



In The Supreme Court of Bermuda
CIVIL JURISDICTION
2024: No. 253

**IN THE MATTER OF THE BERMUDA CONSTITUTION ORDER 1968
AND IN THE MATTER OF ORDER 114 OF THE RULES OF THE
SUPREME COURT 1985**

BETWEEN:

DEVON HEWEY

Applicant

-v-

THE LEGAL AID COMMITTEE

First Respondent

and

THE ATTORNEY-GENERAL OF BERMUDA

Second Respondent

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Third Respondents

JUDGMENT

Date of Hearing: 16th and 22nd January 2026

Date of Decision: 23rd January 2026

Date of Judgment: 5th May 2026

Appearances: The Applicant in Person¹
Mr Brian Myrie, Deputy Solicitor-General for the Respondents

¹ The Applicant had the assistance of a *McKenzie* Friend, Mr Eron Hill.

JUDGMENT of Richards J

Introduction

1. By Originating Summons issued on 17th September 2024, the Applicant seeks declarations that:

“...section 5 of the Legal Aid Act 1980 (‘the Act’) as read with, inter alia, section 12 of the act, taken in its statutory context to the First Applicant on the facts of the present case has contravened and/or will contravene and/or is likely to contravene his right to a fair hearing as guaranteed by, inter alia, section 6 of Schedule 1 of the Bermuda Constitution Order 1968 and is repugnant to certain fundamental rights at common law including equality of treatment and the rule of law.

“...the Legal Aid Committee’ refusal and/or inability to appoint King’s Counsel to represent the First Applicant at his forthcoming retrial has breached and/or will be/ and/or is likely to breach his constitutional right to a fair hearing within a reasonable timeframe as guaranteed by s. 6 of Schedule 1 of the Bermuda Constitution Order 1968 and is repugnant to certain fundamental rights at common law including equality of treatment and the rule of law.”

“...the disparity between the counsel available to the Third Respondent to conduct the prosecution of the Applicant at his retrial and the counsel available to the Applicant to conduct his defence gives rise to an appearance of bias and/or will and/or is likely to contravene his right to a fair hearing as guaranteed by section 6 of the Bermuda Constitution; further or alternatively, this disparity is repugnant to certain fundamental rights at common law, including equality of arms and the rule of law.”

2. The Applicant further seeks damages, an order *“requiring the Respondents to appoint Mr Richard Thomas KC to represent the First Applicant at his impending retrial”* and costs.
3. The Respondents, jointly represented in these proceedings by the Deputy Solicitor-General, Mr Brian Myrie, oppose the grant of any such relief.

The Previous Judicial Review Proceedings

4. The Applicant has previously sought, by way of an application for Judicial Review, to persuade this Court to compel the Legal Aid Committee (“LAC”) to appoint overseas King’s Counsel to represent him. That application was heard and determined by Wheatley AJ². In his Statement of Facts in support of the Originating Summons in these proceedings, the Applicant adopted part of Her Ladyship’s summary of the facts and I respectfully do likewise:

- “1. The Applicant in this matter was charged along with his co-defendant, Jay Dill (Dill), for the premeditated murder of Randy Robinson and the use of a firearm to endanger life. The Applicant and Dill were convicted on 25 February 2013 by a jury of their peers. Both defendants appealed against their convictions. The Court of Appeal dismissed both the Applicant’s and Dill’s appeals on 18 March 2016 with the reasons for the dismissals being delivered on the 13 May 2016.*
- 2. Following the Court of Appeal’s dismissal, the Applicant applied to the Judicial Committee of the Privy Council (JCPC) seeking leave to appeal the Court of Appeal’s decision. Leave was granted and the JCPC considered the appeal in February 2022. The JCPC allowed the appeal in its judgment handed down on 11 April 2022 – Devon Hewey v The Queen [2022] UKPC 12 (the JCPC Judgment), thereby setting aside the Applicant’s conviction and sentence. Subsequently, and as directed by the JCPC, the matter was remitted to the Court of Appeal to determine whether the Applicant should be retried. This issue was heard by the Court of Appeal on 9 June 2022 (the Retrial Hearing). On 17 June 2022, the Court of Appeal ordered that “the interests of justice requires that the Appellant should be retried” (the COA Retrial Order). The reasons for the COA Retrial Order were handed down on 12 August 2022 – Hewey v The Queen [2022] CA (Bda) 15 Crim.*
- 3. Notably, throughout the duration of the criminal proceedings from the initial trial in the Supreme Court to its return to the Court of Appeal in 2022, the Applicant was*

² [2024] SC (Bda) 9 civ.

legally aided. Mrs Simone Smith-Bean was appointed as his counsel to have conduct of the Retrial Hearing. On 2 September 2022, Mrs Smith-Bean, indicated to the Respondent that she was seeking overseas counsel to have conduct of the retrial. Mrs Smith-Bean provided an opinion as to why overseas, Queen’s Counsel (as it was then) was required to the Respondent for consideration on 23 November 2022 (the Opinion). The Opinion relied on the judgments of the JCPC and Court of Appeal, to support why the Applicant’s case was an exceptional one where overseas counsel was necessary to do justice to the points of public importance that would arise. An estimate of the costs of instructing Mr Thomas KC was subsequently submitted to the Respondent for consideration.

- 4. The Respondent refused to appoint overseas counsel. Instead, on 30 November 2022, the Respondent added Legal Aid Counsel, Ms Susan Mulligan, to the Applicant’s legal aid certificate. The Applicant was informed in the Respondent’s correspondence of 1 December 2022 that “there are not sufficient grounds to warrant overseas counsel” in his case.*
- 5. Additionally, on 30 November 2022, Mrs Smith-Bean provided Bar Council with a similar submission to that of the Opinion which also gave notification of the Applicant’s intention to seek special admission of overseas counsel for the purposes of the retrial. Bar Council subsequently informed Mrs Smith-Bean on 9 December 2022 that it had no objections to Mr Thomas KC’s admission to the Bermuda Bar for the purposes of the Applicant’s retrial. It expressly stated that it was satisfied that the test under section 51 of the Supreme Court Act 1905 (the SCA) was met. Mr Thomas KC was thereafter issued with a special practicing certificate on 26 January 2023.*
- 6. The Applicant had also written to the Respondent on 12 December 2022 advising why he had no trust and confidence with Ms Mulligan representing him at the retrial. The Respondent refused to “transfer from Ms Mulligan as lead counsel to Ms Smith Bean” in its correspondence to the Applicant dated 14 December 2022.*

7. *Mrs Smith-Bean wrote to the Respondent in January 2023 requesting that it reconsider Mr Thomas KC being appointed as counsel. On 20 January 2023 the Respondent sent a letter to Mrs Smith-Bean declining the approval of King’s Counsel being appointed and stated as follows:*

“...The committee refers you to their previous decision on 30 November 2022 to decline a KC for this matter and their decision remains unchanged. There are seasoned counsel in this jurisdiction who have experience with the areas of law which will arise in this retrial therefore a KC is not required. Please note that approval has already been granted for in house Legal Aid Counsel Ms Susan Mulligan, who is experienced counsel, as Lead Counsel and Mrs. Simone Smith Bean as Second Chair for this trial. The Committee will not consider any further request for a KC.”
8. *Mrs Smith-Bean sent further correspondence for the Respondent to reconsider its refusal to fund overseas counsel on 24 January 2023. Thereafter, the Applicant requested by letter dated 25 January 2023, as an alternative, that Ms Smith-Bean be permitted to conduct the trial alone.*
9. *On 24 January 2023, Legal Aid Counsel, Ms Mulligan, visited the Applicant after her appointment as his Lead Counsel. Thereafter, Ms Mulligan provided a memo to the Respondent for consideration which recommended that the Applicant should not be permitted to have overseas counsel but should be permitted to appoint an alternative local senior counsel as well as provided her opinion that the Respondent should not fund Ms Smith-Bean to conduct the trial alone. The Respondent wrote to Mrs Smith-Bean and Ms Mulligan on 27 January 2023 informing them, inter alia, that it would not allow Mrs Smith-Bean to be Lead Counsel, that a KC would not be appointed and that alternative, local counsel can be appointed as Lead Counsel with Mrs Smith-Bean being second chair.*
10. *Whilst the Applicant’s representation issues were ongoing, Mrs Smith-Bean for the Applicant continued to proceed with the application for the special admission of Mr Thomas KC. On 9 December 2023, Bar Council informed the Applicant that it had no*

objections to Mr Thomas KC's admission to the Bermuda Bar for the purposes of the Applicant's trial. It expressly stated that it was satisfied that the test under section 51 of the Supreme Court Act 1905 (the SCA) was met. Mr Thomas KC was issued with a special practising certificate by Bar Council on 26 January 2023. As a result of Bar Council's approval, the Department of Immigration approved Mr Thomas KC's application for a work permit on 12 April 2023. The Court was also satisfied that the statutory test for overseas counsel was met and granted Mr Thomas KC special admission on 25 April 2023.

- 11. The Applicant subsequently requested on 5 February 2023 that his legal aid certificate be transferred from Mrs Smith-Bean to Ms Shi-Vaughn Lee of 95 Law Ltd. The Respondent accepted there was a good enough reason for there to be a change in appointed counsel and discharged Mrs Smith-Bean. However, in the Respondent's letter of 10 February 2023, it informed the Applicant, that it would "consider" amending the certificate to appoint Ms Lee on the condition that the Applicant also either accepted Ms Mulligan as lead counsel at his trial, or chose a different local senior counsel approved by the Respondent.*
- 12. The Respondent wrote to the Court on 3 March 2023 where a query had arisen at a case management hearing as to why the Applicant was unrepresented, setting out the history of the Respondent's decisions in the Applicant's matter as well as confirming the status of legal aid at that time. The Respondent concluded as follows:*

"...The Committee has carefully considered all of Mr. Hewey's requests and affirms, once again, its decision not to appoint King's Counsel from overseas to represent Mr. Hewey. The Committee also declined to provide public funds to retain inexperienced junior counsel to represent Mr. Hewey without being guided by an experienced lead counsel."
- 13. Given the position set out by the Respondent in this correspondence, the Applicant investigated the possibility of appointing local lead counsel. This was unsuccessful given the late stage of being retained with the retrial being less than one month away*

as they were either not available, would not be bound by the legal aid rates, or no response was received. Therefore, the retrial set to commence in April 2023 was adjourned due to the Applicant's lack of legal representation, and these proceedings were commenced.

14. *This is an application for the judicial review of the Respondent's decisions to: (1) refuse to fund the Applicant being appointed overseas counsel, Mr Thomas KC, to represent him at his retrial for pre-meditated murder as his "counsel of choice"; and (2) the LAC's refusal to appoint the Applicant's local counsel of choice for the retrial.*
15. *In summary, the Applicant's position is that in refusing the applications, the Respondent has acted both ultra vires and arbitrarily. In the alternative, that the Respondent's decisions were irrational and/or wholly unreasonable. Further, the Applicant is alleging that the Respondent failed to provide sufficient reasons for its refusal to fund overseas counsel, is a breach of basic principles of natural justice. It is also the Applicant's case that the inference to be made from the Respondents' purported inability to provide adequate reasons is that there were no lawful or good reasons behind the refusals.*
16. *The following remedies are being sought:*
 - i. A **Declaration** that the decision of the Legal Aid Committee refusing to fund overseas King's Counsel to represent the Applicant at his retrial for premeditated murder was unlawful, and/or irrational and/or unreasonable.
 - ii. **Certiorari** quashing the said decision of the Legal Aid Committee.
 - iii. **Mandamus** compelling the Legal Aid Committee to appoint overseas Kings Counsel for the purposes of representing the Applicant at his retrial for premeditated murder.
 - iv. A **Declaration** that the decision of the Legal Aid Committee refusing to appoint Ms Shi-Vaughn Lee to represent the Applicant at his retrial proceedings was unlawful, and/or irrational and/or unreasonable.
 - v. **Certiorari** quashing the said decision of the Legal Aid Committee.

- vi. **Mandamus** compelling the Legal Aid Committee to appoint the Applicant's choice of local external counsel for his retrial for premeditated murder.
- vii. **Costs**, on an indemnity basis, alternatively on a standard basis.
- viii Any other relief that the Court deems appropriate."

17. *The Applicant relies upon his affidavit sworn on 20 March 2023... as well as his affidavit in reply sworn 15 June 2023... The Respondent relies on the affidavit of Senior Legal Aid Counsel..., Ms. Susan Moore Williams, sworn on 1 June 2023... "*

5. Wheatley AJ refused the application for judicial review in its entirety. The Applicant appealed and, on 27th June 2024, the Court of Appeal issued its reasons for dismissing his appeal³. It subsequently heard and refused an application for leave to appeal to His Majesty in Council⁴.

6. Kawaley JA (as he then was), giving the leading judgment in the Court of Appeal, said as follows:

"17. It was clear beyond sensible argument that section 5 of the Act, read in a straightforward way, limits the counsel who may be appointed by the LAC instead of Legal Aid Counsel to "barristers and attorneys who are in active private practice in Bermuda." The purpose of the roster is to create a pool of lawyers which can be drawn on from time to time in connection with various cases. A foreign counsel who has been specially admitted to the Bermuda Bar for a particular case cannot possibly be considered to be "in active private practice in Bermuda" in the requisite sense, as the Acting Judge rightly found. The Regulations such as regulation 10 (3) could only validly implement these legislative provisions, not nullify them.

18. *The LAC was obliged, rather than permitted, to refuse the assignment request in question. The appeal against this decision had to be dismissed. It was, therefore, unnecessary to consider the criticisms of the decision based on grounds which*

³ [2024] CA (Bda) 13 Civ

⁴ [2024] CA (Bda) 24 Civ

assumed that it was open to the LAC to appoint Mr Thomas KC pursuant to sections 5 and 12 of the Act.”

7. The appeal was effectively disposed of on this basis, but Kawaley JA proceeded to address another issue raised on behalf of the Applicant (emphasis added):

“22. Mr Hill requested a short adjournment to the following morning to address an alternative constitutional argument. The Court declined this request on the grounds that no constitutional motion was properly before the Court in relation to this appeal and the appropriate course would be to file an application under section 15 of the Bermuda Constitution. In addition, the President drew attention to the way that section 6 of the Constitution was drafted and the difficulty that it presented in mounting any constitutional claim.”

The Procedural History of the Present Application

8. This is, in essence, the Constitutional Motion that the Court of Appeal indicated, in the paragraph quoted above, could have been filed. In support of it, the Applicant has sworn Affidavits dated 8th May 2025 and 6th January 2026. The Respondents have filed Affidavits sworn by Ms Tiphani Philip (Office Manager of the Legal Aid Office and Secretary to the Legal Aid Committee) on 15th December 2025 and Mr Adley Duncan (Acting Deputy Director of Public Prosecutions) on 14th January 2026.
9. Given the delay already occasioned to his retrial, it is regrettable that it took as long as it did to hear this application. The Attorney-General’s Chambers filed a Notice of Appearance on behalf of all three Respondents on 2nd October 2024. A Consent Order for Directions was then agreed between the parties and formally issued by the Acting Registrar on 7th February 2025. Unfortunately, it would seem that no signed copy of that order reached the Attorney-General’s Chambers until much later in the year. The Applicant was advised by email, dated 10th February 2025, that the signed orders were ready for collection, but may not have appreciated that it was then his responsibility to serve a copy on the Attorney-General’s Chambers. Those directions required him to file his evidence by 28th February 2025. He did so on around 8th May 2025 (that being the date upon which his Affidavit was sworn, although

it is entitled “*Affidavit of Devon Hewey dated 25 April 2025*”). That Affidavit appears to have been filed with the Criminal Division of this Court and not the Civil Division. Lest it be thought that the Criminal Division ought to have redirected it (it was properly entitled as part of these civil proceedings), the document was still relevant to the Criminal Division, which was looking to fix a date for the Applicant’s retrial; it appeared to demonstrate that the Applicant had filed his evidence in these proceedings. On that basis, there was no reason for the Criminal Division to think that it had not also been filed where it properly should have been. Once he had filed his Affidavit (albeit over two months late, in the wrong division of this Court and again without supplying a copy to the Attorney-General’s Chambers), Mr Hewey does not appear to have taken any steps to ascertain why it was not responded to after 21 days had passed (as the agreed directions required). Since he seems not to have understood that, having filed it with the Court, he had to serve a copy of it on the Attorney-General’s Chambers, he must presumably have thought that it would find its way there by some other means (as perhaps he had thought re the Consent Order). The Attorney-General’s Chambers could not sensibly be expected to respond to an Affidavit they had never seen, but having signed the Consent Order back in February, they might reasonably have wondered (i) why they never received a signed copy of it; and (ii) why the Applicant had not served his evidence in accordance with its terms. However, no inquiries as to the status of the matter seem to have been made with the Applicant or the Court.

10. The Court also has a duty actively to manage cases before it (and the parties have a duty to help it in doing so). Given both sides’ apparent lack of compliance with the agreed directions, it would have been better if the matter had been listed earlier than it was, to ascertain the reasons for the non-compliance, confirm whether it was being pursued and, if so, issue fresh directions. In the meantime, the Applicant was appearing periodically before the Criminal Division of the Court (where I usually sit), but the status of these proceedings remained unclear. He maintained that he had filed his evidence and was awaiting a response from the Court and/or Attorney-General’s Chambers. I eventually decided to make enquiries and in due course caused this matter to be listed before me on 10th November 2025. I made fresh directions on that date, which were revised as necessary on 12th December 2025 and 6th and 12th January 2026. Those directions were not all perfectly observed, but we were eventually

able to have the substantive hearing of this matter on 16th January 2026⁵. I am grateful to the parties for their efforts to file the necessary evidence and other materials in accordance with a very short timetable, which included a number of public holidays, given the time of year.

The Constitutional Question

11. Some of the submissions advanced during this matter went back over old ground and the Applicant's decision to refile the written submissions and bundle of authorities that he relied upon before Wheatley AJ almost invited the response that he was seeking to relitigate decided issues. However, I accept that there is a fresh question presented by this application; one which the Court of Appeal acknowledged, but did not formally decide. That is whether and if so in what circumstances, the Constitution may compel a reading of the Legal Aid Act 1980 that may empower or even require the Legal Aid Committee to fund a person's representation by overseas counsel. However, it seems to me that Kawaley JA tried to give some pointers as to the likely resolution of this question, perhaps hoping thereby to avoid any additional delay that might result from the filing of a separate Constitutional claim.
12. Before turning to what His Lordship wrote, it is necessary to set out section 6(1) and (2) of the Constitution of Bermuda (emphasis added):

"6 Provisions to secure protection of law

- (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*
- (2) Every person who is charged with a criminal offence-*
 - (a) shall be presumed to be innocent until he is proved or has pleaded guilty;*
 - (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;*
 - (c) shall be given adequate time and facilities for the preparation of his defence;*

⁵ Some further material was filed by both parties thereafter and I heard some further oral submissions on 22nd January 2026.

- (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or, where so provided by any law, by a legal representative at the public expense;
- (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;
- (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge; and
- (g) shall, when charged on information or indictment in the Supreme Court, have the right to trial by jury,

and, except with his own consent, the trial shall not take place in his absence, unless he so conducts himself in the court as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.”

13. As to the import of section 6(2)(d) Kawaley JA opined (emphasis added):

“24. ...There is quite clearly no constitutional right to a publicly funded lawyer of your own choice. Parliament is free to choose what level of choice, if any, a criminal legal aid applicant is entitled to enjoy in the counsel assignment process, subject to ensuring the counsel of the level of competence reasonably required to provide adequate representation is made available.

...

26. *Although there is no constitutional route for asserting the right for the LAC to appoint a criminal defendant’s counsel of choice, it might still in extreme circumstances be possible to validly complain of a breach of the fair hearing right under section 6(1), which are the core fundamental rights section 6 protects in relation to criminal proceedings. Indeed, the main policy function of the Act (in relation to criminal cases) is to facilitate the enjoyment of the fair hearing rights protected by section 6(1) of the Constitution. It is well recognised that a conviction may be set aside on the grounds*

that the fairness of a trial has been compromised by inadequate representation. It is clear from the record that the LAC is alert to the need to ensure that lead counsel has appropriate experience.”

14. Kawaley JA proceeded to hypothesise a scenario where the LAC assigned demonstrably unsuitable Counsel for the case. In such a scenario, he reasoned, the Applicant might be able to complain that his fair trial rights were being infringed. However, speaking expressly for the Court as a whole, he said that they regarded such an eventuality as unlikely, based on a cursory review of the roster maintained by the LAC under section 5 of the Act. His Lordship concluded this point by observing that *“the present state of [the Applicant’s] application provides no obvious basis for the advancement of such a constitutional complaint”*.
15. At the risk of quoting rather too much of the judgment, I note that Kawaley JA then observed:
“28. When reflecting on the constitutional implications of the failure of the Act to provide for even the possibility of foreign counsel being appointed, I initially assumed that the Act could be read in modified form, pursuant to section 5 of the Bermuda Constitution Order 1968 as conferring on the LAC a power to appoint foreign legal counsel where this was necessary to avoid contravening an applicant’s section 6(1) fair hearing rights. That thought only led to a legal dead end, because section 5 of the Constitution only applies to “existing laws” at the time of the promulgation of the Constitution, which the Act (enacted post-1968) clearly is not.”
16. The Applicant contends that His Lordship fell into error here and refers to his earlier first instance decision in *Centre for Justice v AG* [2016] SC (Bda) 72, where Kawaley CJ (as he then was) said as follows:
“29. ...Where the contention is that local legislation is invalid for inconsistency with the Constitution, this is quintessentially a question of statutory interpretation, with the primacy of the Constitutional provisions deriving from either:
(a) Section 5(1) of the Bermuda Constitution Order 1968 (UK), which provides that laws in force before June 2, 1968 “shall be read and construed with such

modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution”; or

- (b) *Section 2 of the Colonial Laws Validity Act 1865 (a UK statute which itself extends to Bermuda), which provides that laws passed by Bermuda’s Parliament “shall be absolutely void and inoperative” to the extent of any repugnancy to a UK Order made under a UK Act (e.g. the Bermuda Constitution Order) extending to Bermuda.”*

17. The Applicant argues that, via these means, the Act can and should be read in such a way as to bring it into compliance with the Constitution, despite having been enacted after it. In the Court of Appeal’s judgment on the application for leave to appeal to His Majesty in Council, Kawaley JA described this argument as *“interesting”*, but declined to decide it *“because in the present case no constitutional point was argued on any basis before the Supreme Court or the Court of Appeal. Permission to raise a fresh constitutional point on appeal was refused.”*
18. Nevertheless, I may respectfully say that I find the discussion in the Court of Appeal’s first judgment quoted above highly instructive. Indeed, it seems to me that it provides an almost complete answer to the present application. The Constitution simply does not enshrine any right to Counsel at public expense; it leaves provision for any such representation entirely to the Legislature. The Legislature has made such provision, but has not provided for the instruction of overseas Counsel.
19. As to the argument based on *Centre for Justice*, there is a clear difference between the language of section 5(1) of the Constitution Order and section 2 of the Colonial Laws Validity Act 1865. The first not only permits, but requires *“modifications, adaptations, qualifications and exceptions”* in the reading of repugnant existing laws. The second simply renders repugnant provisions void and inoperative. I struggle to see how this could enable one to read into the Act a provision to allow for the funding of overseas Counsel. The position would be different if the Constitution guaranteed a right to publicly funded Counsel, but it does not.

20. Even supposing I am wrong about that, however, I do not think that the Applicant has done enough to establish the “*extreme circumstances*” necessary “*validly [to] complain of a breach of the fair hearing right under section 6(1).*”. What he has done is to have asserted that every local Counsel whom the LAC has tried to assign to the matter (save for those it reasonably deemed insufficiently experienced to have sole conduct) is conflicted. Most recently that was in relation to Mr Jerome Lynch KC, who had agreed to do the matter and apparently did not believe himself to have a conflict⁶. It is not necessary for me to get into an analysis of whether all the Applicant’s claims of conflict are well-founded. At least some of them may well be, but what he has not done is demonstrate that there is no one on the roster who is both sufficiently experienced to lead and free from any conflict.
21. The Applicant has sought to persuade me that the onus should be on the LAC to demonstrate that suitable, non-conflicted local Counsel exist and I do agree (as Mr Myrie realistically accepted) that the LAC could have done more to identify to the Applicant those on the section 5 roster whom they considered to have the necessary level of experience to lead the defence case. In argument Mr Myrie briefly contended that being on the roster was sufficient to establish that, but of course the roster has included and still includes persons whom the LAC thought could only do the matter if they were led. Nevertheless, it seems to me that the Applicant is in a far better position to know who would be conflicted out of representing him than the LAC. The number of criminal practitioners on the roster is not vast and if there are truly none who are not both sufficiently experienced and not conflicted, demonstrating that would not be an unduly onerous task. In my judgment, the reactive approach that the Applicant has taken (i.e. waiting for the LAC to identify a Counsel and then objecting to them) has failed to establish that there is not even one suitable local Counsel. If he had done that, he may have been able to establish that the only way to give effect to his section 6(1) fair trial rights would be somehow to have inferred a power to instruct overseas Counsel. It is interesting that, despite Kawaley JA’s reservations⁷ quoted above, I have been presented with some policy documentation to suggest that the LAC has itself recognised the possibility

⁶ Affidavit of Tiphani Philip, dated 15th December 2025

⁷ [2024] CA (Bda) 13 Civ, paragraph 28

that the instruction of overseas Counsel may be “*necessary... to ensure fair representation of the assisted person*”, despite a lack of “*legislative authority*”. Echoing some of Kawaley JA’s language, however, they seem to have concluded that such an instruction would be “*extremely rare*” and “*truly exceptional*”. In my judgment, the evidence upon which the Applicant relies has failed to demonstrate that the circumstances of this case meet such a high threshold.

Conclusion

22. For these reasons, the application is refused and I decline to grant any of the relief sought.
23. I do not propose to make any order for costs. If either party takes the position that I should do otherwise, they should file the appropriate form.

Dated this 5th day of May 2026


THE HONOURABLE MR JUSTICE ALAN RICHARDS
PUISNE JUDGE