard on 15 and 16 July 2009

Appellants (First & Second)
Lord Pannick QC
James Dingemans QC
Jessica Simor
(Instructed by Withers LLP) (UK)
(Instructed by Ozannes Solicitors) (Guernsey)

Appellant (Third) in person
Tomaz Slivnik

Respondents

Jonathan Crow QC
Ben Hooper

(Instructed by Treasury Solicitors)

LORD COLLINS

The right to free elections

1. As a result of the experience of the pre-war dictatorships, the right to free elections was emphasised during and immediately following the Second World War as an essential element of personal freedom and equality before the law. As Professor Hersch (later Sir Hersch) Lauterpacht put it in 1945:

> "… the right of self-government – which in developed society means government by persons freely chosen by and accountable to the electors – is in itself an expression and a condition of freedom. No individual … is free if he is governed against his will, that is, if the persons who exercise authority are not chosen by and accountable to the community at large." (Lauterpacht, *An International Bill of the Rights of Man* (1945), 135)

2. Five years later Lauterpacht said:

> "Without an effective guarantee of these political rights of freedom, personal freedom and equality before the law must be, at best, precarious; at worst they may be meaningless … The insistence on an International Bill of Rights and the proclamation of the enthronement rights of man as a major purpose of the Second World War were prompted by the experience of dictatorships the essence of which was the denial of the political right of freedom. … There is no intrinsic reason why the right to free, secret and periodic elections should not be … recognised by law and declared enforceable." (Lauterpacht, *International Law and Human Rights* (1950), 281-2)

3. Consequently the right to free elections as an essential element of the developing international law of human rights was recognised in Lauterpacht's own draft International Bill of the Rights of Man (Article 10), in the American Law Institute's 1944 draft Statement of Essential Human Rights (Article 16), in the Inter-American Juridical Committee's 1946 draft Declaration of the International Rights and Duties of Man

(Article XIII), and in the Universal Declaration of Human Rights adopted by the General Assembly in 1948 (Article 21(1)), and later in the International Covenant on Civil and Political Rights (1966) (Article 25) and the American Convention on Human Rights (1969) (Article 23).

4. The Preamble to the European Convention on Human Rights states that fundamental freedoms are best ensured by (inter alia) an effective political democracy. In *Bowman v United Kingdom* (1998) 26 EHRR 1, para 42, the European Court of Human Rights said: "Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system." In *United Communist Party of Turkey and Others v. Turkey* (1998) 26 EHRR 121, para 45, it was said:

> "Democracy is without doubt a fundamental feature of the European public order ... The Preamble goes on to affirm that European countries have a common heritage of political traditions, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society".

5. The First Protocol to the European Convention on Human Rights was signed in Paris on March 20, 1952. The Protocol was ratified by the United Kingdom in November 1952, and entered into force on May 18, 1954. By Article 3 of the Protocol:

> **"Right to free elections**
>
> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Background to the appeal

6. Sark is a small island in the Channel Islands, with a population of about 600. This appeal from the Court of Appeal (Pill, Jacob and Etherton LJJ: [2008] EWCA Civ 1319, [2009] 2 WLR 1205) principally concerns the application of Article 3 of the First Protocol to the constitutional changes introduced on Sark under the Reform (Sark) Law,

2008 (“the Reform Law”) in relation to the composition of the Chief Pleas, which is its legislature (and also its executive). Under the Reform Law the members of the electorate (consisting of some 500 voters) each vote for 28 Conseillers, and the 28 candidates with the largest number of votes are elected. After approval of the Reform Law by Order in Council, the first election of the 28 Conseillers took place on December 10, 2008.

7. Sir David Barclay and Sir Frederick Barclay, the first and second appellants (“the Barclay brothers”), own property on Sark. The third appellant, Dr Slivnik, lives on Sark and wants to stand for election to the Chief Pleas. The appellants have two complaints. First, they claim that because of the position under the Reform Law of two office-holders and prominent members of the community, the Seigneur (or Lord) of Sark and the Seneschal (or Steward), the Reform Law is incompatible with Article 3. Each of them is an ex officio, unelected, member of the Chief Pleas, and the Seneschal is the president of the Chief Pleas. Neither of them has the right to vote, but the Seigneur may speak in debate, and has the right of temporary veto of certain legislation. Second, the appellants claim that the Reform Law is incompatible with Article 3 (read alone or in conjunction with the prohibition on discrimination in Article 14 of the Convention) because Dr Slivnik is prevented from standing for election: as a resident he has the right to vote, but he is ineligible to stand because, as a citizen of Slovenia, he is an alien for the purposes of the Reform Law. Dr Slivnik also made a number of complaints about the conduct of the Seigneur and the Seneschal, but they are not relevant to the outcome of the appeal.

The Channel Islands

8. The Channel Islands consist of two Bailiwicks, Jersey and Guernsey. The Channel Islands are Crown dependencies but they are not part of the United Kingdom nor are they colonies. When King Philippe Auguste retook possession of continental Normandy in 1204, King John retained the Channel Islands. His right as Duke of Normandy lapsed, and a separate title grew up by force of occupation, which attached to him as King of England. This was confirmed by the Treaty of Bretigny in 1360. See Matthews (1999) 3 Jersey L Rev 177; *Minquiers and Ecrehos Case (France v United Kingdom*) 1953 ICJ Rep 47, 56-57.

9. The Channel Islands are not represented in the United Kingdom Parliament. Acts of Parliament do not extend to them automatically, but only if they expressly apply to the Islands or to all HM Dominions or do so by necessary implication. By convention Parliament does not legislate for the Islands without their consent in matters of taxation or other matters of purely domestic concern. The United Kingdom Government is responsible for their international relations and for their defence. It is the practice for the Island authorities to be consulted before an international agreement is reached which would apply to them.

10. The Crown has ultimate responsibility for the good government of the Islands. The Secretary of State for Justice and Lord Chancellor ("the Secretary of State"), the first respondent, has departmental responsibility for the constitutional relationship between the Crown and the Channel Islands. The second respondent, the Committee for the Affairs of Jersey and Guernsey, is a committee of the third respondent, the Privy Council. It is the practice for such a Committee to be appointed at the start of each sovereign's reign to deal with the affairs of the Channel Islands. The Committee consists of three Privy Counsellors: the Secretary of State, a Minister in the Department of Justice, and the Lord President of the Council. The Privy Council's main business in connection with the Islands is to deal with legislative measures submitted for ratification by Order in Council. The Crown acts through the Privy Council on the recommendation of the Committee.

Sark

11. In 1565, acting by letters patent, Queen Elizabeth I appointed Helier de Carteret as the Seigneur of Sark (or Lord of Sark), and granted it to him as a royal fief as a reward for his having secured the island against the French. Inheritance of the fief and any land sublet by the Seigneur is by male primogeniture in the manner of the Crown. The Seigneur has always been free to sell the fief subject to royal consent. The present Seigneur is John Michael Beaumont. His family acquired the fief with Crown permission in 1852. He inherited it on the death of his grandmother Dame Sibyl Hathaway in 1974.

12. The letters patent granted in 1565 required the Seigneur to keep the island continually inhabited or occupied by 40 men who had to be English subjects or swear allegiance to the Crown. To achieve and to maintain the island's defences, Helier de Carteret leased 40 parcels of land (known as "tenements") at a low rent on condition that a house was built and maintained on each parcel and that "the Tenant" provided one man, armed with a musket, for the defence of the island. The 40 tenements still exist, with minor boundary changes. There are 36 Tenants because some Tenants own more than one tenement.

13. In 1675 the office of Seneschal (or Steward) was created by the Crown. The main function of the Seneschal was to dispense justice, as Sark's chief judge. The present Seneschal is Lieutenant Colonel Reginald Guille MBE.

14. Sark is part of the Bailiwick of Guernsey, but has a large measure of independence from Guernsey. The States of Guernsey may legislate for Sark on criminal matters without the consent of the Chief Pleas and on any other matter with their consent.

The European Convention on Human Rights and Sark

15. The European Convention on Human Rights provided in Article 63 (now Article 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 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 Guernsey in 1953, and the First Protocol, which contains a similar power to extend in Article 4, was extended to the Bailiwick of Guernsey in 1988.

16. One of the questions canvassed on this appeal is whether the remedies under the Human Rights Act 1998 are available to the appellants. In the course of the passage of the 1998 Act the House of Lords rejected an amendment to apply the Act to the Channel Islands and the Isle of Man, and a similar amendment was withdrawn in the House of Commons: *Human Rights Law and Practice*, 3rd ed 2009, ed Lester et al, para 2.22.4. Instead the Convention was applied by local legislation. The Human Rights (Bailiwick of Guernsey) Law 2000 has given effect to Convention rights and came into force in November 2006.

Legislation in Sark

17. The Chief Pleas legislates by two methods, Laws and Ordinances. It can legislate for Sark on any matter by Projet de Loi, which requires the Royal Assent. After the Chief Pleas passes a Law, it is remitted as a Projet de Loi to departmental officials at the Ministry of Justice to be referred to the Committee for the Affairs of Jersey and Guernsey for its consideration and report. If the Committee recommends that Royal Assent be granted, the Projet de Loi is presented to the next available meeting of the Privy Council, together with a report on any petitions which have been received. The Projet de Loi will not go to the Privy Council if the Committee decides not to recommend it for Royal Assent. Her Majesty in Council then gives Royal Assent (by Order in Council) to any Projet de Loi presented by the Privy Council pursuant to a recommendation by the Committee. She will also dismiss any petitions as appropriate.

18. The evidence in these proceedings was that, in considering whether or not to recommend approval, the Committee will in general respect the decision of the Chief Pleas, and there would tend to be a presumption in favour of recommending Royal Assent. But consideration is given to the Crown's responsibilities, so that if a Projet de Loi violates the Crown's international obligations or any fundamental constitutional principle, or if it is clearly not in the public interest for it to become law, then a recommendation may be made to withhold Assent.

19. The Chief Pleas also legislates on a range of local affairs by Ordinance. The Royal Court of Guernsey may annul an Ordinance on the ground that it is unreasonable or *ultra vires* the Chief Pleas, but the Chief Pleas may appeal to the Privy Council against the annulment.

20. The Seigneur had (and continues to have) power to veto an Ordinance, but it must be placed before the Chief Pleas again (not more than 21 days later), and the Chief Pleas will then consider whether the Ordinance should be confirmed. The Seigneur had (and has) no power to veto Laws.

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

The Reform (Sark) Law 1951 ("the 1951 Law")

22. Until the Reform Law became law in 2008, the majority of the members of the Chief Pleas were unelected Tenants, whose entitlement to sit derived from their status as landowners. Until 1922 the Seigneur and the Tenants were the only members, together with a Seneschal chosen by the Seigneur. The Sark Reform Law of 1922 introduced adult suffrage for the election of 12 People's Deputies.

23. Under the 1951 Law the Chief Pleas consisted of the Seigneur, the Seneschal (who was appointed for a three year term of office by the Seigneur with the approval of the Lieutenant Governor and was ex officio President of the Chief Pleas), the Tenants, and 12 Deputies of the People elected triennially. In the case of a tenement jointly owned by two or more persons, one of those persons was appointed as the Tenant, by those owners or a majority of them.

24. Both the Seigneur and the Seneschal had the right to vote in the Chief Pleas. The Seneschal was entitled, in the event of an equality of votes, to a casting vote in addition to his original vote, but following *McGonnell v. United Kingdom* (2000) 30 EHRR 289 (involving the compatibility of the judicial functions of the Bailiff of Guernsey with Article 6(1) of the Convention), the Seneschal agreed not to exercise his casting vote pending further reform.

25. Under the 1951 Law, aliens were not eligible to vote or stand for election to the Chief Pleas.

Reform process

26. Sark has been considering constitutional reform since 1999. In March 2006, the Chief Pleas voted for a reform which would have provided for a legislature to consist of 16 Tenants elected by the Tenants and 16 Deputies elected by the rest of the population. In April 2006 the Chief Pleas withdrew its support for that option. On May 7, 2006, the Secretary of State (at that time Lord Falconer) wrote to the Seigneur to say that he was pleased with the decision of the Chief Pleas to withdraw the plan to reserve 16 seats in the Chief Pleas for Tenants because he "would not have been able to recommend for Royal Assent legislation about which there are serious or substantial ECHR compliance issues". He said that "[a]ny option which falls short of a wholly democratic process would cause me serious difficulties. ... I am concerned that Sark should give itself, and the UK, the best protection it can from ECHR challenge and its possible consequences … [i]t is the UK which is vulnerable to an ECHR challenge. The UK cannot stand by and give that situation its tacit approval by doing nothing".

27. In April 2007, the Chief Pleas approved another version of a new law which would still reserve seats in the Chief Pleas for Tenants, but with those Tenants elected by universal suffrage. The Secretary of State (by then Mr Jack Straw) decided not to submit that proposal to the Privy Council, because there were some aspects of the proposed law which he considered not to be unquestionably compliant with international law and the United Kingdom's obligations, having regard to the Crown's responsibility for the good government of the Crown Dependencies. In particular, there were concerns that (a) the composition of the legislature was not consistent with modern democratic principles; (b) the dual role of the Seneschal as judge in Sark's sole court of justice and President of Chief Pleas might cast doubt on the judicial impartiality of a person subsequently called upon to determine a dispute concerning legislation with which he had been involved; and (c) the role of the Seigneur, his membership of the Chief Pleas and his wider functions, sat uneasily with democratic principles.

28. On February 21, 2008, the Chief Pleas approved a new version of a Reform Law. Under that Law, the reserved seats for Tenants are removed. The Seigneur and the Seneschal remain members, but without the right to vote. The Seigneur's right of temporary veto of Ordinances is preserved. The Seneschal can now only speak for the purposes of exercising his role as President. Neither is now entitled to sit on Committees of the Chief Pleas.

29. The Barclay brothers presented several Petitions opposing the reform proposals as they evolved, and in particular a Petition dated March 3, 2008, asking that the Privy Council withhold approval of the Reform Law as enacted. The Petition complained, so far as is now material, that (a) in violation of Article 3 of the First Protocol, the Seigneur would be an unelected member of Chief Pleas, with a right to address it and with a power to veto Ordinances; (b) the membership of the Seneschal as President of Chief Pleas was

incompatible with Article 3; (c) the prohibition on non-British nationals standing for election was incompatible with Article 3 and with Article 14 of the Convention.

30. The Committee for the Affairs of Jersey and Guernsey rejected the Petitions. The Schedule to an Order in Council dated April 9, 2008 notes that the Committee recommended that the Petitions be dismissed and that the Reform Law should receive Royal Assent at the next meeting of the Privy Council on April 9, 2008. The Schedule then gave a summary of the Committee's conclusions, which included: "The Reform Law would not violate any of the Crown's international obligations, and that therefore those international obligations provided no basis for refusing Royal Assent".

The Reform Law

31. The following are the principal features of the Reform Law which are relevant on this appeal.

The Chief Pleas

32. All legislative and executive functions which may be exercised within Sark are exercisable by the Chief Pleas, or by the relevant Committee of the Chief Pleas or other body on which the function is imposed or conferred: section 1.

33. The Chief Pleas consists of the Seigneur, the Seneschal, and 28 elected Conseillers, with elections to take place every fourth year: section 21(1). The number of Conseillers may be varied by ordinance: section 21(5).

34. A person is entitled to have his name inscribed in the register of electors if he is ordinarily resident in Sark and has been for 12 months: section 28(4). A person who is registered in the Cadastre (rating register) as the possessor of real property in Sark is deemed to be ordinarily resident: section 28(5). A person is eligible to be elected a Conseiller if he is entitled to vote and "he is not an alien within the meaning of the law in force in the United Kingdom" (section 28(3)(b)). By section 50(1) of the British Nationality Act 1981, an "alien" is: "a person who is neither a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland".

35. Both the Seigneur and the Seneschal are now prohibited from being members of a Committee of the Chief Pleas: section 45(3). Thus, neither can be directly concerned in the day-to-day running of Sark's Executive Government. The 1951 Law did not prevent the Seneschal and the Seigneur from sitting on executive Committees of Chief Pleas, and they exercised their right to do so.

The Seigneur

36. The Seigneur is a member of the Chief Pleas: section 21(1)(a). The Seigneur has the right to speak at any meeting of the Chief Pleas but does not have the right to vote: section 35(3). He cannot be a member of a Committee of the Chief Pleas: section 45(3).

37. The Seigneur has the power temporarily to veto Ordinances made by the Chief Pleas. Section 38 provides:

> "(1) Subject to subsections (2) and (3), the Seigneur may, during any meeting of the Chief Pleas at which an Ordinance is made, veto any Ordinance made at that meeting.
>
> (2) Where an Ordinance has been vetoed pursuant to subsection (1), it shall not be registered but shall again be laid before the Chief Pleas not earlier than 10 days, and not later than 21 days, after the meeting at which it was made.
>
> (3) Where an Ordinance is laid before the Chief Pleas pursuant to subsection (2), the Chief Pleas may either-
>
> (a) confirm the Ordinance, whereupon the veto shall cease to be operative and the Ordinance shall take effect from the date of its registration, or otherwise in accordance with its provisions, as if it had not been vetoed; or
>
> (b) refuse to confirm the Ordinance, whereupon it shall not be registered and shall not take effect".

38. The Seigneur has other powers and responsibilities under the Reform Law. The most significant for the purposes of this appeal are these: (1) the Seigneur appoints the Seneschal (with the approval of the Lieutenant Governor): section 6(1); (2) the Seigneur's consent is needed for the Seneschal to summon an extraordinary meeting of the Chief

Pleas: section 32(2)(b); (3) the Seigneur is a Trustee (section 56), making him responsible, together with the other three Trustees (the Seneschal, Prévôt and Greffier) for all Island Properties, i.e. schools, teachers' houses, the medical centre, and administrative offices.

The Seneschal

39. The Seneschal continues to be appointed by the Seigneur with the approval of the Lieutenant Governor: section 6(1). He is no longer appointed for a limited 3-year term: his appointment is for life. The reason is that it was thought that a Seneschal with a three-year term might not give a fair trial in litigation involving the Crown or the Seigneur if he were seeking re-appointment. By section 6(2), the Seneschal may only be removed by the direction of the Lieutenant Governor "for good cause" (formerly, he was simply subject to removal "by the direction of the Crown": section 22(1) of the 1951 Law).

40. The Seneschal is an unelected member of the Chief Pleas: section 21(1)(b). The Seneschal continues to be the ex officio President of the Chief Pleas: section 35(1). He is a Trustee of Island property (section 56).

41. Meetings of the Chief Pleas are convened by the Seneschal by the publication of an Agenda (section 32(1)). He has power (if the Seigneur consents) to summon an extraordinary meeting of the Chief Pleas, and a discretion to determine whether an extraordinary meeting will be held at the request of at least nine Conseillers (section 32(2)(b) and (c)). The Seneschal has no right "to speak or to vote at any meeting of the Chief Pleas" (section 35(4)). It was common ground that he may speak insofar as is necessary to enable him to preside over the Chief Pleas. But he cannot speak in favour of or against the substance of any matter raised by the Conseillers.

Seneschal's procedural powers

42. The Chief Pleas has power to make rules of procedure (section 36(1)) but the Rules of Procedure under the 1951 Law have been applied by the Chief Pleas under the Reform Law. New rules were adopted in April 2009.

43. The procedural powers of the Seneschal under the rules which were current when the decisions of the Committee for the Affairs of Jersey and Guernsey and the Privy Council were taken are these. He convenes meetings by means of an agenda: rule 1(2). He may, on grounds of public interest, decline to allow a question to be put or rule that the question need not be answered: rule 8. He is responsible for maintaining order at a

meeting and, subject to the provisions of the Rules, regulates the conduct of business: rule 10(1). He may direct a member to discontinue his speech if he considers it irrelevant or tedious repetition of the member's arguments: rule 10(4). Where he considers that grave disorder has arisen in a meeting he may adjourn the meeting: rule 10(7). He decides whether to allow an amendment to be moved in the case of non compliance with the requisite notice period (rule 11(2)). He decides whether or not a member's oral contribution to the debate is relevant and therefore permissible (rule 11(6)), and he decides the order of proposed amendments (rule 11(8)). He provides clarification on the Rules: rule 13.

The proceedings: jurisdiction

44. By claim form dated April 4, 2008, the appellants sought judicial review of (1) the decision dated March 19, 2008 of the Committee for the Affairs of Jersey and Guernsey to recommend that Royal Assent be granted to the Reform Law; and (2) the decision of the Privy Council to advise Her Majesty, on April 9, 2008, to grant Royal Assent in accordance with the first decision, which resulted in an Order in Council of that date.

45. There is no issue on this appeal about jurisdiction to determine the legality of the decisions of the Committee and the Privy Council. Wyn Williams J held in the Administrative Court [2008] 3 WLR 867, paras 98-102, and the respondents accepted in the Court of Appeal [2009] 2 WLR 1205 (see Pill LJ at paras 19-21) that to the extent that the Reform Law is in breach of Convention rights, then the appellants are entitled to appropriate relief in these proceedings. That is because the respondents expressly advised Her Majesty the Queen to approve the Reform Law on the ground that it did not involve any breach of the obligations of the United Kingdom under the Convention. It will, however, be necessary to revert to the question of jurisdiction because of the appellants' contention that the courts of this country also have jurisdiction to grant relief on the basis that the respondents were acting as public authorities for the purposes of section 6 of the Human Rights Act 1998 when recommending the Order in Council by which the Reform Law was given Royal Assent.

The judgments below

46. Wyn Williams J decided that the comparatively limited rights and powers conferred upon the Seigneur and the Seneschal did not impair the essence of the rights conferred under Article 3 of the First Protocol. Neither was entitled to vote. The Seigneur's right of veto was limited to Ordinances and was no more than a means by which he could ask Chief Pleas to revisit a decision. It was impossible to envisage that the power could ever be used in such a way that it would frustrate the will of the Conseillers permanently. There was no principle that a State could not comply with Article 3 unless

every member of its legislative body were democratically elected. The positions of Seigneur and Seneschal had been inextricably linked with the governance of Sark over centuries, and there was no legal impediment to there being some continuation of those links. Their membership was being pursued for a legitimate aim, namely to form part of a package of measures which was most likely or at least very likely to find favour with a majority of the members of Chief Pleas as currently constituted, and to provide some link between the past and the future. The Reform Law was not in breach of Article 3 in not permitting aliens to stand for election.

47. Wyn Williams J also decided that the combination of the judicial and other functions of the Seneschal was consistent with the duty under Article 6(1) of the Convention to establish an independent and impartial tribunal. His decision on that point was reversed by the Court of Appeal, and there was no further appeal on that point.

48. The Court of Appeal agreed with Wyn Williams J so far as the position of the Seigneur was concerned, and by a majority (Etherton LJ dissenting) with regard to the Seneschal. The principal points made by Pill and Jacob LJJ were these: all members of the Chief Pleas entitled to vote were elected in accordance with a procedure about which there was no complaint. The power of the Seigneur to speak (but not vote) in Chief Pleas made sense in a small community such as Sark, and would not undermine the free expression of the people. The power of the Seigneur to veto Ordinances temporarily, and the requirement for the Seneschal's consent to an extraordinary meeting of Chief Pleas requested in writing by nine Conseillers, might serve the democratic will in providing the opportunity at a later date for a more representative meeting, if some members of Chief Pleas were away from Sark. There was no reason to believe that the Seneschal would use his position as ex officio President to thwart the will of elected members. If his procedural powers were not acceptable to the elected members, Chief Pleas could alter the rules. Jacob LJ added that if the elected members of Chief Pleas were to decide that the continued presence and powers of the Seigneur and Seneschal in Chief Pleas were obstructive to the expression or exercise of the will of the people, there would be nothing that could be done legally to prevent Chief Pleas from voting for a change. The Reform Law did not breach Article 3 in failing to grant to aliens the right to stand for election to Chief Pleas and, in the absence of such a breach, Article 14 of the Convention did not apply.

49. Etherton LJ dissented with respect to the role and functions of the Seneschal. His view was that an unelected President for life of a unicameral legislature, who was not appointed to office by the electorate or by the elected members of the legislature, and whom the elected members had no power to discipline or remove as President, was in principle fundamentally inconsistent with a political democracy. His procedural powers and the requirement of his consent for extraordinary meetings taken as a whole were capable of enabling suppression of free and appropriate debate within the Chief Pleas by elected members on topics they or some of them wished to raise. There was no clearly practicable means for the elected members of the Chief Pleas to control abusive or otherwise incorrect exercise by the Seneschal of his powers as President. They had no

power to dismiss or suspend him. They could apply in writing to the Lieutenant Governor under section 6(2) of the Reform Law for his removal as Seneschal, but that process would be neither swift nor certain. The particular features of the Sark constitution under the Reform Law and the social and constitutional standing of the Seneschal in Sark were obvious disincentives for elected members to challenge the rulings and conduct of the Seneschal as President. In addition to serving as President of the Chief Pleas he held the following positions under the Reform Law: one of the four trustees who, subject to any direction of the Chief Pleas, manage, control and dispose of its property and who sign contracts on its behalf; the returning officer for the purposes of elections of Conseillers to the Chief Pleas and, as such, is required to do everything necessary for effectually conducting the election; critically, under the Reform Law the only court on Sark was the Court of the Seneschal in which, unless a Deputy Seneschal or a Lieutenant Seneschal is appointed to sit, the Seneschal sat alone. The elected members would doubtless bear in mind the possibility that at some point in the future they might have to appear in court before him or one of his deputies or lieutenants in civil or criminal proceedings.

The issues on appeal

50. The principal issues on this appeal are (1) whether (as the appellants contend) the position of the Seneschal and the Seigneur in the Chief Pleas of Sark, as provided for in the Reform Law, constitutes a breach of the right conferred by Article 3 of the First Protocol to participate in elections which ensure the free expression of the opinion of the people in the choice of the legislature; and (2) whether (as the appellants contend) the prohibition imposed by the Reform Law on persons who are "aliens" from standing for election to the Chief Pleas of Sark is a breach of the right under Article 3 of the First Protocol, read alone and/or in conjunction with Article 14 of the Convention.

51. Although there is no cross-appeal by the respondents on the issue of jurisdiction, the appellants invited the House of Lords to determine whether, had it not been accepted by the respondents that the decisions of the Committee for the Affairs of Jersey and Guernsey and the Privy Council were amenable to judicial review (because the respondents expressly advised Her Majesty to approve the Reform Law on the ground that it did not involve any breach of the international obligations of the United Kingdom under the Convention), the Human Rights Act 1998 applies to the decisions.

Article 3 of the First Protocol

52. There have been more than 50 decisions of the European Court of Human Rights on Article 3 of the First Protocol. The following principles emerge from these decisions, particularly from the relatively early case of *Mathieu-Mohin v Belgium* (1988) 10 EHRR 1, and the recent decision of the Grand Chamber in *Yumak v Turkey* (2009) 48 EHRR 61.

53. First, Article 3 of the First Protocol enshrines a characteristic principle of an effective democracy. It is of prime importance in the Convention system, of which democracy constitutes a fundamental element, and the rights guaranteed under Article 3 of the First Protocol are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law: *Mathieu-Mohin v Belgium*, at para 47; *Yumak v Turkey*, at paras 105 and 107. See also *Zdanoka v Latvia* (2007) 45 EHRR 478, para 98 (Grand Chamber); *Tanase v Moldova* [2008] ECHR 1468, at paras 100-101.

54. Second, although Article 3 is phrased in terms of the obligation of the Contracting States to hold elections which ensure the free expression of the opinion of the people rather than in terms of individual rights, Article 3 guarantees individual rights, including the right to vote and the right to stand for election: *Mathieu-Mohin v Belgium*, at paras 48-51; *Yumak v Turkey*, at para 109(i); *Zdanoka v Latvia*, at para 102.

55. Third, there is room for "implied limitations" on the rights enshrined in Article 3, and Contracting States must be given a wide margin of appreciation in this sphere: *Mathieu-Mohin v Belgium*, at para 52; *Yumak v Turkey*, at para 109(ii).

56. Fourth, the content of the obligation under Article 3 varies in accordance with the historical and political factors specific to each State; and for the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features which would be unacceptable in the context of one system may be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the free expression of the opinion of the people in the choice of the legislature: *Yumak v Turkey* at para 109(iii); *Aziz v Cyprus* (2005) 41 EHRR 164, para 28.

57. Fifth, Article 3 is not (by contrast with some other Convention rights, such as those enumerated in Articles 8 to 11) subject to a specific list of legitimate limitations, and the Contracting States are therefore free to rely in general in justifying a limitation on aims which are proved to be compatible with the principle of the rule of law and the general objectives of the Convention: *Yumak v Turkey*, at para 109(iii); *Tanase v Moldova*, at para 105.

58. Sixth, limitations on the exercise of the right to vote or stand for election must be imposed in pursuit of a legitimate aim, must not be arbitrary or disproportionate, and must not interfere with the free expression of the opinion of the people in the choice of the legislature: *Yumak v Turkey*, at para 109(iii)-(iv).

59. Seventh, such limitations must not curtail the rights under Article 3 to such an extent as to impair their very essence, and deprive them of their effectiveness. They must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature and the laws which it promulgates: *Mathieu-Mohin v Belgium*, at para 52; *Yumak v Turkey*, at para 109(iv).

60. Eighth, as regards the right to stand for election, "…the Court accepts that stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility…": *Melnychenko v Ukraine* (2006) 42 EHRR 784, para 57. In *Zdanoka v. Latvia* (2007) 45 EHRR 478, para 106 the Grand Chamber said:

> "The Convention institutions have had fewer occasions to deal with an alleged violation of an individual's right to stand as a candidate for election, i.e, the so-called 'passive' aspect of the rights under Article 3 of Protocol No. 1. In this regard the Court has emphasised that the Contracting States enjoy considerable latitude in establishing constitutional rules on the status of members of parliament, including criteria governing eligibility to stand for election. Although they have a common origin in the need to ensure both the independence of elected representatives and the freedom of choice of electors, these criteria vary in accordance with the historical and political factors specific to each State. The multiplicity of situations provided for in the constitutions and electoral legislation of numerous member States of the Council of Europe shows the diversity of possible approaches in this area. Therefore, for the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned."

61. Ninth, the Court takes account of the practice of members of the Council of Europe in assessing the compatibility of electoral rules with Article 3, in particular in the area of qualifications to stand for election. In *Yumak v Turkey* (at para 111) the Court said in relation to electoral systems that "… the large variety of situations provided for in the electoral legislation of numerous Member States of the Council of Europe shows the diversity of the possible options." In *Melnychenko v Ukraine*, at para 30, the Court, when considering whether it was compatible with Article 3 to impose a residence requirement before citizens could stand for election, referred to the fact that 19 States did not impose any such requirement for participation in elections while 21 States did so for elections to one or more of the legislative chambers. In *Gitonas v Greece* (1997) 26 EHRR 691 the Court decided that the disqualification in Greece of civil servants from elected office was compatible with Article 3, and at para 40 it said that "equivalent provisions exist in

several member States of the Council of Europe." In *Sukhovetsky v Ukraine* (2007) 44 EHRR 57, at para 76, the Court, in deciding that the Ukrainian rules with regard to electoral deposits were compatible with Article 3, considered the practice of the Convention States with regard to the amount of the deposit and whether it was appropriate that it should be forfeit if the candidate failed to win election irrespective of the percentage of votes cast.

62. Examples of the operation of these principles as regards the right to vote include *Yumak v Turkey*, which concerned a Turkish law under which a political party had to receive at least 10% of the national vote in an election in order to obtain any seats in the Turkish parliament, and which was the highest threshold in the Contracting States. The effect was that two of the eighteen parties which had taken part in the 2002 elections had passed the 10% threshold and secured seats, with the result that 45% of the voting public were not represented in the parliament. It was held that the threshold law served the legitimate aim of avoiding excessive and destabilising parliamentary fragmentation and thus strengthening governmental stability. Although it appeared excessive, it was not disproportionate in that it did not impair the essence of the rights secured by Article 3 of the First Protocol. But a blanket disenfranchisement of convicted prisoners regardless of the nature of the offence or length of sentence was held to be disproportionate: *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 (Grand Chamber).

63. As regards the right to stand for election, it has been held that public servants could be barred from standing for election: *Ahmed v United Kingdom* (2000) 29 EHRR 1; *Gitonas v Greece*, supra; and a former member of the Communist Party could be banned from standing for election in Latvia because she could be presumed to be anti-democratic: *Zdanoka v Latvia* (2007) 45 EHRR 478. But the requirement of a command of Latvian at the highest level from a Russian minority candidate for election was disproportionate: *Podkolzina v Latvia* [2002] ECHR 405.

64. The effect of these principles is that there is no narrow focus on one particular element of democracy. The electoral rules have to be looked at in the round, and in the light of historical and political factors. The proper application of these principles leads inevitably to the conclusion that the Reform Law is not in breach of Article 3 of the First Protocol.

65. The appellants submit that it is incompatible with the most basic principles of democracy as expressed in Article 3 of the First Protocol for unelected individuals to be members of the Chief Pleas with the power (1) in the case of the Seigneur, to speak in the Chief Pleas and to veto (even on a temporary basis) legislation and (2) in the case of the Seneschal, to preside and control proceedings in the Chief Pleas, in each case in addition to their other important functions and powers on Sark (Appellants' Case, at para 58).

66. The appellants exaggerate their case. The starting point is that only Conseillers are entitled to vote in the Chief Pleas, and therefore it is only Conseillers who determine whether legislation is to be enacted. The electorate of Sark consists of fewer than 500 voters, who choose 28 elected Conseillers by a process of casting 28 votes each and electing the 28 candidates with the largest number of votes. There is therefore one Conseiller for every 17-18 persons in the electorate. It is not easy to envisage, in the words of Article 3, conditions which are more likely to ensure the expression of the opinion of the people in the choice of the legislature.

67. The appellants' case was, in part, that to the extent that members of the legislature (implicitly including both chambers) were not elected, Article 3 was not satisfied: Appellants' Case at para 63(2). That was put too widely. It is plain that the effect of Article 3 is not to require that all members of the legislature of a Contracting State be elected. A legislature may consist of two chambers, and a wholly unelected second chamber, such as the House of Lords, is not in itself incompatible with Article 3. When the First Protocol was under negotiation, the formula "The High Contracting Parties undertake to hold free elections of the Legislature" was proposed, but it was not acceptable to some countries, because it might be interpreted as an obligation to hold elections for both chambers of the legislature. This was unacceptable to the Governments of some States where the upper chamber was in whole or in part not elected but hereditary (such as the United Kingdom) or appointed (as in Belgium). The Committee of Ministers recorded that the original text, which was maintained, "had been carefully drafted to avoid this difficulty": Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights, Vol VIII (1985), pp 48-52, letter dated November 28, 1951, from Chairman of the Committee of Ministers to the President of the Consultative Assembly. It was for that reason and by reference to those documents that the Court in *Mathieu-Mohin v Belgium* said, at para 53, that "Article 3 applies only to the election of the 'legislature', or at least of one of its chambers if it has two or more."

68. The European Commission for Democracy through Law (also known as the Venice Commission) was established in 1990 as the Council of Europe's advisory body on constitutional matters. The Venice Commission adopted guidelines on elections as part of a code of good practice in electoral matters. Guideline 5 was that "at least one chamber of the national parliament" must be elected by direct suffrage.

69. Consequently the appellants also formulated the principle for which they contended as being that "all the members of a unicameral legislature must be elected": Appellants' Case at para 63(3). No doubt where, as here, there is a unicameral legislature, best practice is that it should be an elected assembly. Jacob LJ observed correctly in the Court of Appeal that "[i]f one were starting from scratch, there can be few who would think the new Reform Law of Sark satisfactory … [T]o confer by heredity upon an unelected man the positions and powers of the Seigneur … would be going too far by the standards of modern democratic governance": para 117.

70. It does not follow, however, that as a matter of Convention law there is an invariable rule that all members must be elected irrespective of their powers and irrespective of the circumstances. The effect of the jurisprudence under Article 3 is that all the circumstances must be considered. It is not a necessary consequence, therefore, that the mere existence of some unelected members contravenes Article 3. In 2007 the Barclay brothers themselves made a representation supporting an option for constitutional change which would have continued the reservation of half of the seats for 16 Tenants elected by the Tenants.

71. "Membership" of two unelected individuals in the circumstances of this case does not contravene Article 3. The purpose of Article 3 is to ensure that legislation is enacted through genuinely democratic processes. An electorate of about 500 elects 28 voting representatives. Neither the Seigneur nor the Seneschal can vote. It is true that the Seigneur can speak on matters of substance in debate. But the fact that unelected persons may influence the outcome of debate is not undemocratic, especially when the influence is open and transparent.

72. Even if Article 3 did in principle require that even non-voting members be elected, then a limitation on that principle by having two prominent non-voting members would be well within the margin of appreciation in the light of the constitutional history and the political factors relevant to Sark. The position of the Seigneur dates from 1565, and the position of the Seneschal from 1675. Until 1922 the composition of the Chief Pleas reflected the feudal system in Sark. Between 1922 and 2008, the feudal Tenants dominated the Chief Pleas. Even the introduction in 1922 of a minority of elected Deputies was not easily achieved. At the time this was a very controversial change. The Lieutenant Governor told the Chief Pleas members that, unless they agreed to changes approved by the Privy Council, the Island's administration would be taken over forcibly: Sark Constitutional Review Committee, *Report on the Future Constitution of the Island of Sark*, January 2002, para 62.

73. The Reform Law eventually introduced universal suffrage for the election of all those members who could vote on legislation. The fact that the Reform Law was enacted by, and therefore with the consent of, the legislature was relied on by the respondents. But that would not save it from incompatibility with the Convention. Some profoundly undemocratic laws have been enacted by democratically elected legislatures. In any event, the Reform Law was enacted by the unreformed Chief Pleas which was certainly not fully democratic. But the respondents are right in their contention that the Chief Pleas' support for the Reform Law is a political factor of weight, because it offers confidence that the Reform Law will command the level of respect and legitimacy in the eyes of the people of Sark that is necessary to secure significant constitutional change.

74. Thus even if the membership of the Seigneur and the Seneschal is to be regarded as a limitation on the people's right to choose the legislature, then the limitation falls well

within the margin of appreciation allowed by Article 3. It fulfils all the conditions suggested by the jurisprudence of the Strasbourg Court. It cannot be said to be arbitrary. Because the Seigneur and the Seneschal cannot vote, it cannot be said to be lacking in proportionality. The free expression of the opinion of the people of Sark is not impeded by it. Nor could it be plausibly suggested that their membership impairs the "very essence" of the people's right to choose the legislature, or deprives the right of its effectiveness. Nor can it be argued seriously that the Seigneur's right to speak in the Chief Pleas will frustrate the free expression of the opinion of the people in the choice of the legislature.

75. Nor is the conclusion affected by the other powers and responsibilities of the Seigneur and the Seneschal. The Seigneur has the power temporarily to veto Ordinances (but not Laws) under section 38 of the Reform Law. The effect of section 38 is that where an Ordinance has been vetoed then it is laid before the Chief Pleas again not earlier than 10 days later, but no later than 21 days later, whereupon the Chief Pleas will either confirm, or refuse to confirm, the Ordinance. The appellants argue that the existence of this power will inevitably deter the Chief Pleas from adopting a position opposed by the Seigneur, whether because the Chief Pleas wishes to avoid a veto or simply because it prefers to seek the approval, or avoid the disapproval, of the Seigneur.

76. It is true that HM Procureur, the head of the Government legal service in Guernsey, in a letter of April 30, 2004 to the Chairman of the Sark Constitutional Steering Committee, wrote:

> "I regret that I remain opposed to the retention by the Seigneur of any power of veto. ... In my opinion it is simply unacceptable in the 21st century for an unelected and unappointed citizen, whatever his civic role, or whatever his rank or position in Sark society, to be able to veto legislation passed by the (soon to be more democratically constituted) Chief Pleas, irrespective of whether that veto is absolute or limited. ... The Seigneur has informed me that he has no strong feelings on the Seigneurial veto. He writes: 'If it is a possibility that it might cause problems in the future then I am quite happy that it should be abolished'

77. The present Seigneur's evidence was that he had never used his power of temporary veto, and that he had no recollection of his predecessor (his grandmother, Dame Sybil Hathaway) having used it. His evidence was that he would only consider using it in, at most, two circumstances: (a) if an Ordinance had not been drafted by the Guernsey Law Officers and he considered that it might be ultra vires; or (b) in what he describes as the unlikely event that an ordinance were passed by a close vote at a meeting

of the Chief Pleas at which only a minimal number of members were present and he were to feel that, with a normal turnout, the Ordinance might possibly have been rejected.

78. The suggestion by the appellants that the power might have a chilling effect on the exercise of the power of the democratically elected members to legislate is wholly speculative. It is legitimate to take account of the fact that the power has not been used in modern times, and that the Seigneur has indicated that it will be used in only very limited circumstances. The use of the power if few members are present and voting will tend to ensure that the democratic will is respected by ensuring that sufficient numbers of members are present. That objective could have been achieved by different means (such as a special quorum for the passage of legislation), but the method proposed is proportionate and consistent with Article 3.

79. The unelected House of Lords has power (subject to the Parliament Acts 1911 and 1949) to delay United Kingdom legislation, and that is a power which directly affects the process of the elected chamber. The appellants do not suggest that that power is inconsistent with Article 3. The reason why the power is compatible with Article 3 is that it has its origin in historical and political factors, it is not arbitrary or disproportionate, and it does not affect the essence of democratic rights. Indeed in *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 32, Lord Bingham of Cornhill suggested that the use of the Parliament Acts to secure extension of the maximum duration of Parliament by overriding the need for the passage of legislation through the House of Lords might itself be contrary to Article 3. So also in theory Her Majesty could refuse Royal Assent, although by convention it cannot be refused except on the advice of ministers, and the power to refuse it has not been exercised since 1708: see Bradley and Ewing, *Constitutional and Administrative Law*, 14th ed 2007, p 21.

80. The appellants argue that the delaying power of the House of Lords is not incompatible with Article 3 because the requirements of Article 3 are satisfied if there is one wholly elected legislative chamber. This is unpersuasive. It does not follow from the fact that Article 3 does not regulate the composition of a second chamber that there are no limitations imposed by Article 3 on the powers of the second chamber. If a second chamber had a power permanently to frustrate the will of the democratically elected chamber, and the power was not purely theoretical, like Her Majesty's power to withhold Royal Assent, then there would at the least be a case for breach of Article 3.

81. Nor are the appellants assisted by the existence of the Seigneur's other powers. Apart from the power of temporary veto of Ordinances already discussed, the only one which affects proceedings of the Chief Pleas is that the Seigneur's consent is needed for the Seneschal to summon an extraordinary meeting of the Chief Pleas: Reform Law, section 32(2)(b). The Chief Pleas has to meet four times annually: section 32(2). All three methods of summoning extraordinary meetings require the action of an unelected official: (1) at the direction of the Lieutenant Governor; (2) by the Seneschal with the consent of

the Seigneur; and (3) with the consent of the Seneschal on the written request of at least nine Conseillers. The mere existence of this power does not undermine effective political democracy. If there were any serious prospect of its being abused, the Chief Pleas could amend the Reform Law.

82. The Seigneur's other powers do not affect the democratic process. They simply underline his status on Sark. He appoints the Seneschal (with the approval of the Lieutenant Governor) and the Deputy Seneschal (in consultation with the Seneschal and with the approval of the Lieutenant Governor), and he appoints the Deputy Seigneur. He appoints the Prévôt and the Greffier subject to the approval of the Lieutenant Governor. His consent is required for Guernsey police officers to attend in Sark, and his consent is required for removal of a special constable. The Seigneur is a Trustee, making him responsible, together with the other three Trustees (the Seneschal, Prévôt and Greffier) for all Island Properties. It is not suggested that the existence of these powers is contrary to Article 3.

83. So far as the position of the Seneschal is concerned, it is true that it is anomalous that the presiding officer of an elected assembly should be an unelected official appointed by another unelected (and indeed hereditary) official. Etherton LJ was right to say that it is relevant that the members of Chief Pleas have no power to dismiss or suspend the Seneschal, and that the process of applying in writing to the Lieutenant Governor under section 6(2) of the Reform Law for his removal as Seneschal would not be swift or certain. But it does not follow that legislation which provides for an unelected presiding officer is contrary to the duty to allow free elections for the choice of the legislature under Article 3 of the First Protocol. In any event, for essentially the same reasons as apply in the case of the Seigneur, the position of the Seneschal is well within the margin of appreciation, taking into account historical and political factors, and cannot realistically be said to impair the essence of the rights under Article 3 nor to deprive them of effectiveness.

84. It is not suggested that the procedural powers themselves are contrary to Article 3. What is said is that the width of the procedural powers makes it inappropriate that they should be exercised by an unelected person. But they are powers which any presiding officer would be given or would need. It is true that they are capable of being misused, but they could equally be misused by an elected officer. If there were any abuse of the powers, the Chief Pleas could alter the procedural rules under section 36(1) of the Reform Law without the need for any consent.

85. There is nothing in the appellants' reliance on the other powers of the Seneschal. He is *ex officio* the returning officer for elections held under the Reform Law. He is a Trustee of Island property. In both capacities he must act according to law, and in the latter capacity on behalf and subject to the direction of the Chief Pleas: section 57.

The right to stand for election

86. The appellants do not suggest that Article 3 of the First Protocol itself gives resident aliens a right to stand for election. The primary way it is put in relation to Article 3 is that the prohibition on aliens from standing for election to the Chief Pleas advances no legitimate aim and is disproportionate, and therefore contrary to Article 3 of the First Protocol, given that (1) resident aliens may vote for elections to the Chief Pleas; and (2) the Law does not identify as eligible to stand those with sufficiently continuous or close links to, or a stake in Sark. Commonwealth citizens, British protected persons and citizens of the Republic of Ireland may stand for election to the Chief Pleas, so long as they are resident in Sark or own property there, even if they do not live there. The appellants' alternative case is that if citizens have the right to vote, then the prohibition on aliens (or, perhaps, resident aliens) standing for election to the Chief Pleas is unjustifiable discrimination on grounds of nationality contrary to Article 3 of the First Protocol read with Article 14 of the Convention.

87. The principal answer to the appellants' case is that there are many decisions of the Strasbourg Court which proceed on the basis that the rights under Article 3 belong to citizens, and therefore not to aliens. In a passage in *Mathieu-Mohin* at (1988) 10 EHRRI, para 54 repeated or referred to in many subsequent judgments, the Court referred to the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election. For example, in *Kovach v Ukraine* [2008] ECHR 125, para 49, the Court said in the same context: "In this field, Contracting States enjoy a wide margin of appreciation, provided that they ensure the equality of treatment for all citizens." In *Makuc v Slovenia* [2007] ECHR 523, para 206, the Court said "The Court recalls that this provision guarantees individual rights, including the right to vote and to stand for election. However, these rights are not absolute but rather subject to limitations, such as citizenship …" citing *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41.

88. The Guidelines on Elections of the Venice Commission (referred to above, para 68) said, in the context of conditions for voting and standing for election, that a nationality requirement may apply, but that it would be advisable for foreigners to be allowed to vote in local elections after a certain period of residence: Guideline 1.1.b. The Explanatory Report said (para 6.b-c) that most countries' legislation laid down a nationality requirement, but that the right to vote and/or the right to stand for election might be subject to residence requirements.

89. The International Covenant on Civil and Political Rights (1966) is consistent with this interpretation of the European Convention. Article 25 grants every *citizen*, without any of the distinctions in Article 2 (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) and without unreasonable restrictions "the right and the opportunity … to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage …".

90. In *Melnychenko v Ukraine* (2006) 42 EHRR 784 the Court considered whether a residence requirement could be imposed before a refugee from the Ukraine living in the United States could stand for election to the Parliament. As mentioned above (para 61), the Court looked at the practice of some 40 Council of Europe States, all of which had a nationality requirement together with (in about half of the States) a residence requirement for participation in elections by expatriate citizens as regards at least one chamber. It treated the International Covenant as expressing the relevant international law on the subject. The Court accepted that a residence requirement was compatible with Article 3, but concluded that the electoral commission's decision that the applicant was not resident was unlawful.

91. On the hearing of this appeal the parties did not provide any comparative material on the practice of the Contracting States, but the website of the Inter-Parliamentary Union has a table of the conditions for voting and for standing for election, which confirms what was said in *Melnychenko v Ukraine*. There does not appear to be a single member of the Council of Europe which does not impose a citizenship requirement (in some cases coupled with a residence requirement).

92. *Py v France* (2005) 42 EHRR 548 does not justify the appellants' argument that the Court has implicitly recognised that a person who was not a citizen was within the scope of Article 3 of the First Protocol. New Caledonia was a French overseas territory, and as part of its move towards self-determination the French Constitution was amended to provide for a referendum on self-determination in the territory. A French law provided that persons resident in New Caledonia since 1988 would have the right to vote in the referendum. There was an identical qualification for obtaining citizenship. A French national was appointed to a university post in New Caledonia in 1995, and claimed the right to vote in the referendum although he had not been resident there since 1988. It was held that the residence requirement pursued a legitimate aim and that although a ten year requirement might have seemed disproportionate, "local requirements" (Article 63, now Article 56) justified the restrictions. There was therefore no breach of Article 3 of the First Protocol (or of Article 14 of the Convention). This is not a decision that non-citizens have a right to vote or stand for election. It was simply a decision that the length of residence required by the French law as a qualification for voting in the referendum was justified by local requirements. In view of New Caledonia's transitional status the right to vote was given to the "population" defined by reference to 10 years' residence, which was identical to the citizenship requirement. The Court specifically referred (at [46]) to the need to ensure "citizen participation and knowledge" in framing rules on voting eligibility.

93. Consequently both in international law, as reflected in the International Covenant and in the practice of States, and under the European Convention, as reflected in the decisions of the Strasbourg Court and in the practice of the members of the Council of Europe, it is citizens, and not non-resident aliens, who have the right to vote and stand for election. There may be some exceptional cases, for example where citizenship is withheld on, for example, linguistic grounds from communities who have been settled on the

territory of a State for several generations: see Venice Commission Explanatory Report, para 1.16b. But the general rule is clear.

94. Sark is not an entity in international law and has no separate citizenship. It is entitled to restrict the right to stand for election to persons who are entitled to vote (which requires 12 months residence or registration in the rating register as the possessor of land) and who are not aliens within the meaning of United Kingdom law, where an "alien" is a person who is neither a Commonwealth citizen nor a British protected person nor a citizen of the Republic of Ireland: British Nationality Act 1981, section 50(1).

95. Article 3 does not require a justification for qualifications which are stricter for standing for election than for voting. As already indicated, it is well established that stricter requirements may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility: *Melnychenko v Ukraine* (2006) 42 EHRR 39, para 57; *Zdanoka v. Latvia* (2007) 45 EHRR 478, para 106 (Grand Chamber). Historical and political factors have determined the definition of "alien" in United Kingdom law. The concept of Commonwealth citizenship is of course very wide, but eligibility is limited to those with a genuine connection with Sark in the form of residence or ownership of property. It is clear that in the light of those factors and the breadth of the margin of appreciation, the exclusion of aliens from eligibility to stand for election is justifiable.

Articles 14 and 16 of the Convention

96. Nor does Article 14 assist the appellants. Article 14 provides that the "enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground …" The crucial element under Article 14 is that the discrimination must be in "the enjoyment of the rights" under the Convention. The applicant must have a Convention right before he can complain of discrimination: *Moustaquim v. Belgium* (1991) 13 EHRR 802, and contrast *Gaygusuz v. Austria* (1996) 23 EHRR 364.

97. As the Court said in, for example, *Aziz v Cyprus* (2005) 41 EHRR 164, paras 35-36:

> "The Court further observes that Article 14 has no independent existence, but plays an important role by complementing the other provisions of the Convention and the Protocols, since it protects individuals, placed in similar

> situations, from any discrimination in the enjoyment of the rights set forth in those other provisions. Where a substantive Article of the Convention has been invoked, both on its own and together with Article 14, and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case."

98. Consequently, where there is a breach of Article 3, it has not normally been necessary to deal with Article 14: e.g. *Matthews v United Kingdom* (1999) 28 EHRR 361, para 68; *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41, para 87; *Tanase v Moldova* [2008] ECHR 1468, para 116. *Podkolzina v Latvia* [2002] ECHR 405, para 42; *Sadak v Turkey (No 2)* (2003) 36 EHRR 23, para 47; *Melnychenko v Ukraine* (2006) 42 EHRR 784, para 71. So also where the claim under Article 3 is dismissed and the complaint under Article 14 is essentially the same, it will not be necessary to consider Article 14: *Mathieu-Mohin* (1988) 10 EHRRI, para 59; *Sukhovetskyy v Ukraine* (2007) 44 EHRR 57, para 76. *Aziz v Cyprus* (2005) 41 EHRR 164 is an example of a case where there was a separate breach of Article 14, because the applicant was excluded from the electoral register because he was a member of the Turkish Cypriot community. The complaint under Article 14 was not a mere restatement of the applicant's complaint under Article 3 of the First Protocol. The applicant was a Cypriot national, resident in the Government-controlled area of Cyprus. The difference in treatment in that case resulted from the very fact that the applicant was a Turkish Cypriot. The present case is not a case of discrimination in this sense.

99. There was some discussion in argument of the relevance of Article 16 of the Convention to the present appeal. It provides that "nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens." Article 16 is of very limited scope. It applies only to Articles 10, 11 and 14, and has been held not to apply to non-nationals who are citizens of EU countries: *Piermont v France* (1995) 20 EHRR 301. Because aliens do not have a right under Article 3 of the First Protocol to stand for election, there is no scope for the operation of Article 16.

The applicability of the Human Rights Act 1998

100. The respondents accept that to the extent that the Reform Law breaches Convention rights, then the appellants are entitled to relief in these proceedings. That is because the respondents expressly advised Her Majesty to approve the Reform Law on the ground that it did not involve any breach of the obligations of the United Kingdom under the Convention: *R v Secretary of State for the Home Department, Ex p Launder*

[1997] 1 WLR 839, 867, per Lord Hope of Craighead. Consequently the decision of the Committee for the Affairs of Jersey and Guernsey and the Order in Council are subject to judicial review: *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] 1 AC 453, para 35 (Lord Hoffmann) and para 105 (Lord Rodger of Earlsferry).

101. The Human Rights Act 1998 contains no provision as to its territorial scope, except that section 22(6) provides that it extends to Northern Ireland. As already mentioned, amendments to extend the Act to the Channel Islands and the Isle of Man were rejected or withdrawn during the passage of the Act.

102. The appellants contend that the courts of this country also have the power and the duty to grant relief on the basis that the respondents were acting as public authorities for the purposes of section 6 of the Human Rights Act 1998 when recommending the Order in Council by which the Reform Law was given Royal Assent. The respondents' position is that the Act does not apply because (a) it was not intended to apply to obligations of the United Kingdom assumed under Article 56 (formerly Article 63) of the Convention, and Article 4 of the First Protocol, in respect of compliance with the Convention in territories for the international relations of which it is responsible; and (b) in any event the respondents were not acting as public authorities of the United Kingdom for the purposes of section 6 of the Act, but were acting to advise Her Majesty in respect of her role as sovereign of the Bailiwick of Guernsey. Wyn Williams J accepted both points: [2008] 3 WLR 867, paras 89-96. The Court of Appeal agreed with Wyn Williams J on the first point, but disagreed on the second point: Pill LJ: [2009] 2 WLR 1205, paras 106-109.

103. The appellants accepted in the hearing before the Appellate Committee that the point was academic, but drew attention to the fact that the House of Lords was prepared to address such points if they were of general importance: *R v Secretary of State for the Home Department, Ex p Salem* [1999] 1 AC 450, 456-457.

104. In *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529 the Secretary of State had instructed the Commissioner of South Georgia to issue fishing licences to two specified vessels, which had the effect that the claimant's vessel did not receive a licence. The claimant sought judicial review and damages for deprivation of a possession under Article 1 of the First Protocol. The Convention had been extended to South Georgia and the South Sandwich Islands, but not the First Protocol. The instruction was quashed on the ground of procedural unfairness: [2002] EWCA Civ 1409.

105. The question before the House of Lords was whether the claimant could sue for damages under sections 6 and 7 of the Human Rights Act 1998. As in the present appeal,

this was taken to involve two issues, failure on either of which was fatal to the claim. The first issue was whether the instruction had been issued by the Crown in right of the United Kingdom, or in right of South Georgia and the Sandwich Islands. In the latter event the Secretary of State acting on behalf of HM the Queen would not be a United Kingdom public authority for the purposes of section 6. The second issue was whether the claimant had established breach of a Convention right for the purposes of section 7 of the Human Rights Act.

106. On the first issue it was held by a majority that the instruction had been given by the Crown acting through the Secretary of State in the context of South Georgia and the South Sandwich Islands, and Secretary of State had acted on behalf of HM the Queen in right of that territory and not of the United Kingdom. For the majority the question was the constitutional standing of the instruction: at para 19, per Lord Bingham, para 64, per Lord Hoffmann, and para 79, per Lord Hope. The argument for the claimant that the instruction was given in the interests of the United Kingdom was rejected on the basis that whether the Secretary of State's decision was motivated by the wider political and diplomatic interests of the United Kingdom was "unsuitable for judicial determination" (at para 18, per Lord Bingham), the court was "neither concerned nor equipped to decide in whose interests the act was done" (at para 64, per Lord Hoffmann); or that, although the question might be justiciable, for it to be explored would give rise to great uncertainty; it was irrelevant because the question was simply in what capacity the instruction was given by the Crown: at paras 78-79, per Lord Hope. Lord Nicholls of Birkenhead and Baroness Hale, dissenting, considered that the capacity in which the Crown acted was irrelevant: paras 45-46, 94-95. Baroness Hale of Richmond said that to treat capacity as decisive, when the legality of the instruction could be raised in United Kingdom courts, and when the Secretary of State was answerable, if at all, to the United Kingdom Parliament, would be a surrender of substance to form. The authority of the majority was weakened when in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] 1 AC 453, para 46 Lord Hoffmann said that, in the light of Finnis, *Common Law Constraints: Whose Common Good Counts*? (2008) Oxford Legal Studies Research Paper 10/2008 (criticising the decision of the House of Lords in *Quark* and of the Court of Appeal in *Bancoult* [2008] QB 365), he thought that Lord Nicholls was right.

107. Since it is agreed that this issue does not arise on the present appeal, it is not necessary to say more than that, as matters now stand, the approach laid down by the then majority of the House of Lords leads to the conclusion that the decisions of the Committee for the Affairs of Jersey and Guernsey and the Privy Council were taken as part of the constitutional machinery of the Bailiwick of Guernsey and of Sark for the approval and enactment of Laws in Sark, and that the fact that the decisions were taken by Ministers of the Crown who took into account the international obligations of the United Kingdom is irrelevant. It would be quite wrong for the approach in *Quark* to be revisited on an appeal (particularly with a panel of five) in which it does not arise, and in which it is not argued that *Quark* was wrongly decided and ought to be reconsidered.

108. The second issue in *Quark* was whether the claimant had established breach of a Convention right for the purposes of section 7 of the Human Rights Act. Lord Nicholls considered that, even if the First Protocol had been extended to South Georgia and the South Sandwich Islands, the claimants would not have had a Convention right on which they claim damages under the Human Rights Act. He said at para 36:

> "The Human Rights Act is a United Kingdom statute. The Act is expressed to apply to Northern Ireland: section 22(6). It is not expressed to apply elsewhere in any relevant respect. What, then, of Convention obligations assumed by the United Kingdom in respect of its overseas territories by making a declaration under article 56? In my view the rights brought home by the Act do not include Convention rights arising from these extended obligations assumed by the United Kingdom in respect of its overseas territories. I can see no warrant for interpreting the Act as having such an extended territorial reach. If the United Kingdom notifies the Secretary General of the European Council that the Convention shall apply to one of its overseas territories, the United Kingdom thenceforth assumes in respect of that territory a treaty obligation in respect of the rights and freedoms set out in the Convention. But such a notification does not extend the reach of sections 6 and 7 of the Act. The position is the same in respect of protocols"

109. Lord Hoffmann came to the same view on this point: "The Act is concerned only with the Convention as it applies to the United Kingdom and not by extension to other territories": para 62. Lord Hope emphasised that the United Kingdom government would not be answerable in Strasbourg if the international obligation had not been extended to the overseas territory, but he said that he agreed with Lord Nicholls: para 93. Lord Bingham expressed no view on this point: para 26. Baroness Hale left the question open: para 98. Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] 1 AC 453, para 48, reiterated his view, but that too was a case in which the Convention had not been extended to the overseas territory (the British Indian Ocean Territory).

110. In *R (Al-Skeini) v. Secretary of State for Defence* [2008] 1 AC 153 Lord Bingham said, at para 20, that it was not clear that the view of Lord Nicholls in *Quark* commanded majority support. But Lord Brown (with whom Lord Carswell agreed: para 96) endorsed Lord Nicholls' approach. He said (at para 134):

> "... there is a distinction between rights arising under the Convention and rights created by the Act by reference to

> the Convention. A plain illustration of this arises from the temporal limitations imposed by the Act ... Another illustration is the Act's non-applicability in article 56 cases. Consider *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* ... Even had the UK extended article 1 of the First Protocol to [South Georgia and the South Sandwich Islands], no claim would have been available against the Secretary of State under the Act although the UK would clearly have been liable internationally for any breach. It is for the dependent territory's own legislation to give effect to Convention rights, just as for Jersey, Guernsey and the Isle of Man."

111. This is a case, by contrast with those in which the point has been canvassed, where the relevant Convention obligation has been extended to a dependency. But this point does not arise for decision on this appeal for the principal reason that it was conceded that there was jurisdiction to determine the lawfulness of the decisions of the Committee and the Privy Council. It might conceivably have arisen on the question of remedy, but that too would not arise on the view of the merits expressed in this judgment. In addition there would have been a separate ground for the non-applicability of the Human Rights Act, namely the capacity in which the decisions were taken. Consequently it would also be wrong for the question whether the claimant had established breach of a Convention right to be decided on an appeal where it does not arise and would be an academic question.

112. I would therefore dismiss the appeal.

LORD HOPE

113. I am in full agreement with the opinion of Lord Collins. I wish to add a few comments on two points only.

114. First, while I agree that some of what Dr Slivnik (who appeared in person) said in his brief address was not relevant to the outcome of this appeal, he did bring vividly to life what it means to live in a small island community. He said that Sark works so well because of its small size. That was why it was possible to achieve such a high degree of democracy in such a small society, where everyone knows everyone else. His experience since coming to live there was that it was possible for someone to make a much greater contribution to public life than he had found anywhere else. It was a place where one

could go round and talk to people. One could have much greater direct access to the legislators.

115. This led to two considerations which he wished to stress. The first was that it would be in conflict with democracy in a small society to vest too much power in individuals. The powers that the Reform Law gave to the Seneschal, the highest paid official on the island, were disproportionate. The second was that, as membership of the Chief Pleas was unpaid, there was a very real problem in attracting able and willing candidates for election. The fact that so few tenants had expressed an interest in standing tended to reinforce his perception that the Seneschal had too much power. He himself was keen to volunteer for public life. But he was prevented from doing so because, as an alien, he was not entitled to stand for election. He said that the greatest prospect in achieving reforms that were truly in the best interests of democracy lay in quashing the Reform Law, so that the 1951 Law could be restored and more time given to the process of reform.

116. The answer to these points lies, as Lord Collins has explained so carefully, in the principles that are to be derived from Article 3 of the First Protocol. As he has said, electoral rules have to be looked at in the round and in the light of each state's own historical and political factors. Taken in the round, having regard to the things that the Seneschal can and cannot do and to the potential means of addressing any abuse, the powers that are given to him are well within the margin of appreciation allowed by that article. Dr Slivnik's frustration at not being eligible for election is readily understandable. But there is ample authority for the proposition that the Chief Pleas' decision granting the right to stand for elections only to those who are citizens of Sark was well within that margin of appreciation also. I agree that the appeal must be dismissed.

117. Second, I wish to clear up any uncertainty which my remarks *in R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, paras 92-93 may have caused; see paras 109-110 above. As I stated in para 93 of my opinion in that case, I was in full agreement with what Lord Nicholls of Birkenhead said about the territorial scope of the Human Rights Act 1998. This extended to para 36 of his opinion, where he said that notification by the United Kingdom that the Convention was to apply to its overseas territories did not extend the reach of the Act to those territories. I would respectfully endorse the observation by Pill LJ in the Court of Appeal [2009] 2 WLR 1205, para 105 that my own remarks should not be interpreted as meaning that notification attracted the application of the Act. What I was seeking to show, as an additional reason for agreeing with Lord Nicholls, was that notification under article 56 or, as the case may be, article 4 of the First Protocol was a pre-condition for a consideration of that issue and that on the facts of that case this condition could not be satisfied.

LORD SCOTT

118. I am in full agreement with the reasons Lord Collins gives for dismissing this appeal. I can add nothing useful and for the reasons he gives I would do likewise.

LORD BROWN

119. I have read Lord Collins' judgment and regard it as convincing and definitive on all the issues we have to decide. With regard to the applicability of the Human Rights Act 1998, to my mind the most interesting question debated before us, tempted though I have been to address it, I am persuaded by Lord Collins (see paras 100-111 of his judgment) that it would not be right to succumb.

LORD NEUBERGER

120. I have read the magisterial judgment of Lord Collins and agree with it. Accordingly, I too would dismiss this appeal.