

JERSEY / JUDGMENT

Green v AG [2003] JCA 125A (18 July 2003)

[2003] JCA 125A**COURT**

court of appeal

BEFORE

Sir Philip

Bailhache, Bailiff, President;

R. C. Southwell,

Esq., Q. C.; and

The Hon. M. J.

Beloff, Q. C.

Paul Anthony GREEN

-v-

The Attorney General

Paul Anthony GREEN applied

for leave to appeal against a sentence of 6 years' imprisonment passed on him on 16th December, 2002, by the Superior Number of the Royal Court, to which he was remanded by the Inferior Number on 22nd November, 2002, following a guilty plea to 1 count of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a controlled drug, contrary to Article 61(2)(b) of the Customs and Excise (Jersey) Law, 1999.

Leave to appeal was

refused by the Deputy Bailiff on 24th January, 2003; and on 5th February, 2003, the appellant exercised his entitlement, under Article 39 of the Court of Appeal (Jersey) Law, 1961, to renew his application to the plenary Court.

On 18

th

July, 2003, the plenary Court

refused the application for leave to appeal: see: [2003]JCA125.

Following a recently

revealed difference of opinion in the Court of Appeal in Jersey as to the application of Article 35(4) of the Court of Appeal (Jersey) Law, 1961: vide McClements

v The Attorney General

(18th July, 2002) Jersey Unreported; [2002/132],

and

Breen, Croke, Crook and

Buckley v The Attorney General

(13th September, 2002) Jersey Unreported;

[2002/167], the Court asked to be addressed by Counsel on the application of Article 35(4).

Advocate R. Juste for the appellant;

Advocate M. R. Renouf, convened as amicus

curiae to assist Court in relation to provisions of Article 35 of the Court of Appeal (Jersey) Law, 1961;

C. E. Whelan, Esq., Crown Advocate.

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JUDGMENT

THE BAILIFF: 1. This is the judgment of the Court. The Issues 2. Article 35(4) of the Court of Appeal (Jersey) Law 1961 ("the 1961 Law") provides "Subject as hereinafter provided, six weeks of the time during which any such appellant, when in custody, is specially treated as such in pursuance of prison rules, or the whole of that time if it is less than six weeks shall be disregarded in computing the term of any such sentence as aforesaid: Provided that -(b)..... The Court of Appeal may direct that no part of the said time (or such part thereof as the Court thinks fit (whether shorter or longer than six weeks) shall be disregarded as aforesaid". (" the Proviso ") 3. In short, the time during which a prisoner appealing to the Court of Appeal is specially treated in pursuance of the prison rules is to be disregarded in the computation of a sentence (if leave to appeal was not granted) unless the Court of Appeal exercises a discretion to direct that no part of that time is to be so disregarded. 4. The perceptible purpose of the provision is to deter appeals without any merit, in the public interest of saving scarce Court time, and avoiding delay to other appeals (either criminal or civil) with merit. Genesis of the Appeal 5. There has recently been revealed a difference of opinion in the Court of Appeal in Jersey as to the application of Article 35(4). Previously it had been the Court of Appeal's practice always to make a direction under the Proviso whenever Article 35(4) applied, in line with the practice adopted by the Bailiff and the Deputy Bailiff sitting as single Judges of the Court of Appeal. 6. In *McClements v The Attorney General* (18 th July, 2002) Jersey Unreported; [2002/132], the Court of Appeal declined to make a direction under the Proviso on the basis that there was "no conceivable merit in this appeal and there was no prospect of success". 7. In *Breen, Croke, Crook and Buckley v The Attorney General* (13 th September, 2002) Jersey Unreported; [2002/167], a differently constituted Court of Appeal indicated that it wished to hear arguments for considering how Article 35(4) should in future be applied. The view was, however, expressed that the Court of Appeal should continue its general policy of making directions under the Proviso, because, first, there is in practice little, if any, difference between the treatment of prisoners who were appealing their sentence and other prisoners; secondly, when most applicants are represented by Advocates "it is not appropriate for the sins of the Advocates to result in loss of time by their clients"; and thirdly, the Human Rights (Jersey) Law 2000 ("the 2000 Law") is likely soon to be brought into force. 8. The Applicant whose application for leave against sentence has been dismissed contends that the Court of Appeal should exercise its discretion under the Proviso in his favour. Since this is a test case we made it clear that this would be done in his case, whatever conclusions we came to upon the 'general issue' as to whether, and, if so, when and how Article 35(4) and the Proviso should be applied. 9. Two members of the present Court were each parties to one of the decisions to which we have referred; although in neither case was any detailed argument then available of the quantity and

quality presented to this Court from Mr Renouf, whose client Mr Barr has a contingent interest in the issue and whom we invited to assist the Court as *amicus curiae*, from Advocate Juste on behalf of the Applicant and from Mr Whelan, a Crown Advocate. The Bailiff of Jersey, the President of this Court, was party to neither of the previous decisions. We make it clear that we start our consideration with a clean slate, and uninfluenced by the previous decisions between which in any event we are compelled to choose. The Law in Jersey 10. The wording of Article 35(4) of the 1961 Law appears to be in almost identical terms to the corresponding (repealed) section of the first English legislation i.e. Section 14(3) of the Criminal Appeal Act 1907 ("the 1907 Act") (though the latter lacked a limit as to the length of time spent in custody which could be disregarded). 11. The salient similarity is that the time in custody pending the hearing of the appeal shall be disregarded in the computation of the sentence, unless the Court of Appeal directs otherwise. Furthermore, the trigger for the time to be disregarded is in Jersey, as the language of the earlier provisions in England and Wales made clear, the special position of appellants in custody, compared to that of the generality of the prison population. 12. Article 35(4) of the 1961 Law has not been amended since its enactment. However the position in England has changed. The Law Today in England 13. The 1907 Act was amended by the Criminal Justice Act 1948 s.38(2) in a way which ensured that an unsuccessful appellant could not lose more than six weeks - the so-called 42 day rule. 14. A change in the law was recommended in the report of the strong Interdepartmental Committee on the Court of Criminal Appeal in August 1965 (Cmnd 2755 para 167-184) ("the Committee"). 15. The Committee said that the justification for disregarding the time, namely special treatment, had lost its force due to a general improvement in conditions, and indeed led to misunderstanding amongst appellants who argued that because they had not availed themselves of facilities under the special rules they should not be penalised for appealing (para 171). 16. The Committee said, however, that the primary (and surviving) justification for disregarding the time was that it "was in practice necessary as a barrier against a possible flood of hopeless appeals" (para 181). 17. In consequence by the Criminal Appeal Act 1968 Parliament: (i) repealed the whole of the 1907 Act. (ii) [by Section 29] altered the position in England so that the time that an appellant spent in custody pending the determination of his appeal should count as part of the sentence, unless the Court of Appeal directed to the contrary. (iii) removed the reference to special treatment . [This reflected previous changes to like effect in Scotland: see section 9(4) of the Criminal Appeal (Scotland) Act 1926 as amended by section 30 of the Criminal Justice (Scotland) Act 1949.] 18. As already stated, in Jersey Article 35(4) of the 1961 Law has not been amended to reflect the changes in the legislation in England or Scotland. Effect of lack of special treatment of prisoners in Jersey 19. The Applicant submits that in point of fact Appellants (including him) receive no different treatment from that accorded to other convicted prisoners. A letter dated 1st April 2003 from the Governor of HM Prison La Moye to Mr Barr's lawyers confirms that to be the position. It is urged that, in consequence, the reference in Article 35(4) to special treatment is redundant and wants for subject matter. The precondition for automatic disregard (subject to the Court's contrary discretion) of time spent in custody by an

appellant prisoner can no longer be satisfied as there is no special treatment for such prisoners. We consider that submission first because, if it is correct, it is potentially dispositive of the entire issue before us. 20. Article 26(1) (as amended) of the Prison (Jersey) Law 1957, states that the Prison Board may make Rules for the regulation and management of the prison, including the treatment of prisoners. Particular Rules concerning the treatment of Appellants are contained in Rules 110-114 inclusive. For this purpose "appellant" includes an applicant for leave to appeal - see Articles 30(1) and 42 of the 1961 Law and AG-v-Young 1998 JLR 387. Such Rules refer to matters such as the conditions applicable to appellants' absence from prison, the right to visits from private medical advisers and other visitors and the provision of other facilities for approval. They read in full as follows: "APPLICATION OF RULES 110. Rules 111 to 114 apply to prisoners who are appellants against a conviction or sentence pronounced by a court, hereinafter called "appellants", but their application to prisoners who are under sentence of death shall be subject to the Special Rules applying to those prisoners. APPELLANTS ABSENT FROM PRISON

111. (1) An appellant who, when in custody, is absent from prison for purposes in connexion with his appeal, shall, while so absent, be kept in custody of an officer designated in that behalf by the Governor. (2) An appellant when absent from prison under this Rule shall wear his own clothing or, if his own clothing cannot be used, clothing different from prison dress. PRIVATE MEDICAL ADVISERS 112. An appellant may for the purposes of his appeal receive a visit from a registered medical practitioner selected by him or by his friends or legal adviser, under the same conditions as apply to a visit by his legal adviser. OTHER VISITORS 113. An appellant may for the purposes of his appeal receive a visit from any other person. LETTERS AND OTHER FACILITIES FOR APPEAL 114. (1) Writing materials to such extent as the Governor considers reasonable shall be furnished to an appellant who requires them for the purpose of preparing his appeal. (2) An appellant may write letters to his legal adviser or other persons for the purpose of his appeal. (3) A confidential written communication prepared as instructions for the legal adviser of an appellant may be delivered personally to such legal adviser, and shall not be treated as a letter to which paragraph (3) of Rule 64 applies, unless the Governor has reason to suppose that it contains matter not relating to such instructions." 21. In 1999, an argument, similar to that advanced by Advocates Renouf and Juste, was made in *Crawford v The Prison Board* (17 th June, 1999) Jersey Unreported; [1999/111] ("Crawford"). The representation in *Crawford* also drew the Royal Court's attention to the fact that there was very little difference in treatment between categories of prisoners. The Royal Court rejected the representation. Its major reason for so doing was that an appellant prisoner was "entitled to the privileges set out in Rule 111 and 114 as a matter of right. That legal right is not available to prisoners in general". 22. We consider that the analysis in *Crawford* is correct. It is indisputable that Appellants are, under the Prison Rules, differentiated from other prisoners. [See in particular the text of Rule 110 itself.] The draftsman of Article 35(4) was, in our view, identifying a class of prisoner so defined, to whom (uniquely) the Article would apply. The relevant distinction is one of law, not of fact.

The Appellant prisoners' rights under Rule 110-114 are entrenched. Other prisoners' equivalent privileges are vulnerable to removal at any time. Our interpretation is supported by the reasoning of the Committee who did not view the disappearance of any differences in treatment in fact of appellant prisoners and others as emasculating the Criminal Appeal Act 1907. They said: "The original reasons for this provision were (i) the need to provide a deterrent against frivolous appeals, and (ii) the idea that a convicted prisoner ought not to be regarded as serving his sentence so long as he was enjoying the special privileges of an appellant. With the general amelioration of conditions in prison the second of these reasons has now lost its force. The special treatment accorded to an appellant in pursuant of Rules 57 to 61 of the Prison Rules 1964 means no more than that he is allowed additional letters and visits for the purposes of his appeal and is entitled to be examined in connection with the appeal by a doctor of his choice. The provision of these necessary facilities is no longer of any significance in relation to the discounting of time, and it may be thought that the statutory reference to "the time during which any such appellant, when in custody, is specially treated as such in pursuance of rules made under section 47 of the Prison Act 1952" has become an unnecessarily elaborate way of describing the time during which a prisoner is an appellant. The removal of the present reference to special treatment would indeed eliminate a common source of mis-understanding among appellants, who seek to argue that, because they have not availed themselves of the facilities under the special Rules, they ought not to suffer any loss of time." (para 171) 23. A construction which focuses by contrast on fact is an invitation to uncertain application of the Article. It cannot have been envisaged that at a time when there was in prisons a differentiation between the treatment accorded to this discrete group of prisoners, a Court should have had to investigate on every occasion whether the particular Appellant had actually benefited from it. Such, however, would be the necessary consequence of the submission advanced by Advocates Renouf and Juste. 24. We therefore consider that Article 35(4) retains its vitality, and the Court of Appeal retains its discretion under the Proviso. Construction of the Proviso 25. It was argued by Advocate Renouf that the discretion in the Proviso was in some way confined by the substantive part of the Article which precedes it. We do not agree. On its face the discretion is not so confined. Discretion 26. Ought, nonetheless, the Court of Appeal to exercise such discretion always - or at any rate as a general rule

- to direct that time spent in custody by appellants should be counted as part of their sentence? 27. We start by reiterating that in principle it seems to us that the exercise of a power to deter hopeless appeals is not offensive to notions of justice or to considerations of human rights. 28. As was said in the Practice Direction (Crime: Sentence: loss of time)

[1980] 1 WLR 270 by the English Court of Appeal: "Meritorious appeals are suffering serious and increasing delays, due to the lodging of huge numbers of hopeless appeals": see to like effect Practice Note: Crime: Applications for leave to Appeal

[1970] 1 WLR 663. The continued concern of the English Courts to preserve (within limits) this power is illustrated further by the Guide to Proceedings in the Court of Appeal, Criminal Division, February 1997, para 9 signed by Lord Bingham of Cornhill LCJ. Jersey is not suffering from any similar flood of hopeless appeals; but it is still true that the more hopeless appeals are pursued, the greater the risk of delays in the hearing of meritorious appeals. 29. The practice of disregarding time in the computation of sentences, was also discussed in the case of *Tiwari v The State* (Privy Council Appeal No.76 of 2001 from Trinidad and Tobago). Their Lordships declined to express an opinion on whether or not the time the Appellant spent in prison awaiting the determination of his appeal should count as part of the term of imprisonment, because the Court of Appeal had not had the opportunity to hear submissions on the issue. Their Lordships did however appear to suggest that the fact of an appeal being devoid of any merit might still be a valid reason for the Court of Appeal to exercise its discretion against an appellant. 30. On the other hand, the use of the powers of the English Court of Appeal to penalise an appellant who persists, without justification, with a wholly unmeritorious appeal is residual, even vestigial. The Registrar of Criminal Appeals states that in England and Wales the only recent example was in *Selby* (13 May 1999) Unreported Judgment of the Court of Appeal (No.9806289/W5) (letter to Mr Whelan dated 12 May 2003). It is noteworthy that in *Selby* the single judge had warned the Applicant that he would be at risk of an order for loss of time if he renewed his application to the Full Court. This may reflect an increasing unease with penalising a party for exercising his fundamental rights of access to a Court, while recognising that there is no fundamental right to pursue a hopeless appeal - indeed sometimes such pursuit could aptly be characterised as an abuse of process. Human Rights 31. Although the provisions of the 2000 Law are not yet in force, we have been invited to consider the issue in the context of the European Convention on Human Rights ("the Convention") which has been extended to Jersey. In the case of *Monnell and Morris v the United Kingdom* 10 E. H. R. R. p 205 ("Monnell"), the general principle that prisoners could be deterred from vexatious appeals was found by the European Court of Human Rights to be in accordance with human rights principles. The case, however, must be applied with some care, because : (i) the importance of Article 6 of the Convention (fair trial rights) is, if anything, enhanced by more recent Strasbourg jurisprudence - although no doubt has yet been cast on the decision in *Monnell*; (ii) what was then under consideration was the reformed English statute, Section 29 of the 1968 Act; and (iii) the stress laid upon the various safeguards attendant upon the Court's exercise of this power which affects the liberty of the subject - next to life, the interest most valued in modern legal systems. 32. The critical part of the judgment reads, so far as material, as follows: "II ALLEGED BREACH OF ARTICLE 6 1 AND 3(c) 58..... However, the Court of Appeal not only refused Mr Monnell and Mr Morris leave to appeal but it also exercised its competence under section 29(1) of the Criminal Appeal Act 1968 to order a further period of imprisonment against them in the form of loss of time. It must therefore be ascertained whether, at this stage of the determination of the criminal charges against Mr Monnell and Mr Morris, there was a fair procedure and an effective defence of their interests. The Court of Appeal's power to direct loss of time is

intended to serve in practice as a deterrent against clearly unmeritorious applications for leave to appeal, which, if not discouraged, would unacceptably clog the process of dealing with appeals of some merit. Article 6 § 1 (art. 6-1) itself prescribes the hearing of criminal cases "within a reasonable time". There can accordingly be no doubt that the aim pursued by the exercise of the power conferred by section 29(1) of the 1968 Act is a legitimate one in the interests of the proper administration of justice for the purposes of Article 6 (art. 6). Although not expressly provided for in the text of section 29(1) of the Criminal Appeal Act 1968, the basis on which loss of time was ordered against Mr Monnell and Mr Morris was, in line with the stated policy and practice of the Court of Appeal, the unmeritorious character of their applications for leave to appeal. The nature of the issue to be decided for the ordering of loss of time was not such that their physical attendance was essential to assist the Court of Appeal in its determination. In the opinion of the Court, Article 6 (art. 6) required that Mr Monnell and Mr Morris be provided, in some appropriate way, with a fair procedure enabling them adequately and effectively to present their case against the possible exercise to their detriment of the power under section 29(1) of the 1968 Act. The Court will accordingly review the procedure followed to ascertain whether this condition was satisfied. To begin with, the principle of equality of arms, inherent in the notion of fairness under Article 6 § 1 (art. 6-1) was respected in that the prosecution, like the two accused, was not represented before either the single judge or the full Court of Appeal. The principle of equality of arms is, however, "only one feature of the wider concept of fair trial" in criminal proceedings; in particular, "even in the absence of a prosecuting party, a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage". In this connection, it is to be noted that, pursuant to the legal aid scheme Mr Monnell and Mr Morris had the benefit of free legal advice on appeal. The counsel who had represented them at the trial advised that there were no reasonable prospects of successfully appealing, but both men chose to ignore this advice and pressed ahead with applications for leave to appeal. They were both also aware that, in the absence of arguable grounds of appeal, to lodge and then to renew their applications for leave to appeal might well result in loss-of-time orders. Warnings to this effect were given in the Forms AA and SJ. Nevertheless and despite the fact that the single judge had refused leave, they renewed their applications to the full Court of Appeal on the same grounds as in their original applications. As to the possible manner of presenting their case, the system whereby applications for leave to appeal are lodged and then renewed on official forms meant that Mr Monnell and Mr Morris, like all applicants for leave to appeal, were afforded the opportunity to submit written grounds of appeal. Admittedly, their ancillary applications to be present before the Court of Appeal were unsuccessful, this being a matter within the discretion of the Court. Consequently, neither man was able to formulate oral arguments in person before being penalised by an additional loss of liberty. However, there is no reason why their written submissions should not have included considerations relevant to exercise of the power to direct loss of time, especially in view of the warnings given to them in the Forms AA and SJ as to the importance of legal advice and the consequences of pursuing an application without arguable grounds. Indeed,

arguments going to the issue of the unmeritorious character of the application will necessarily have been incorporated in their submissions in support of the grounds of appeal. In accordance with the usual procedure, when considering Mr Monnell's and Mr Morris' applications, both the single judge and the full Court of Appeal had before them all the relevant papers including the grounds of appeal, a transcript of the trial and, for Mr Monnell, the social enquiry and psychiatric reports prepared on him. Be that as it may, Mr Monnell and Mr Morris, like any Applicant for leave to appeal, had the right to instruct counsel to appear on their behalf and present oral argument at a hearing both before the single judge and the full Court of Appeal. It can be presumed that neither Mr Monnell nor Mr Morris could afford to pay for counsel out of his own pocket, and under English law they were not automatically entitled to legal aid either for the preparation of the written grounds of appeal or for representations through counsel at an oral hearing. Under paragraph 3(c) of Article 6 (art. 6-3-c) they were guaranteed the right to be given legal assistance free only so far as the interests of justice so required. The interests of justice cannot, however, be taken to require an automatic grant of legal aid whenever a convicted person, with no objective likelihood of success, wishes to appeal after having received a fair trial at first instance in accordance with Article 6 (art. 6). Each Applicant, it is to be noted, benefited from free legal assistance both at his trial and in being advised as to whether he had any arguable grounds of appeal. In the Court's view, the issue to be decided in relation to section 29(1) of the Criminal Appeal Act 1968 did not call, as a matter of fairness, for oral submissions on behalf of the applicants in addition to the written submissions and material already before the Court of Appeal. In short, the interests of justice and fairness could, in the circumstances, be met by the applicants being able to present relevant considerations through making written submissions. In coming to this conclusion, the Court has also borne in mind that, as the power under section 29(1) is exercised in practice, the maximum loss of time risk is in the order of two months and not the whole of the period spent in custody between conviction and determination by the Court of Appeal. It is true, as the applicants' lawyers stressed before the Court, that this practical restraint is not brought to the attention of prospective applicants for leave to appeal. However, in view of all the other considerations prevailing, this shortcoming cannot be decisive for present purposes. Finally, the Court has no cause to doubt that the Court of Appeal's decision to refuse the applicants leave to appeal and, further, to impose loss of time was based on a full and thorough evaluation of the relevant factors. Having regard to the special features of the context in which the power to order loss of time was exercised and to the circumstances of the case, the Court finds that neither Mr Monnell nor Mr Morris was denied a fair procedure as guaranteed by paragraphs 1 and 3(c) of Article 6 (art. 6-1, art. 6-3-c). There has accordingly been no breach of either of these provisions of the Convention." 33. It can thus be seen that the Strasbourg Court places emphasis on a variety of factors which together make the English procedure compliant with the Convention: (i) free legal advice at all material stages (other Strasbourg cases, eg *Maxwell v UK* (31/1993/426/505) and *Benham v UK* (7/1995/513/597) emphasise the importance of legal assistance in criminal proceedings); (ii) adequate warnings about the

risks run in pursuit of a vain appeal; (iii) the amplitude of material available to both single judge and Court of Appeal; (iv) the length of time at risk of deduction (a maximum of the order of 2 months) 34. We would add that the practice directions in England (paragraph 28 above) assume that the prisoner will have received legal advice, and, if such advice is positive, obtained the assistance of legal representation to draft substantive grounds supported by the written opinion of Counsel in order that the single judge can determine the application properly. 35. By contrast, current Jersey law falls short of the express and implied desiderata in *Monnell and Morris*, a function partly of the administration of legal aid and partly of Jersey criminal procedure rules, in ways which we will consider at a later stage in the judgment. 36. Most notably the statutory law in Jersey stipulates for automatic disregard of time spent in custody while an appellant in computation of the length of sentence, subject to a favourable exercise of the Court's discretion. In our judgment it ought to provide for time in custody as an appellant to be automatically taken into account in computing length of sentence, subject however to exercise of discretion to order that part of the time in custody as an appellant be disregarded. The presumption inherent in the current Jersey provision is too adverse to an appellant. 37. While *Monnell and Morris* does not touch upon this precise situation since the Court was then considering a statutory provision which was in comparative terms inherently appellant-friendly, we do not consider that Article 35(4) as presently drafted, and if operated without necessary practical safeguards, would be likely today to pass muster in the Strasbourg Court. We note that, with different shades of emphasis, all three Counsel before us articulated the same view. The Committee in recommending reform in England and Wales in 1965 said this: "We recommend therefore that the time during which an appellant is in custody pending the determination of his appeal should, subject to any direction which the Court may give to the contrary, be reckoned as part of any term of imprisonment under his sentence. The Court will thus retain power to penalise an appellant whose appeal is totally devoid of merit, but it will be required to bring its mind to the problem instead of operating an almost automatic rule. In any case where the Court orders the forfeiture of time we think it should give its reasons, and that this should be communicated to the appellant if he has not been present." [para 181] 38. We agree that this is the better approach, but we consider additionally that if the Court is minded to make such a direction, it should inform the appellant and allow him an opportunity to argue that it should not be made. 39. We are informed by Mr Whelan for the Attorney-General that in view of the anomalies and uncertainties which affect the present operation of Article 35(4) and the prospective coming into force of the 2000 Law, legislative revision of Article 35(4) is under active contemplation. The obligation to read and give effect to Jersey legislation "so far as it is possible to do so" "in a way which is compatible with Convention Rights" (the 2000 Law, Article 4) cannot, in our view, be deployed so as to rewrite Article 35 as if it were Section 29 of the Criminal Appeal Act 1968. Creative construction is one thing; judicial legislation another. This former is permitted: the latter not (see *R v A* [2001] 3 All ER1 per Lord Hope at paras.108-110, pages 35-36). Absent amendment, which could sensibly follow the well-tried English precedent, a Jersey Court might be compelled, in future, in an appropriate

case, to make a declaration of incompatibility (the 2000 Law, Article 5). Practice Directions 40. Unless or until such amendment is made it is necessary for the Royal Court to follow guidelines which will, to the greatest extent possible, immunise its exercise of discretion from challenge on Convention grounds. We emphasise "guidelines", since we note that it is alien to the concept of discretion that it should be fettered by a policy which admits of no exceptions (Wade and Forsyth. Administrative Law 8th ed. pp.356-361). Mutatis mutandis, these could be used even after amendment. 41. Three strands of legal principle need to be taken into account in deciding how the problems arising from the continuance in force of Article 35(4) are best to be resolved:

- (i) fairness in relation to the deprivation of liberty; (ii) consistency of application of Article 35(4); and (iii) the impact of Article 6 of the Convention both today as a guide to the appropriate Court procedures, and in the future when the 2000 Law will have come into force. 42. The principal ways in which Article 35(4) can work unjustly, inconsistently and contrary to Article 6 of the Convention are these: (i) the automatic effect of Article 35(4) in causing an applicant for leave to appeal to have to serve an extra 6 weeks in prison unless the Court makes a specific order to the contrary (this being the opposite of the English provision, under which an applicant cannot serve extra time in prison unless a specific order to that effect is made by the single Judge or the full Court of Appeal, Criminal Division); this means that if an application for leave is withdrawn, an extra 6 weeks imprisonment is automatically served unless a specific application has been or is made for a direction to the contrary, and there is no procedure laid down by which any such application is to be made; (ii) the time limit of 10 days (under Article 30) for the making of an application for leave to appeal is often too short to enable a prospective applicant to obtain legal advice, resulting in the applicant making an immediate application (without the benefit of such advice) which may prove to be misconceived either entirely or as to the grounds on which it has been put forward, and if it is withdrawn, (i) above may apply; (iii) in practice the absence in many instances of legal advice before an application for leave is made; (iv) even if legal advice is available, counsel may not be able to draft appropriate grounds of appeal, particularly if new counsel not involved in the Royal Court trial and/or sentencing hearing has to be or is appointed; (v) the lack of adequate written or other warnings to prospective applicants of the risk they run of serving an extra 6 weeks in prison if they apply for leave to appeal; (vi) the lack of reasons for refusal of an application for leave when dealt with by a single Judge of the Court of Appeal; (vii) the lack of adequate warnings to those applicants who may be minded to renew their applications to the full Court; (viii) inconsistent applications of Article 35(4) by different single Judges and differently constituted full Courts of Appeal. 43. As we have indicated, Article 35(4) will need to be redrafted when the 1961 Law is revised: (i) to retain a specific power to order that part of the time spent as an applicant for leave. and therefore as an "appellant" as defined in the 1961 Law (see Attorney-General-v-Young above) is to be disregarded; but (ii) to ensure that extra time in prison is served only if that specific power is exercised, after the applicant has had the opportunity to make written and/or oral submissions with the benefit of legal

representation. 44. Until Article 35(4) has been amended, steps need to be taken to ensure that the deficiencies summarised in paragraph 42 above are remedied appropriately. Mr Whelan for the Attorney General has most helpfully provided this Court with proposed practice directions and warnings to be added to the relevant forms. In the time available for the preparation of this judgment it is not possible for us to draft a definitive set of practice directions or appropriate forms with suitable warnings on them. This Court can, however, indicate the nature and scope of the practice directions which in the judgment of this Court are needed to achieve the appropriate remedies for the present deficiencies. It is possible that some of the matters would be dealt with better within the Court of Appeal Rules. 45. The practice directions should reflect the following points: (i) Although a 10 day period is laid down in Article 30(1) of the 1961 Law for giving notice of appeal or notice of application for leave to appeal, in the case of all such notices this period is to be treated as extended pursuant to Article 30(3) of the 1961 Law until 28 days after the date of the conviction, or the sentence, sought to be appealed against. (ii) Any application for further extension beyond this period of 28 days is to be made in writing to a single Judge of the Court of Appeal in a form to be specified, with a brief statement of the reasons why a further extension of time is sought. (iii) Every application for leave to appeal is to be made on a specified form containing a suitably drafted warning as to loss of time, and is to be accompanied by a brief opinion in writing, as to the potential grounds for appeal available to the applicant, to be provided by the advocate who appeared for the applicant at the trial (in the case of a conviction) or at the sentencing hearing (in the case of sentence). [The system of the Tour de Rôle for legal aid and the Code of Conduct for Advocates will need to be amended so as to ensure that they place on advocates the professional duty to provide such an opinion by no later than 21 days after the date of the relevant conviction or determination of sentence, or if time for filing a notice of application for leave is extended beyond the 28 day period, by no later than a date 7 days before such time as extended expires.] (iv) The decision by a single Judge of the Court of Appeal whether or not to grant leave to appeal is to be reached on the basis only of the written application for leave and the written opinion of the advocate, and without an oral hearing, unless the single Judge directs that such an oral hearing is to take place attended by the Advocate who has signed the opinion and (if the Attorney General so wishes) by a Crown Advocate. (v) The decision of the single Judge is to be delivered to the applicant and the two advocates on a specified form which is to contain: (a) a brief statement of the Judge's reasons for refusing or granting leave to appeal; and (b) a suitable indication of the applicant's right to renew the application pursuant to Article 39(1) of the 1961 Law to the full Court of Appeal, together with a suitably drafted warning as to loss of time, if the application has been refused. (vi) If an applicant renews an application to the full Court of Appeal, this is to be by filing a specified form containing a suitably drafted warning as to loss of time, and accompanied by the single Judge's reasons and the advocate's opinion already submitted to the single Judge which may, if thought fit, be added to by a further opinion in writing dealing with the reasons given by the single Judge for refusing the application (either by the same advocate or by a different advocate if there has been a change of advocate). (vii) The full Court of Appeal may direct that either: (a) the application for leave is to be heard

solely as an application for leave; or (b) the application for leave is to be heard as if the full appeal is being heard. (viii) Neither a single Judge nor a full Court of Appeal will decline to make a direction relating to the full period of six weeks under the Proviso without first giving the applicant the opportunity either through an advocate or in person to make both written, and (if so wished) oral, representations as to why such a direction should be made. (ix) Neither a single Judge nor a full Court of Appeal will decline to make a direction relating to the full period of six weeks under the Proviso if: (a) it is shown to the Judge's or the full Court's satisfaction that the application has been made on the advice of an advocate as contained in a written opinion submitted to the Judge or the full Court; or (b) the application for leave was withdrawn before the single Judge had made a decision whether or not to grant the application; or (c) the application for leave has been refused by the single Judge, who has made a direction that Article 35(4) be disregarded, the application has been renewed to the full Court, and the application has been withdrawn before it has been considered by the full Court; or (d) for reasons other than the free choice of the applicant, the applicant has not been represented by an advocate, and no advocate's opinion has been submitted. 46. The requirement to submit an advocate's opinion raises questions of legal professional privilege. In England and Wales counsel is expected to furnish such an opinion for submission to the Court. We take the view that submission of such an opinion to the Court with the express or implied consent of the applicant will constitute a waiver of privilege by the applicant. In our judgment the furnishing of such opinions is desirable if meritorious applicants are correctly to be given leave. Applicants who decline to obtain an advocate's opinion or to authorise submission of such an opinion to the Court may be at risk of an adverse exercise of the discretion: this should be covered by appropriate warnings. 47. Naturally advocates will bear in mind the terms of their oath, and therefore will not provide opinions supporting applications for leave unless they are satisfied that the grounds of appeal to be relied on are reasonably arguable. 48. We make an order for payment of the costs of Advocates Renouf and Juste in relation to the Article 35(4) point. Finally we wish to express our gratitude to Advocates Renouf, Juste and Whelan for all their assistance. *Authorities Crawford -v- Prison Board* (17 th June 1999) (Jersey Unreported); [1999/111] *McClements -v- AG* (18 th July 2002) (Jersey Unreported); [2002/132] *Monnell and Morris -v- UK 10 EHKR 205*. Report of Interdepartmental Committee on the Court of Appeal Criminal Appeal Cmnd 2755. *Breen, Croke, Crook, Buckley -v- AG* (13 th September 2002) Jersey Unreported; [2002/167] Criminal Appeal Act 1907: s. 14(3) Criminal Justice Act 1948: s. 38 (2). Criminal Appeal Act 1968. Criminal Appeal (Scotland Act 1926: s.9(4) Criminal Justice (Scotland Act 1949: s.30. Prison (Jersey) Law 1957: Article 26(1). Prison (Jersey) Rules, 1957: Rules 110-114. *Selby* (Unreported Judgment of English Court of Appeal: No. 9806289/W5) *Young -v- AG* (23 rd November 1998) Jersey Unreported: [1998/231]. Practice Direction (Crime: Sentence: loss of time) [1980] 1 WLR 270. Practice Note: Crime: Applications for leave to appeal [1970] 1 WLR 663. Guide to Proceedings in the Court of Appeal, Criminal Division, February 1997. *Tiwari -v- The State* (Privy Council Appeal No.76 of 2001). *Maxwell -v- UK* (31/1993/426/505: para k). *Benham -v- UK* (7/1995/513/597). *R -v- A* (need ref ex MJB/RCS/CEW) . *Wade and Forsyth: Administrative Law* (8 th Edition) pp 356-361. Page Last Updated: 23 Jun 2016 BAILII: Copyright Policy |

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