

officers in the performance or purported performance of their law enforcement functions. That question has not previously had to be decided by a court of law in Guernsey.

Factual Background

2. The issue has been raised by the States in an *exception de fonds* pleaded in its defence of an action for damages instituted by the Plaintiff. I have agreed to hear the *exception* as a preliminary matter and for this purpose, I must assume that the facts alleged by the Plaintiff are true.
3. The following summary of the factual background to the matter is taken from the Plaintiff's Cause. The sequence of events began when officers of the Customs and Immigration Department of the States of Guernsey intercepted at the Post Office a parcel that was thought to contain controlled drugs. On the morning of 25th September 2000, they caused a controlled delivery of the parcel to be made at an address in Rue de Barras, Vale, following which a number of persons were arrested, three of whom were in due course convicted and sentenced.
4. The Plaintiff was not one of those three convicted persons but he was arrested that morning and subsequently detained at police headquarters where he was interviewed by officers of Customs and the Police. In due course he was charged with an offence which I assume was drug related but the Cause does not disclose the details or nature of the offence. The Plaintiff was brought before the Magistrate's Court where, on four separate occasions, applications made on his behalf for him to be released on open remand were refused. He was committed on 6th February 2001 and his trial was fixed in the Royal Court for 2nd July 2001. On 28th June 2001, the Royal Court ordered that the trial could not proceed unless certain material was disclosed by the prosecution to the Plaintiff. The prosecution chose not to disclose that material and so on the following day, 29th June, the prosecution offered no evidence and the Plaintiff was formally acquitted by the Royal Court.
5. In the present proceedings, the Plaintiff alleges false imprisonment and assault and claims damages including loss of income and legal fees and aggravated and exemplary damages, totalling £225,000.
6. At the heart of the Plaintiff's case are allegations that false evidence was produced against him. Three Customs officers made statements to the effect that he had been seen riding his motorcycle along Rue de Barras at 0940 hours on the morning of the controlled delivery of the parcel; allegations he claims were false. He also claims that the investigating officers made false allegations that they had found a substance thought to be cannabis resin in a garage to which he had access and which he had permitted them to search. The Plaintiff alleges the cannabis was either "planted" by the investigators in the garage or never in fact found there and that the evidence was manufactured in order to bolster the case against him.
7. The Cause also pleads that the reasons given to the Court by the prosecution in opposition to his applications for open remand were all false allegations. As H M Procureur said at the hearing before me, the Cause could be interpreted as an allegation of conspiracy against the Plaintiff to which the Law Officers of the Crown were a party along with Police and Customs officers. However no such conspiracy is expressly pleaded and my understanding of the Plaintiff's case is that he is not seeking to pursue any allegations against the Law Officers and he is not trying to claim that the States of Guernsey would have any liability for the actions of the Law Officers when prosecuting a criminal offence on behalf of the Crown.

Counsels' Submissions

8. Advocate Barnes, who appeared on behalf of the Plaintiff, had two lines of argument. Initially, he relied upon the principles of legal responsibility and liability as they have evolved in England and Wales and developments in the law of vicarious liability in that jurisdiction.

Later, he added a claim, based upon the European Convention on Human Rights, that the Plaintiff has an enforceable right to receive compensation.

The Status of a Police Officer at Common Law

9. The first part of the history of the relationship between an English police officer and his relevant local authority is told in the judgment of McCardie J. in Fisher v Oldham Corporation [1930] 2 KB 364. The status of a police constable evolved over time and, by 1930, the relationship between local government officials and the police was governed in part by the Municipal Corporations Act 1882 which created a watch committee with responsibility for appointing borough constables. On appointment the constables were required to be sworn in before a local justice. The watch committee had the power to frame such regulations as they deemed expedient for preventing abuse or neglect and to ensure the efficient discharge of the constable's duties. The watch committee also had power to dismiss a constable whom they considered to be negligent. The plaintiff in Fisher claimed that those provisions created the relationship of master and servant between Oldham Corporation and an Oldham police officer.

10. However McCardie J. dismissed that argument. After reviewing how the role of constable had evolved over the centuries, he concluded, at page 371, that:

“Prima facie, therefore, a police constable is not the servant of the borough. He is a servant of the State, a ministerial officer of the central power, though subject, in some respects, to local supervision and regulation.”

11. He cited with approval the Australian case of Enever v The King (1906) 3 Commonwealth L. R. 969 in which, after considering a number of English decisions, Griffiths C.J. said

“At common law the office of constable or peace officer was regarded as a public office, and the holder of it as being, in some sense, a servant of the Crown”.

12. Griffiths C.J. is further quoted as having held that:

“the powers of a constable, quâ peace officer, whether conferred by common or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself. . . . A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application.”

13. McCardie J. added that a similar view had been taken by the Supreme Court of Canada, the Supreme Court of Massachusetts and the Supreme Court of South Africa. He illustrated the point by asking what value a resolution of the watch committee would have if it directed that a man arrested for a serious felony be released. The police constable would have a duty to disregard the resolution and a duty to consider charging the members of the committee with a conspiracy to obstruct the course of justice.

14. At the conclusion of his judgment, McCardie said (at page 377):

“I hold that the defendants are not responsible in law for the arrest or detention of the plaintiff. The police, in effecting that arrest and detention, were not acting as the servants or agents of the defendants. They were fulfilling their duties as public servants and officers of the Crown sworn “to preserve the peace by day and by night, to prevent robberies and other felonies and misdemeanours and to apprehend offenders against the peace.” If the local authorities are to be liable in such a case as this for the acts of the police with respect to felons and misdemeanours, then it would indeed be a serious matter and it would entitle them to demand that they ought to secure a full measure of control over the arrest and prosecution of all offenders.

To give any such control would, in my view, involve a grave and most dangerous constitutional change.”

15. Advocate Barnes informed me that, following the decision in Fisher, a practice grew up in England whereby Chief Constables accepted legal responsibility for the police officers under their command and thereby enabled proceedings to be instituted against a Chief Constable. That practice became enshrined in legislation with the enactment of the Police Act 1964 (later replaced by the Police Act 1986) rendering the Chief Constable liable for the actions of individual police officers (section 88 of the Police Act, 1986).
16. Guernsey has no statutory provision to that effect. The provisions establishing the Island Police Force are to be found in the Loi Ayant Rapport à la Police Salariée Pour L’Ile Entière 1920 which set up a committee with responsibility for the establishment and supervision of an Island wide salaried police force. The Law of 1920 is still in force although it has been amended on a number of occasions. There have been a number of changes in the supervising committee but its duties and responsibilities have not fundamentally altered. Today the relevant committee is the Home Department but in the year 2000, when the events that are the subject of these proceedings occurred, the Home Affairs Committee had responsibility for the establishment of the Island Police Force.
17. The Law of 1920 is in different terms from the English legislation but there are similarities between the responsibilities of the relevant supervising committee of the States of Guernsey and the watch committee in the Fisher case. H M Procureur submitted there is a stronger basis for arguing that a master/servant relationship existed in England because the watch committee had the power and responsibility of appointing and removing police constables. In Guernsey, the 1920 Law, as enacted, stated that the Inspector, Sergeants and Officers were “*nommés*” by the committee (which I translate as “nominated” or “appointed”). However that provision was later amended and eventually repealed by The Island Police Force Establishment (Guernsey) Law 1949 which simply provides that the establishment of the Police Force is such as the States shall from time to time determine by Resolution. Since 1949 the responsibility for appointing and dismissing officers has lain with the Chief Officer of Police.
18. Advocate Barnes’ main submission was that Fisher would not be decided in the same way today because the law of vicarious liability has developed since 1930. The master/servant relationship is no longer the deciding factor and if the modern principles of vicarious liability are applied they lead to a different conclusion.
19. Advocate Barnes and H M Procureur (on behalf of the States) both referred me to Chapter 6 of Clerk & Lindsell on Torts, 19th edition, and what is said therein about the different tests that have been applied by the courts in identifying whether the relationship of employer and employee exists in any particular case. The ‘Control Test’ was derived from Short v J & W Henderson Ltd (1946) 62 T.L.R. 427 where Lord Thankerton identified four indicia of a contract of service, namely: (a) the master’s power of selection; (b) the payment of remuneration; (c) the master’s right to control the method of doing the work: and (d) the master’s right of suspension or dismissal (para 6-06). The inadequacy of the ‘Control Test’ is said by the authors of Clerk & Lindsell to have been brought out in cases concerning negligent hospital treatment (para 6-08).
20. Next came the ‘Organisation Test’ which involved “*asking was the worker part of the employer’s association; was his work co-ordinated by the employer, so that the employer controlled the “where” and “when”, rather than the “how”?*” (para 6-09).
21. Clerk & Lindsell goes on to say (at para 6-10) that “*the more modern approach is to abandon the idea of a simple test and to take a “multiple factor” approach. All aspects of the relationship are to be assessed and the assessment itself is seen as a complex undertaking. In*

essence, the most recent case law has underlined the need to identify the economic reality of a given relationship”. At para 6-11, it concludes that “Ultimately, there is no single test that determines the existence of an employer/employee relationship”.

22. The change in approach is well illustrated by the hospital cases but, as Clerk & Lindsell says at para 6-18, this may be due to:

“the development of a different approach to the liability of hospital authorities for negligence occurring in the course of the treatment of their patients ... In many of the cases the tendency has been to treat the question of the hospital authority’s liability as raising issues of primary, as well as vicarious, responsibility. The hospital authority itself, it is said, is under a duty to its patients which it does not discharge simply by delegating its performance to someone else, no matter whether the delegation be to an employee or an independent contractor.”

23. The change in approach is clear from the judgment of Lord Denning L.J. (as he then was) in Cassidy v Minister of Health [1951] 2 K.B. 343, at page 362 where he said:

“when hospital authorities undertake to treat a patient, and themselves select and appoint and employ the professional men and women who are to give the treatment, then they are responsible for the negligence of those persons in failing to give proper treatment, no matter whether they are doctors, surgeons, nurses or anyone else.”

24. He continued (also on page 362):

“I think it depends on this: Who employs the doctor or surgeon – is it the patient or the hospital authorities? If the patient himself selects and employs the doctor or surgeon, as in Hillyer’s case, the hospital authorities are of course not liable for his negligence, because he is not employed by them. But where the doctor or surgeon, be he a consultant or not, is employed and paid, not by the patient but by the hospital authorities, I am of opinion that the hospital authorities are liable for his negligence in treating the patient. It does not depend on whether the contract under which he was employed was a contract of service or a contract for services. That is a fine distinction which is sometimes of importance; but not in a case such as the present, where the hospital authorities are themselves under a duty to use care in treating the patient.”

25. Despite these developments, Clerk & Lindsell considers that the position of police officers at common law is unchanged. It says at para 6-16:

“A police officer is neither an employee of the Crown nor of the police authority and therefore, at common law, the only legal remedy available to a person injured by a police officer’s tort lies against the officer himself. However, this was remedied by legislation in 1964, now replaced by the Police Act 1996.”

26. After the oral hearing had concluded I became aware of the decision of the Court of Appeal in Farah v Commissioner of Police of the Metropolis [1998] Q.B. 65 which referred to, and applied, the decision in Fisher. I drew the decision to the attention of counsel and invited their submissions on it. Advocate Barnes submitted that it did not affect the Plaintiff’s position that the law of vicarious liability has developed since 1930 to the extent that an employer no longer needs to exercise any control over the manner in which an employee carries out his duties in order to remain vicariously liable for his employee’s acts.

27. Advocate Barnes said that in Farah the court was concerned only with the issue as to whether as a matter of the law of agency a police officer was the agent of the Commissioner of Police, it having been conceded that whilst by statute the Commissioner was vicariously liable for the acts of police officers, police officers were not employees of the Commissioner.

28. On the other hand, H M Procureur submitted that *dicta* in Farah strongly suggest that the court identified no relevant developments affecting vicarious liability since the date of the decision in Fisher. It rather underlined the constitutional importance of the independence of law enforcement officers.
29. I believe the case merits further consideration, being the only recent English decision of which I am aware that has referred to Fisher. The plaintiff was a Somali refugee who claimed to have been attacked by white youths who set a dog on her and injured her. When she summoned the police they arrested her without cause and later offered no evidence against her so that she was acquitted. She brought an action for damages against the Police Commissioner pursuant to section 48(1) of the Police Act 1964 alleging false imprisonment, assault and battery, malicious prosecution and unlawful discrimination under the Race Relations Act 1976 claiming that the police conduct amounted to a breach of that Act. The Commissioner applied to strike out the latter part of the claim, the application was refused by the judge at first instance and the Commissioner appealed.
30. In the first part of its decision, the Court of Appeal held that the Race Relations Act 1976 applied to police officers' duties when giving assistance to members of the public; that it was therefore unlawful for officers to discriminate on the grounds of race; and that it was open to a member of the public to bring proceedings against police officers under the Act.
31. The Court of Appeal went on to decide that on its true construction section 53(1) of the Race Relations Act 1976 excluded the operation of section 48(1) of the Police Act 1964 in relation to claims under the Act of 1976, so that section 48(1) did not render a chief officer of police vicariously liable for actions of his officers committed in contravention of the Race Relations Act.
32. Next the Court of Appeal considered the effect of section 32 of the Race Relations Act. The chief constable could be held liable (for the actions of his officers in contravention of the Race Relations Act 1976) under section 32 of the Act if either the officers were the employees of the chief constable (section 32(1)) or they were acting as his agents and with his authority (section 32(2)). It was common ground that the officers were not the employees of the chief constable. The issue to be decided was, therefore, whether the police officers were the agents of the chief constable. It is not the same as the question I have to decide in the present case but it is informative to see how the Court of Appeal approached it.
33. In my view it is helpful to note that in his judgment, Hutchinson L.J. accepted the judgments in Fisher and in Enever as authority for the proposition that a police officer fulfils his duties as a public servant and, in some sense, an officer of the Crown. He dismissed a submission based upon a passage in a textbook Clayton & Tomlinson on Civil Actions Against the Police, 2nd edition (1992), at page 39 and supported by Hawkins v Bepey [1980] 1 W.L.R. 419 that police officers are now to be regarded as agents of the chief officer. The Court held that that decision was determined on its "rather special facts" and that it did not conflict with Fisher (at page 83A). Hutchinson L.J. concluded "*In my view there is no valid ground for concluding that the officers in the instant case were acting as agents of the commissioner*" (page 83B).
34. Otton L.J. said (at page 85F) that "*In my view the concept of principal and agent is inimical to the status of a police constable*". He then referred with approval to Fisher and Enever, recognising that observations there were strictly *obiter* as the case was concerned only with the relationship of master and servant. He declined to accept the views expressed in 'Clayton and Tomlinson'.
35. Advocate Barnes sought to distinguish the position in Guernsey from that in England on the ground that the duties and responsibilities of the Guernsey police force have evolved over the centuries in a different way from their counterparts on the mainland; the members of the

States of Guernsey Police are the successors of the parish constables in the discharge of their law enforcement functions.

Conclusion re the Status of a Police Officer

36. I accept that the role of a police officer has evolved differently in different jurisdictions. I also recognise that our Law of 1920 is not identical to the statute that established the Oldham Watch Committee and which was the subject of McCardie J.'s consideration in Fisher. However I believe there are sufficient similarities to justify treating the English common law as being highly persuasive.
37. I accept the reasoning of McCardie J in Fisher and of the Court of Appeal in Farah as demonstrating that the status of a police constable is special. Applying the same reasoning to the status of a Guernsey police officer, I conclude that the relationship of the police officers in the present case with the States of Guernsey, acting through the Committee for Home Affairs, was not one of master and servant. As with the watch committee in Oldham, the Committee for Home Affairs could not have issued instructions to the officers telling them how to discharge their duties.
38. Furthermore, a Guernsey Police officer is not the agent of a States committee, for the reasons given in the English judgments and, as Otton L.J. said, the concept of principal and agent is inimical to the status of a police constable.
39. As for the other developments in the principles governing vicarious liability, the 'Control Test' is not satisfied because the States of Guernsey has no right to control the police officer's method of doing the work. Indeed it is important that the police officers are independent of the States because on occasions the Police may have to investigate complaints against the States, for example under Health and Safety legislation if a States' employee is injured at work.
40. Similarly, the 'Organisation Test' is not satisfied because the States cannot control the police officer's work in the required sense.
41. I am not persuaded that the hospital treatment cases on vicarious liability are of any assistance. It is clear from the passages I quoted above that in Cassidy, Lord Denning L.J. based the liability of the hospital authority on the fact that the authority had undertaken responsibility to treat the patient and therefore owed a duty to the patient. That view is supported by the authors of Clerk & Lindsell who suggest that the tendency has been to treat the question of liability as raising questions of primary as well as vicarious liability (see the passage quoted from para 6-18). In the instant case it is not suggested that the States of Guernsey had any primary liability for the matters giving rise to the claim. I therefore reject Advocate Barnes' submission that by reference to the English hospital cases I should conclude that the States are vicariously liable for the actions of the officers concerned.
42. The judgment of the High Court of Australia in Ever and the other decisions cited in Fisher from Canada, Massachusetts and South Africa show that it was widely accepted, both as a matter of common law and constitutional law, that a police officer acting in the discharge of his duties is to be regarded as an officeholder or servant of the Crown or of the state rather than as an employee or even as an agent of the chief constable. My understanding of Farah is that the English Court of Appeal accepted that the common law position in England and Wales had not altered. In my opinion, a Guernsey judge should be slow to depart from such a well established view of the legal and constitutional status of police officers. In coming to that opinion I have borne in mind the cautionary words of H M Procureur that I must be careful I do not stray into areas of judicial law making.
43. During argument, I asked how an injured party would commence proceedings if he was unable to identify the police officer alleged to have caused him injury and if I was to decide

that the legal position is the same as in Fisher. As there are no such difficulties in the present case I do not need to speculate as to how they might have to be addressed in a particular case. If that situation does ever arise, there may be other procedures that would be available to obtain disclosure of the identity of individual involved. In any event, I do not see that possible problems that could perhaps be encountered in seeking to identify an individual officer should lead me to conclude that the relationship between a police officer and the States is different from what I have set out above.

44. Advocate Barnes illustrated his submissions by asking how someone could obtain compensation if a police officer was found liable for causing serious injury to that person in a road traffic accident. If the States was not vicariously liable, he said the injured person would be unlikely to recover his loss from the officer concerned. In my view, that is principally an insurance matter; I would expect a police officer driving a police vehicle to be insured whether or not the States is vicariously liable for his negligence. It therefore does not assist in establishing the nature of the common law relationship between the States and police officers.

The Status of a Customs Officer at Common Law

45. So far I have been looking at the legal relationship between police officers and the States. However, the events which are the subject of the claim also involve officers of what was known, at the time, as the Customs and Immigration Department of the States of Guernsey. In paragraph 2 of the Cause, it is pleaded that the Defendant acting by the Home Department is responsible for the wrongful acts of the Officers of Police and the Customs and Immigration Department. In fact, the Home Department did not exist at the date of the matters alleged in the Cause. It came into existence only after the machinery of government was reformed in 2004. In the relevant year, 2000, the States committee with responsibility for the Customs and Immigration Department was, as I recall, the Board of Administration. However I will treat the Plaintiff's error in attributing responsibility to the wrong committee as being immaterial to the determination of the question whether the States of Guernsey is or is not liable for the acts and omissions of the officers involved in this case.
46. In relation to the Customs and Immigration Department, the governing Law is the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972 as amended. Section 2 of that Law provides that:

“2. The Chief Revenue Officer shall, subject to the general control of the Board, be charged with the duty of collecting and accounting to the Board [of Administration] for the duties of customs and excise.”

47. Section 3 provides that:

“3. (1) Any act or thing required or authorised by or under this Law or any other enactment to be done by the Chief Revenue Officer may be done by any officer or other person authorised generally or specifically in that behalf in writing by the Board or by the Chief Revenue Officer.

(2) Any person, whether an officer or not, engaged by the orders or with the concurrence of the Board or the Chief Revenue Officer (whether previously or subsequently expressed) in the performance of any act or duty relating to an assigned matter which is by law required or authorised to be performed by or with an officer, shall be deemed to be the proper officer by or with whom that act or duty is to be performed, and any person so deemed to be the proper officer shall have all the powers of an officer in relation to that act or duty.

(3) The Board shall furnish every officer with a written certificate of his appointment and identity and an officer shall, if so required, produce the said certificate in proof of his appointment and identity.”

48. Advocate Barnes submitted that the effect of those provisions is that customs officers are subject to control by the relevant committee of the States and that the Chief Revenue Officer could not be responsible because he is not a separate legal entity. Hence, the States are vicariously liable for the acts and omissions of customs officers.
49. On the other hand, H M Procureur submitted first that having “general control” of the Chief Revenue Officer does not give rise to vicarious liability for the actions of customs and immigration officers. Further, the power to issue written certificates of appointment does not determine responsibility for the actions of the officers any more than the power to issue licenses imposes liability upon a licensing authority.
50. He also asserted that the Chief Revenue Officer is in a similar position to the Chief Officer of Police. Both receive funding for their activities from the States of Guernsey but both have operational control and responsibility for the officers who serve under them. They each have independent power or authority as a result of the legislation creating their offices.

Conclusion re the Status of a Customs Officer

51. In my view, the starting point is to look at the legislation that established and governs the Customs and Immigration Department. It is common ground that there is no provision rendering the States, or anyone else, vicariously liable for the acts and omissions of customs and immigration officers.
52. There are statutory provisions to the effect that in the investigation of offences and gathering of evidence customs officers have the same powers as police officers (see the definition of ‘officer’ in section 1(1) of The Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972 as amended by section 2(1) of The Customs and Excise (General Provisions) (Bailiwick of Guernsey) (Amendment) Law, 1991 and section 69(1) of The Drug Trafficking (Bailiwick of Guernsey) Law, 2000). In practice, the Royal Court frequently sees that in connection with prosecutions for offences involving the illegal importation of controlled drugs police and customs officers have worked alongside each other in investigating the offences and apprehending suspects.
53. There are differences between police officers and customs officers. Historically, their respective roles have evolved separately and differently over the centuries. There are other differences at the present time, for example a customs officer does not take an oath before the Royal Court on appointment, unlike a police officer.
54. However, when a customs officer is discharging a criminal law enforcement function, he has the same duties and responsibilities as a police officer doing the same task. They often work alongside each other; the operation may be led either by a Customs officer or by a Police officer; and their roles are interchangeable. In such tasks, the relationship between the individual officer and his superior, whether he is the Chief Officer of Police or the Chief Revenue Officer, is similar. Neither group of officers is under the control of any States committee. The reasons for holding that a police officer enjoys a special status whereby he is neither the servant nor the agent of the States apply equally to a customs officer when discharging a law enforcement function. (I am not asked to decide whether in the discharge of some of his other duties a customs officer may be the servant or agent of the States and I make no decision in respect of any other duties he may be required to perform.)
55. I cannot see that there is any legal justification for saying that the States of Guernsey is vicariously liable for the acts and omissions of one group of officers when it is not vicariously liable for the other group. It seems to me that both groups of officers should have the same

relationship with the States when they are discharging the same law enforcement functions and therefore, having decided that the States is not vicariously liable for the acts and omissions of police officers, I find that I must reach the same decision in respect of customs officers when acting in law enforcement.

European Convention on Human Rights

56. In a second supplementary Skeleton Argument Advocate Barnes raised for the first time arguments based on the European Convention on Human Rights. He submitted that a rule preventing a person from taking proceedings against a State for malicious prosecution, assault and false imprisonment committed by agents of the State would be inconsistent with the person's rights under Articles 5(5) and 6(1) of the Convention both independently and in conjunction. Article 5(5) provides that:

“(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.”

57. Article 6(1) of the convention confers the right to a fair and public hearing in the determination of a person's civil rights and obligations or of any criminal charge against the person.

58. Advocate Barnes relied upon Ashingdane v United Kingdom A 93 (1985); 7 EHRR 528, para 57 and Fayed v United Kingdom A 298B (1994) 18 EHRR 393 at paras 65-68. Both cases considered restrictions that may be imposed by the State to restrict a person's access to justice; principles which are summarised in paragraph 65 of the judgment in Fayed.

59. I agree with H M Procureur's submission that the case law was of no assistance in the present case and that there is no breach of the Plaintiff's Convention rights because he had a remedy to sue the individual officers. The States is not denying or restricting his right of action; he had a remedy but he chose to sue the wrong Defendant. His remedy may now be barred by prescription, more than six years having elapsed since the date of the matters complained about, but prescription periods are accepted as being a legitimate restriction and six years is a reasonable period of time in which to bring a claim.

60. At the hearing before me, Advocate Barnes also cited Roche v United Kingdom (19 October 2005, Application No. 32555/96). He relied upon a passage in the dissenting opinion of Judge Loucaides joined by seven other judges (at page 42 of 46 of the copy provided to the Court) which concluded with the following statement:

“The courts may examine whether there is a sufficient legal basis for a civil right in the States in question regardless of the domestic conditions or limitations.”

61. Taking that passage in conjunction with Article 5(5), Advocate Barnes submitted that the Court must examine whether a person has an effective remedy for compensation. If the only remedy is against an individual officer, it may not be effective in any case where identification of the officer concerned is difficult or where it may be difficult to enforce an award of compensation against any individual officer who has been found liable. Having regard to those issues, he submitted that right to receive compensation has to be met by the States as the Defendant; only the States can satisfactorily discharge any obligation to pay compensation.

62. H M Procureur asserted that all the case law was concerned with restrictions that had been placed on a citizen's access to justice. In the present case there is no such restriction; the States are merely saying that they are not liable. H M Procureur said that in practice if proceedings were brought successfully against an individual officer, the States would meet

any award made against the individual officer or his chief officer with a payment from general revenue unless it was covered by insurance.

63. I accept H M Procureur's submissions in respect of Articles 5 and 6. If the Plaintiff's factual allegations are correct, as I must assume they are, the Plaintiff would have had an effective remedy against the individual officers had he sued them within the relevant prescription period. Consequently, it would not have been necessary for him to sue the States of Guernsey in order to enforce any right he may have had under those Articles of the ECHR.
64. In a further written skeleton argument lodged after the oral hearing, Advocate Barnes submitted that the Plaintiff had a direct remedy against the Defendant pursuant to section 8 of the Human Rights (Bailiwick of Guernsey) Law 2000, the Defendant having committed an unlawful act namely a breach of Article 5 of the Convention in that the Plaintiff was unlawfully arrested and imprisoned. Section 8(1) provides that:

"In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just."

65. He may be correct in saying that the effect of section 8 is to create a new remedy directly against the States. However, I do not believe that the section can be applied retrospectively to an act committed prior to the coming into force of the Law. Sub-sections 18 (2) and (3) provide as follows:

"(2) This Law shall come into operation on such date as the States may by Ordinance appoint: and different dates may be appointed for different provisions and for different purposes.

(3) Section 7(1) (b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise section 7(1) does not apply to an act committed before the coming into force of that section."

66. Sub-section 7(1) states:

"7. (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

(a) bring proceedings against the authority under this Law in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act."

67. The relevant dates are that the Plaintiff was arrested on 25th September 2000. That was some time before the legislation to incorporate the provisions of the ECHR into our domestic law was enacted. Indeed, the Projet de Loi entitled "The Human Rights (Bailiwick of Guernsey) Law, 2000 was not approved by the States of Deliberation until two days after the Plaintiff was arrested. It was approved by Her Majesty in Council on 13 December 2000 and the Order in Council was registered by the Royal Court on 22nd January 2001. There was then a delay of more than five years before the Law was brought into force, in its entirety, on 1st September 2006.

68. I do not consider that the effect of section 8 can be applied retrospectively to give the Plaintiff a right to recover compensation from the States in respect of acts allegedly committed before the Law was enacted and brought into force.

69. Even if I am wrong in my conclusion that section 8 cannot give rise to a remedy in respect of acts committed before the Human Rights Law came into force, Advocate Barnes would have to face two further issues identified by H M Procureur in a written response to the Defendant's further submissions dated 1st March 2011. The first is fundamental and the second is procedural. H M Procureur wrote:

“The Plaintiff’s reference to section 8 of the Human Rights Law is elliptical. The question presently before the Court is whether, if the Plaintiff’s assertion of fact were proved, the States of Guernsey would be liable in damages for the conduct of the law enforcement officers (and of what the Plaintiff calls “the Prosecution”). If that conduct were held to constitute acts of (or, rather, acts for which legal responsibility resides with) that public authority which is the States of Guernsey, then it might be that section 8 might provide the plaintiff with an additional head of action (albeit probably attracting lower damages than the heads pleaded in the Cause); but his essential difficulty remains the same (as did Ms Farah’s – for different reasons but the point is made that of course the English Human Rights Act did not, and could not have, overcome her error in the choice of defendant either). In any event, the plaintiff cannot, in the context of a supplementary skeleton argument on a point of law arising on an exception de fonds, purport to add an entirely new remedy to his pleadings.”

70. The term “public authority” is not defined in the Human Rights Law but I accept that it may include a police officer and a customs officer in the discharge of their duties. However, the question is whether the acts of such officers are considered to be the acts of the States of Guernsey which is the public authority that the Plaintiff has chosen to sue as the defendant to his action. As H M Procureur suggests, that is the same as the question that arises from the case currently pleaded. For that reason, it would not give the Plaintiff any additional remedy he does not already have. I agree with his submission.
71. I also accept the submission that the Plaintiff cannot add an additional remedy to the current pleadings without applying to amend them first.

Conclusion

72. In conclusion, for the reasons I have given in this judgment, I allow the Defendant's *exception de fonds*.
73. I apologise to counsel that this judgment has taken me longer to produce than I would normally like but that is in part due to the additional research I carried out after the hearing which was not wholly productive but it did lead me to the discovery of the Court of Appeal's judgment in Farah.

Postscript

After seeing a draft of this judgment, Advocate Barnes observed that it does not record that Police and Customs are, according to their contracts of employment, employees of the States of Guernsey, their employing department being the Home Department. The same point had been made in argument but I did not include it in my judgment for several reasons. First, I had no evidence to that effect, I did not know whether it was accepted by H M Procureur and I could not take judicial notice of it. Second, the Home Department did not exist in 2000, the relevant year. Third, the contracts of employment have to state the name of the employer and, if it is correct that at the relevant time their contracts of employment recorded the States as being the employer, that would not, in my view, alter the legal and constitutional status of an officer as established in Fisher and Enever.