IN THE MATTER OF A TRIBUNAL OF INQUIRY APPOINTED UNDER S.64 OF THE CONSTITUTION OF GIBRALTAR

Before:

The Rt Hon Lord Cullen of Whitekirk KT
The Rt Hon Sir Peter Gibson
The Rt Hon Sir Jonathan Parker

Report of the Tribunal

to His Excellency Lieutenant General Sir Robert Fulton, KBE
Governor and Commander-in-Chief

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INTRODUCTION

1. The members of the Tribunal were appointed by His Excellency the Governor by letters dated 14 September 2007, and, in the case of its Chairman, dated 11 December 2007, under section 64 (4) (a) of the Gibraltar Constitution Order 2006 and in accordance with the advice of the Judicial Service Commission (JSC), to advise him on the matter of the Chief Justice. The letters of appointment stated:

> "The Tribunal should inquire into and report on whether the Chief Justice of Gibraltar is unable to discharge the functions of his office by reason of inability or for misbehaviour having regard to the Memorandum and Supplementary Memorandum with two Appendices submitted by 13 senior representatives of the legal profession on 17 April 2007 and any other submissions and evidence which may be placed before it and report on the facts thereof to me and advise me whether I should request that the question of the removal of that judge should be referred by Her Majesty to the Judicial Committee."

2. Subsection (2) of section 64 provides that the Chief Justice "may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be removed except in accordance with subsection (3)" (which requires a reference of the matter to the Judicial Committee of the Privy Council). Subsection (4) provides that if the Governor considers that the question of removing the Chief Justice from office for inability as aforesaid or for misbehaviour ought to be investigated, he is to appoint a tribunal, which "shall inquire into the matter and report on the facts thereof to the Governor and advise the

Governor whether he should request that the question of the removal of that judge should be referred by Her Majesty to the Judicial Committee". If the Tribunal so advises, the Governor is to request that the question should be referred accordingly.

3. Subsection (8) of section 64 requires that the powers of the Governor are to be exercised by him in accordance with the advice of the JSC. The JSC, which is established by section 57 of the Constitution, is chaired by the President of the Gibraltar Court of Appeal (currently the Rt Hon Sir Murray Stuart-Smith). The other members include the Chief Justice, the Stipendiary Magistrate and the Attorney General.

4. The signatories to the Memorandum dated 17 April 2007 referred to in the letters of appointment (to whom we will refer as "the Signatories"), who included all Queen's Counsel in Gibraltar, with the exception of the Speaker in the House of Assembly, expressed, on behalf of themselves and their respective firms, "their deep concern at a state of affairs which has developed seriously affecting the administration of Justice and the reputational image of Gibraltar." They stated that they had lost confidence in the ability of the present incumbent of the office of Chief Justice to discharge the functions of his office. In response to a request by the Governor for details of the concerns expressed in the Memorandum, the Signatories submitted the Supplementary Memorandum which was dated 21 May 2007. It should be noted that in a letter to the Governor dated 22 May Hassans, one of the Signatories, qualified their support for the Supplementary Memorandum.

5. Copies of the Memorandum and the Supplementary Memorandum were provided to the Chief Justice. By letter dated 26 July 2007 solicitors acting for him wrote to the Governor enclosing his Preliminary Response to the matters raised in the Supplementary Memorandum.

6. Having considered the Memorandum, the Supplementary Memorandum and the Chief Justice's Preliminary Response, the JSC advised the Governor to appoint a Tribunal under section 64(4) of the Constitution. On 17 September 2007, on the advice of the JSC, the Governor suspended

the Chief Justice from performing the functions of his office under section 64 (6).

7. Mr Timothy Otty QC was appointed Counsel to the Tribunal and Clifford Chance as Solicitors to the Tribunal.

8. It will be noted that our terms of reference are not in exact correspondence with the terms of section 64. We took the view, which was communicated to the Chief Justice by letter from the Solicitors to the Tribunal dated 21 December 2007, that in so far as it might be suggested that there was any discrepancy between the terms of reference and section 64 of the Constitution, the text in the Constitution was to be preferred.

9. Prior to the full hearing we held two hearings for directions, arising from which we were satisfied that, in addition to the Chief Justice, the Signatories, the Government of Gibraltar (to which we will refer as "the Government") and Mrs Anne W Schofield, the wife of the Chief Justice, should be entitled to be represented before the Tribunal. In the event Mrs Schofield was not so represented. She did not give evidence before the Tribunal, in the circumstances set forth in the second part of the Fourth Schedule to this Report.

10. Mr Michael Llamas was appointed Secretary to the Tribunal. His duties were of an administrative nature.

11. The procedural history of this Inquiry is set out in the First Schedule to this Report.

12. We would like to express our appreciation for the assistance which counsel and solicitors for the parties provided in enabling the Inquiry to perform its task in an expeditious and fair manner. We are greatly indebted to Counsel to the Tribunal, for the considerable amount of work done by him in preparing and presenting material at the hearings, and to the Solicitors to the Tribunal in organising a large volume of documentation and communications.

13. In considering what facts have been proved by the evidence before us, we have applied the standard of proof on the balance of probabilities, for the reasons set out in the Fifth Schedule to this Report.

CHAPTER 1

BACKGROUND

In this chapter we set out, as a background to the following chapters, details relating to:

- the career of the Chief Justice (paragraphs 1.1 – 1.5)
- Gibraltar (paragraphs 1.6 – 1.20)

together with our observations as to the nature and subject-matter of this inquiry(paragraphs 1.21 – 1.25).

The career of the Chief Justice

1.1 Derek Schofield is 63 years old (he was born on 20 February 1945). He was called to the English Bar in 1970. In 1974 he was recruited on a short-term contract via the British Overseas Development Agency to the post of Resident Magistrate in Kenya. In the event, he spent thirteen years in Kenya. In 1979 he was appointed Senior Resident Magistrate, Mombasa. In that post, he exercised administrative control over some six courts in the Coast Province of Kenya, coupled with an enhanced civil and criminal jurisdiction. In 1972 he was appointed Acting Judge of the High Court of Kenya. The following year, he was confirmed in that office. In 1983 he was appointed Resident Judge in Kisumu. He served in that office until 1985, when he was transferred to Nairobi.

1.2 In 1983 he married Anne Wangeci Kariuki, a Kenyan lawyer. They have two children.

1.3 In January 1987 he resigned as a judge in Kenya on the ground that improper pressure had been exerted on him by the Chief Justice of Kenya (who, it is said, had in turn been subjected to pressure from President

Moi) in connection with an application for committal of the Head of the Kenyan CID for contempt of court. Shortly thereafter, he left Kenya with his wife and their infant children.

1.4 In March 1987 he was appointed Judge of the Grand Court of the Cayman Islands.

1.5 He continued in that office until February 1996, when he was appointed Chief Justice of Gibraltar following an open competition in the course of which a number of other applicants were interviewed. The interviewing panel consisted of the outgoing Chief Justice of Gibraltar (Sir Alister Kneller), a member of the Gibraltar Court of Appeal who was Sir Alister Kneller's predecessor as Chief Justice, the Deputy Governor of Gibraltar, a legal adviser from the Foreign and Commonwealth Office (FCO) and the Chief Secretary.

Gibraltar

1.6 It is convenient at this point for us to give a brief description of the constitutional position of Gibraltar, and of its political and legal systems.

1.7 Gibraltar is part of the dominions of Her Majesty the Queen and thus subject to British sovereignty. Her Majesty is Head of State of Gibraltar, and citizens of Gibraltar are British citizens.

1.8 Gibraltar is also part of the European Union, by virtue of its being a European territory for whose external relations the United Kingdom is responsible. In consequence European legislation applies to Gibraltar as it does to a Member State, subject to certain special concessions.

1.9 The constitution in place in 1996 when Derek Schofield was appointed Chief Justice was established by the Gibraltar Constitution Order 1969 (the 1969 Order). Under that constitution (the 1969 Constitution) the legislative power of the Gibraltar House of Assembly – the precursor of the Gibraltar Parliament established by the 2006 Constitution referred to in the Introduction to this Report – was strictly limited. Thus:

- Section 35(2) of the 1969 Order provided that save with the consent of the Governor, acting in his discretion, the House of Assembly should not proceed on any bill which in the opinion of the Governor related to or closely concerned a matter which was not "a defined domestic matter", that is to say such a matter as might from time to time be specified by the Governor acting on instructions given by Her Majesty through a Secretary of State (see ibid. section 55).

- Section 34(2) of the 1969 Order provided that should the Governor consider that legislation was necessary or desirable with respect to any such matter "in the interests of maintaining the financial and economic stability of Gibraltar" he could introduce a bill for that purpose, and, notwithstanding that the bill had not been passed by the House of Assembly, he could himself, with the prior approval of a Secretary of State, bring it into law by assenting to it on behalf of Her Majesty.

- Section 37(1) of the 1969 Order provided that any law to which the Governor had given his assent might be disallowed by Her Majesty through a Secretary of State.

1.10 So far as the judicature was concerned, section 58(1) of the 1969 Order provided that the Chief Justice and the President and members of the Gibraltar Court of Appeal should be appointed by the Governor in pursuance of instructions given by Her Majesty through a Secretary of State. As to tenure, section 60(1) of the 1969 Order provided that, subject to the provisions of that section relating to removal (provisions which were largely replicated in the 2006 Constitution), a person holding the office of Chief Justice should vacate that office on attaining 67 years. Hence, on his appointment as Chief Justice, Derek Schofield became entitled (subject to the provisions as to removal) to security of tenure until he attained 67 (i.e. until 20 February 2012). Section 60(8) of the 1969 Order provided that the powers of the Governor under that section (i.e. including his powers in relation to the removal of judges) were exercisable by him acting in his discretion. There was no provision in the 1969 Order enabling a judge to be appointed for a fixed term.

1.11 In 1996 the political party in power in Gibraltar was the Gibraltar Socialist Labour Party (GSLP) under the leadership of the Hon. Joe Bossano, who was Chief Minister. The largest opposition party was the Gibraltar Social Democrats (GSD) under the leadership of the Hon. Peter Caruana QC, who was leader of the Opposition. However, in the general election held on 17 May 1996 the GSD was returned to power and Mr Caruana QC became Chief Minister, with Mr Bossano becoming the leader of the Opposition. The GSD was re-elected in succeeding general elections held on 10 February 2000, 27 November 2003 and 11 October 2007. Mr Caruana QC contines as Chief Minister, with Mr Bossano continuing as leader of the Opposition.

1.12 While he was Chief Minister, Mr Bossano had advocated the reform of the 1969 Constitution to give Gibraltar a greater degree of self-determination. This initiative was in turn taken up and progressed by Mr Caruana when he became Chief Minister. In 2000 a select committee on constitutional reform was set up, with a view to achieving a consensus on proposals for constitutional reform to be submitted to the UK Government with a view to Gibraltar being granted a greater degree of self-determination. In 2004 formal negotiations on constitutional reform began with the UK Government. Thereafter talks were held between the UK Government and a cross-party delegation from Gibraltar led by the Chief Minister and including the leader of the Opposition. In March 2006 the Foreign Secretary (Rt. Hon. Jack Straw MP) announced to the House of Commons that agreement had been reached on the terms of a new constitution for Gibraltar, to be placed before the people of Gibraltar in a referendum. In the referendum, which was held on 30 November 2006, the people of Gibraltar voted in favour of the new constitution. On 2 January 2007 the Gibraltar Constitution Order 2006 (the 2006 Order) came into effect, thereby establishing the 2006 Constitution.

1.13 The 2006 Constitution differs from the 1969 Constitution in a number of important respects. For present purposes it suffices to note two of the principal differences.

1.14 In the first place, the 2006 Constitution grants Gibraltar a significantly greater degree of self-determination than it possessed under the 1969 Constitution. Gone are the references to "a defined domestic matter". In their place, section 47(1) of the 2006 Order provides that the Gibraltar Government shall be responsible for all matters save external affairs, defence, internal security and matters falling within the Governor's responsibility for public offices and related matters; and that in respect of external affairs the Governor shall so far as practicable consult with the Chief Minister. There is no equivalent in the 2006 Constitution to the power of veto conferred on the UK by section 37(1) of the 1969 Order (see paragraph 1.9 above).

1.15 Secondly, and of greater relevance to this Inquiry, changes were made by the 2006 Constitution in relation to the appointment of judges. Thus:

- Section 57(1) of the 2006 Order establishes the JSC (referred to in the Introduction to this Report), to be composed of the President of the Court of Appeal (as Chairman), the Chief Justice, the Stipendiary Magistrate, two members appointed by the Governor acting in accordance with the advice of the Chief Minister (i.e. in effect, nominated by the Chief Minister) and two members appointed by the Governor acting in his discretion (i.e. nominated by the Governor).

- Section 57(2) provides that, subject to the qualification in subsection (3), in appointing judges the Governor shall act *in accordance with the advice of the JSC*. This is in direct contrast to section 58(1) of the 1969 Constitution, which provided (see paragraph 1.10 above) that in appointing judges the Governor was to act "*in pursuance of instructions given by Her Majesty through a Secretary of State*."

- Section 57(3) provides that the Governor may, with the prior approval of a Secretary of State, disregard the advice of the JSC "in any case where he judges that compliance with that advice would prejudice Her Majesty's service." However, it is evident from its terms that this power is likely to be exercisable only in extreme circumstances.

- The 2006 Constitution retains the age limit of 67 years for the Chief Justice, but section 64(7) of the 2006 Order introduces a greater degree of flexibility by enabling judges to be appointed for a fixed term.

1.16 Hence, consistently with the greater degree of self-determination granted to Gibraltar in relation to the powers of the legislature, the 2006 Constitution grants to Gibraltar a greater degree of self-determination in relation to the judicature by effectively transferring the power of appointing judges from the UK to Gibraltar through the mechanism of the JSC.

1.17 The judicial system in Gibraltar is modelled on the English system. The Gibraltar Supreme Court consists of the Chief Justice and one additional Puisne Judge (currently Mr Justice Dudley). The Gibraltar Supreme Court has both civil and criminal jurisdiction, and hears appeals from the Magistrates' Court. The Magistrates' Court is presided over by a Stipendiary Magistrate (currently Mr Charles Pitto) or by lay magistrates. Appeals from the Gibraltar Supreme Court are heard by the Gibraltar Court of Appeal, which currently consists of a President (the Rt Hon Sir Murray Stuart-Smith) and three former members of the English Court of Appeal. Appeals from the Gibraltar Court of Appeal are heard by the Judicial Committee of the Privy Council.

1.18 Gibraltar has a fused legal profession, with barristers and solicitors enjoying the same rights of audience in the courts and of direct access by clients. The Gibraltar Bar is regulated by the Gibraltar Bar Council, whose functions are directly comparable with its English counterpart.

1.19 In evidence before us is a list of barristers and solicitors of the Supreme Court of Gibraltar as at January 2008. 26 firms are listed, comprising some 166 lawyers. Included in the list are Hassans (54 lawyers), Triay & Triay (20 lawyers), Triay Stagnetto Neish (12 lawyers), and Attias and Levy (9 lawyers). Each of those firms undertakes a considerable amount of litigation.

1.20 It should be added that Gibraltar is well served by the media. Among the newspapers published in Gibraltar are the *Gibraltar Chronicle*, which is

published daily (except Sundays), and *The New People*, *Panorama* and *Vox*, which are published weekly. In addition, the Gibraltar Broadcasting Corporation provides an online news service.

The nature and scope of the subject-matter of the Inquiry

1.21 As to the nature of the subject-matter of this Inquiry, it is right to record that at no stage has any doubt been cast on the Chief Justice's ability as a lawyer in deciding cases argued before him. Indeed, his record in terms of successful appeals against his judgments is good. Rather, the matters which this Tribunal is required to investigate concern other aspects of the Chief Justice's conduct, both personal and judicial, during the period from 1999 onwards. In conducting that investigation we take full account of the complimentary remarks about the Chief Justice made by a number of witnesses. Thus, Mr Felix Alvarez, the Chairman of the Equality Rights Group in Gibraltar, complimented the Chief Justice on his enthusiastic and determined support for human rights in Gibraltar; Mr Bossano said that he had every confidence in the Chief Justice and that he believed that a large majority of ordinary people in Gibraltar did so too; and Bishop Caruana (the Bishop of the Diocese of Gibraltar in Europe) said that he had found the Chief Justice to be correct, courteous and polite, and a gentleman.

1.22 The scope of this Inquiry was determined by a Statement of Issues. At our first directions hearing we directed that a draft Statement of Issues should be prepared and served. This was in order to identify the criticisms to which the Inquiry would be directed, and ensure that fair notice was given to the Chief Justice. The draft Statement of Issues was based on, and derived from, criticisms of the conduct of the Chief Justice in the Memorandum, the Supplementary Memorandum and the representations received pursuant to our ruling at the first directions hearing. It was revised on 15 April 2008 in the light of our decision at the second directions hearing (see paragraphs 1-3 of the First Schedule to this Report). The headings of the revised Statement of Issues are set out in the Third

Schedule. It should be noted that the revised Statement of Issues included the response of the Chief Justice to each criticism so far as it was known at 15 April 2008. In addition the Chief Justice set out his position more fully in his witness statements, which ultimately came to be five in number.

1.23 As can be seen from the Third Schedule, the Statement of Issues includes in chronological order 23 particular instances or episodes where the conduct of the Chief Justice was the subject of criticism. They formed the factual subject-matter of the full hearing before us. In the chapters of this Report which follow we address them in turn. However, we should point out that we took the view, in the light of the evidence, that episode No 23 (Alleged inappropriate criticism of Registry staff in October 2007) had been given somewhat greater prominence than it merited. There also may have been confusion as to what was said by the Chief Justice. Accordingly we did not consider that the evidence afforded us any material assistance in discharging our functions.

1.24 We should add for completeness that we reached a similar conclusion in regard to the matters comprised in the last entry in the Third Schedule (other undated instances of alleged misconduct on the part of the Chief Justice raised by the Deputy Registrar of the Supreme Court). The criticisms of the Chief Justice under this head were either not made out in evidence or were shown to be insignificant.

1.25 Again for the sake of completeness we would mention that, although in the event we declined to take up the Government's invitation to inquire into the Chief Justice's relationship with a particular firm of lawyers in Gibraltar, we do not accept the submission of counsel for the Chief Justice that in inviting us to do so the Government was demonstrating improper motivation on its part. Nor do we accept his submission that the fact that the Government invited us to inquire into that matter casts doubt on its representations in relation to those other issues into which we did inquire.

CHAPTER 2

1999

This chapter is concerned with the following:

- the address by the Chief Justice at the Opening of the Legal Year in October 1999 (paragraphs 2.1 – 2.24)
- the remarks by the Chief Justice about judicial appointments in November 1999 (paragraphs 2.25 – 2.31)
- the attendance of the Chief Minister at the Supreme Court in December 1999 (paragraphs 2.32 – 2.35).

The dates in this chapter are in the year 1999, save where otherwise indicated.

The address by the Chief Justice at the Opening of the Legal Year in October 1999

2.1 We begin this section of the chapter by referring to two matters which preceded the Opening of the Legal Year in October 1999.

2.2 The first related to the proposal by the Chief Justice in May 1998 that a number of members of the Bar should be given the opportunity to sit as Stipendiary Magistrates for 3 weeks in the coming 12 months. On 15 July 1998 the Chief Secretary wrote expressing the agreement of the Chief Minister with this proposal, saying that the procedure previously followed for the selection of the Stipendiary Magistrate should be followed, viz. internal advertisement, and, in the absence of a suitable candidate, external advertisement, followed by selection by a Public Service Commission Board. The Chief Justice was invited to identify suitable candidates. On 27 July 1998 the Registrar wrote to the Chief Secretary, saying that the Chief Justice was pleased that funding was available for this purpose and that he would discuss the way forward

with the Governor. On the same day the Chief Secretary wrote to the Registrar, saying that funding for the proposals would not be made available until the Government had agreed the way forward. The Chief Justice drafted a proposed advertisement inviting candidates to apply to him and on 20 October 1998 sent a copy to the Chief Secretary, saying that a copy was being given to the Deputy Governor to enable him to liaise with the Chief Secretary on the final version. According to the Government's press release of 28 October 1999, to which we will refer later, the long established practice was that the publication of invitations to apply, and the receipt of applications, for appointment as Stipendiary Magistrate were handled by the Government's personnel manager; and in December 1998 the new Deputy Governor confirmed that the usual procedure would be followed. On 18 December the Chief Secretary confirmed that funding was available. However, the press release stated, the Chief Justice decided not to proceed with his proposal.

2.3 The second matter arose out of a letter dated 10 November 1998 which the Registrar wrote on behalf of the Chief Justice to the Chief Secretary, saying that the Chief Justice considered that he should attend what the Registrar called a conference, but which the Chief Justice in his evidence called a seminar, at Warwick University in the following February on the subject of Lord Woolf's proposals for the reform of civil procedure, and seeking additional funding for the purpose. The letter stated: "He considers it vital that he attend". After further details had been supplied at his request the Chief Secretary responded on 1 December that the Government did not consider that the subject of the conference was of sufficient value for Gibraltar at that stage, and that funds for conferences were fully committed for the remainder of the financial year. However, in the event the attendance of the Chief Justice at the seminar was funded with money from the UK Government. Prior to the beginning of the legal year 1999/2000 the (Gibraltar) Government paid for a conference conducted by Lord Woolf in Gibraltar on the same subject and for court staff to go to England to be trained in the Woolf reforms.

2.4 In the course of his address at the Opening of the Legal Year on 8 October 1999 the Chief Justice said that the courts could not fulfil their responsibilities unless they had adequate funding and that once a budget had been approved "the courts should be free to administer that budget according to its own priorities". He referred to the then recently promulgated draft Latimer House Guidelines and their statement of four principles including that:

> "Sufficient funding to enable the judiciary to perform its functions to the highest standards should be provided" and
>
> "The administration of monies allocated to the judiciary should be under the control of the judiciary".

He then continued:

> "The judiciary has encountered one or two instances in the past year where the denial or delay of the release of funds by the Government has had the potential to affect adversely the administration of justice. The matter is one of practical importance, but there is also a fundamental principle involved. The Chief Justices of the Commonwealth were all agreed that those who control the judiciary's purse strings exercise enormous influence and have the capacity to undermine the judiciary's independence. That is why the Latimer House Guidelines are expressed as they are. A system should be in place which on the one hand enables the judiciary to administer justice properly whilst on the other subjects the judiciary's budget to proper controls, but which enables the judiciary to function independently and without improper restraint. It is a matter which I shall be addressing in the coming year."

2.5 The Chief Justice's comments attracted the attention of politicians and the press. In the *Gibraltar Chronicle* of 15 October Dr Joseph Garcia, the leader of the Liberal Party in Gibraltar, was quoted as expressing concern at "the claims of potential or perceived interference by the … Government with the judiciary in Gibraltar", and calling for a public inquiry. When asked by the newspaper to comment on the exact meaning of what the Chief Justice had said, a spokesman for him said that if the Chief Justice had wished to elaborate he would have done so in his speech.

2.6 In a press release dated 15 October the Government dismissed the call for a public inquiry, and said that the financing of the judiciary was not subject to any political interference, the budget of the judiciary being agreed with the judiciary at the start of the financial year. The Government said that it had only denied additional funds in two instances, namely for international conferences and social entertainment.

2.7 In a press release on 18 October 1999 the Chief Justice said that the two instances mentioned by the Government were not those which he had had in mind as having the potential adversely to affect the administration of justice. He repeated verbatim what he had said in his address on the question of funding for the judiciary and said that he was unable to give details of the two instances until he had considered the implications of revealing the contents of confidential files. His comments in his press release were referred to in an article in the *Gibraltar Chronicle* of 19 October 1999.

2.8 On the same day the Government responded by a further press release, saying that it had received no representations, in confidential correspondence or otherwise, complaining about insufficiency of financial resources to enable the judiciary to perform its functions, and that it was surprised that this issue had been raised publicly in a manner that was "open to damaging misinterpretation". The Chief Secretary had been instructed to write to the Registrar, asking for details of the two instances. It also pointed out that it had agreed to a budget for the judiciary in excess of that which the judiciary had requested, and that applications for additional funds were considered on a case by case basis.

2.9 The then Chief Secretary, Mr Ernest Montado, on the following day wrote to the Registrar, saying that it was regrettable that the concerns raised by the Chief Justice had not been brought to the attention of the Government directly but had instead been made public in a manner which could only result in uninformed speculation, misinterpretation and political manipulation. The Government had been criticised in regard to matters which had not been explained to it, and which were said to be the subject of confidential correspondence, thereby further fuelling damaging public

speculation. He therefore requested full details of the two instances including relevant correspondence.

2.10 On 22 October the Registrar responded, identifying the two instances:

> "The first instance the Chief Justice had in mind concerned the delay in the decision to finance agreed proposals for recruitment of members of the Bar to train as Stipendiary Magistrates. The second concerned the refusal of funds for participation in a Judicial Studies Board training seminar on the Access to Justice reforms".

2.11 The Government then issued a Press Release on 28 October, making public the information given by the Chief Justice, and stating its position in regard to the two matters mentioned in the above letter. In relation to the first instance it set out the chronology, including the agreement of the Government to implement the Chief Justice's proposal and the subsequent decision of the Chief Justice not to proceed with it. It denied that there had been any delay in the Government agreeing to finance the proposal and denied that the administration of justice could be adversely affected. It set out what it said was the long established practice in Gibraltar in the matter of judicial appointments; that, it said, included the Governor consulting with the Government through the Chief Minister before the Governor made the appointment. In relation to the second instance it accepted that in November 1998 funds were requested but not approved for the Chief Justice's attendance at a conference in England but said that the costs of that attendance were paid by the FCO. It pointed out that in August 1999 the Government had paid for the judiciary and other officials to attend a conference in Gibraltar on the same subject and organised by the Bar and conducted by Lord Woolf, and had provided further funds to enable some of the court's officers to go to UK courts on attachment for training on Access to Justice reforms. The Chief Minister subsequently accepted in a Parliamentary debate on 20 November 2000 that it would have been better if funding had been made available for the Chief Justice to attend the conference in question.

2.12 The Chief Justice then instructed English Counsel, John Causer, directly and not through solicitors. On 20 October and 2 November the Chief

Justice had two brief telephone conversations with Mr Causer, who found that neither was very satisfactory as he was speaking on a mobile phone from a public place. He understood from the conversations with the Chief Justice that "the Government had trivialised the funding issue by implying that the Chief Justice was in effect seeking funding for cocktail parties when in fact an entertainment budget was only a tailpiece to the main issues". The Chief Justice then faxed a one page letter of instructions to Mr Causer, with a draft press release which he wished to issue. In that letter the Chief Justice referred to his address at the Opening of the Legal Year and to the two instances where, he said, the delay in or denial of funding had had the potential to affect adversely the administration of justice. He said:

> "Political clamour for details of the two instances has led the Government to issue a press release explaining what they are. Unfortunately the Government has put such a "spin" on the facts that I have to put the facts right."

2.13 It should be noted that the Chief Justice did not provide Mr Causer with his address, or its press coverage, or the political comments which it excited, or the press releases of 15, 18 or 19 October, or the letters of 20 and 22 October, or, most importantly, the Government press release of 28 October referred to in that quotation. In his letter of instructions he drew counsel's attention to the references in the draft press release to certain items of correspondence with the Government and to the fact that he had alluded to conversations with the Governor. He did not supply Mr Causer with that correspondence. He asked if the release of the draft would offend the provisions of the Official Secrets Acts. Mr Causer's advice dated 6 November was that both of "the contentious matters" (i.e. the two instances mentioned in the draft press release) would involve revealing the decisions of the Government on funding matters and its motivation and that this would come within the Official Secrets Acts and so the Chief Justice would be exposed to danger. It should also be noted that there appears to have been no recognition in that advice that the Government had already put into the public domain all the relevant facts relating to the two instances by its press release of 28 October.

2.14 The Chief Justice did not issue the draft as a press release, but on 11 November wrote a letter to the *Gibraltar Chronicle*, in which he repeated the substance of what he had said in his address, referred to the Government press release of 18 October and his own press release of the same date, and said that he had considered the legal implications of giving details of the two instances and had taken the advice of counsel who confirmed his view that he was constrained by the Official Secrets Act 1911 from divulging information in his possession.

2.15 On 16 November the Government issued a press release commenting on the Chief Justice's statement in his letter to the *Gibraltar Chronicle* that he was constrained from divulging information in his possession. The Government said that that suggested that it had information which contradicted what it had said. It said that it was not aware of such information, but that if there were any such documents belonging to it and they were identified by the Chief Justice, it would publish them. The Chief Justice did not respond to that invitation.

2.16 The evidence before us highlighted a number of serious concerns in regard to the Chief Justice's address and the events that followed.

2.17 First, the remarks of the Chief Justice were seriously inaccurate and misleading. Behind the matter of funding for part-time magistrates lay the question of the method of arriving at their appointment. The proposal for such appointments had not "petered out", as he sought to represent in his oral evidence. It had been dropped by him, despite the merit which it had of clearing a backlog in the Magistrates Court and creating a pool of Gibraltar lawyers with judicial experience. He dropped it because the Government's approval of funding was, in his words, "on condition that it had a say in the appointments" and would have enabled the executive "to put their own appointees in the judiciary". However, the true position was that the Government did not accept his proposal for a new and different procedure under his control, but insisted on the usual procedures for such judicial appointments - which would not have given it control. As regards his attendance at the seminar, we question whether it was "vital" that he attend it, especially when a committee which he

convened postponed the coming into operation of the Woolf reforms for a year. Quite apart from these facts, the Chief Justice did not disclose that both matters to which he had alluded had been resolved: funding for his first proposal had been offered in December 1998; and funding for the second had been met by the UK Government. Moreover, he could have no complaint about the judicial budget, which had been met in full and more. He failed to make it clear that his complaints related to requests for funding in addition to the budget.

2.18 More seriously still, his remarks suggested that the independent functioning of the judiciary had been at risk of being subject to improper restraint by the Government. In his first and third witness statements he said he profoundly disagreed with the view that it was not appropriate for him to make pronouncements on controversial matters, and that he was concerned that the Chief Minister could use funding as a means of controlling judicial training and appointments. He accepted, however, that he had not previously suggested that the conduct of the Government had breached any international standard, or that the instances referred to by him had affected the administration of justice. He did not explain that neither of the two instances would have breached the draft Latimer House Guidelines, which in any event at that time did not set internationally accepted standards and which, when eventually approved in 2003, omitted the principle that the administration of monies allocated to the judiciary should be under the control of the judiciary. If there really was some cause for thinking that these instances had a potential to affect adversely the administration of justice, we do not understand why he did not raise this privately with the Government. In his oral evidence he said that the fundamental principle to which he had referred in his speech was that adequate funding must be made available for things such as judicial training, but he had not asked the Government for a judicial training budget. He gave no prior notice to the Government of his intention to raise any of these points. It had been his practice to ask the Attorney General and the Chairman of the Bar Council for copies of their addresses, but it never occurred to him that it might be courteous or good practice to

provide anyone with a copy of his address. The Chief Minister said in evidence:

> "I think what any Government anywhere in the world would reasonably expect of its Chief Justice is that if he wants to take issue with the Government on something, that he should raise it privately before going to war publicly."

2.19 Instead he spoke publicly of these instances, in a manner which was highly critical of the Government, and in language which was so unspecific as to create an obvious risk of speculation. As the *Gibraltar Chronicle* in its editorial of 19 October put it, he "[left] the issue in the air, allowing speculation to breed". The Chief Justice demonstrated a complete lack of judgment in his choice of language. According to him, it was "rather a mild mention of the problems with funding". He was not certain that it would have been better to have given some general details of the two instances. In our view the language, tone and manner of his remarks were inappropriate for the holder of his office.

2.20 The Chief Justice went on to compound the difficulty created by his remarks. He said that he had not expected the reaction they had received. As regards the references in the press to his address and to Dr Garcia's call for a full public inquiry, he said he was surprised, but not horrified, at the way in which his remarks had been taken up. He said he was concerned that Dr Garcia had gone "somewhat over the top" and that his moderate remarks had been distorted and used inappropriately. However, he did not consider approaching the Government and explaining that his own remarks had been distorted and used inappropriately because "once one enters that arena it would be, I think, entering dangerous territory for me to start making comments that may be published, misinterpreted, and I felt that at that stage it would all die down and it was prudent for me to maintain silen[ce]".

2.21 It was, in our view, inappropriate for the Chief Justice, having excited the furore over his speech by his ambiguous and unspecific remarks and knowing that what he said had been misunderstood and distorted, to refuse to clarify the position publicly. We conclude that, having been

thwarted initially in obtaining the fulfilment of his wishes in relation to the two instances to which he had alluded, he was determined to embarrass the Government publicly.

2.22 His suggestion that he might be inhibited from revealing certain matters on the ground that they were confidential was inconsistent with his having alluded to them in the first place. He hinted that there was documentation supporting his concerns but never revealed what was that documentation, even when the Government offered to publish anything he identified. When asked about the reference to confidential files in his press release of 18 October, he said that he could not recall considering going to the Government and asking it to agree to his referring to confidential matters.

2.23 It is also clear, on his own evidence, that it never occurred to him at the outset that the contents of his address might have implications under the Official Secrets Acts. That thought was put into his head later by someone, but he could not remember by whom. It did not prevent him telling the Government what were the two instances. Even more unconvincing is his subsequent reliance on Mr Causer. His instructions to counsel were woefully incomplete and tendentious, and the advice was flawed in consequence. It is plain that the Government was not trivialising the funding issue by reference to cocktail parties, yet that is how he chose to characterise what it had done. His draft press release did not have to include any reference to what he counselled the Governor nor to the correspondence with the Government if those were the matters which concerned him. In regard to Mr Causer's advice the Chief Justice said that he was "puzzled as to why the press release of 28 October is not fully addressed", and that he was surprised by the advice, as he had hoped that it would clear him in Official Secrets terms. When asked further questions by the Tribunal on this point two days later the Chief Justice said that it was a misunderstanding that he had expected Mr Causer to deal more fully with the press release. He accepted that he had no answer to the question how Mr Causer could advise without knowing

what had already been put in the public domain, when his instructions omitted any reference to the Government's press release of 28 October.

2.24 We cannot escape the conclusion that the alleged concern about confidentiality and the Official Secrets Acts was an irrelevant diversion from answering the substance of the point against him, namely that he had not told the Government about his concerns privately, so that it could be seen whether they truly had the potential to affect adversely the administration of justice.

Remarks on judicial appointments in November 1999

2.25 In the press release of 28 October, to which we referred in paragraph 2.11, the Government gave details of what it said was the long-standing practice in all judicial appointments, which included that the Governor consulted with the Government through the Chief Minister, after which the Governor made the appointment. In his letter to the *Gibraltar Chronicle* of 11 November (see paragraph 2.14) the Chief Justice challenged the correctness of that statement of practice. He said that it was the first time he had heard of such a practice. He repeated his views on the independence of the judiciary, and suggested the appointment of an independent Judicial Service Commission for making or recommending the appointment of magistrates and judges.

2.26 The issue of "the long-standing practice" received further discussion in the press. The *Gibraltar Chronicle* of 11 November commented that it was "not good to have two key institutions such as the Government and Chief Justice grating against each other". On the same day the Governor issued a statement noting that the public debate had widened to judicial appointments for which he was responsible. He said that the Governor alone took the final decision on these appointments and that during his term of office he had seen no evidence that any judicial appointment had been subject to political interference. He said:

> "I regret that this public discussion is now drawing the judiciary and office of Chief Justice into political debate and causing public confusion and anxiety."

2.27 On 16 November Mr Montado, the Chief Secretary, issued a statement setting out his experience since 1986. He said that all judicial appointments were made by the Governor, but that the established practice in the case of the Chief Justice, Additional Judge and Stipendiary Magistrate was for a board to be constituted to interview candidates and to advise the Governor. The Chief Secretary, he explained, was normally a member of the board, representing the Government. The Governor's practice, he said, had been to consult the Chief Minister informally, either directly or through the Deputy Governor, before making his decision. He said that the practice was clearly reflected in Government files going back more than 20 years.

2.28 In his first witness statement the Chief Justice denied that he had cast doubt on the veracity of government statements. He said that the subject matter of his comments was properly a matter for his concern and that it was appropriate for him to express his views in the manner he did. The appointments made in his first year of office as Chief Justice by the Governor, Sir Richard Luce, did not follow any process of formal consultation with the Chief Minister. He said in evidence that he was unaware of any past practice of formal consultation with Chief Ministers in relation to judicial appointments, and that his predecessor, Sir Alister Kneller, had told him that he was unaware of such a practice. He continued:

> "Genuinely believing that there was no practice of consultation, I felt it would be wrong for me to remain silent in the face of an assertion that there was a practice of consultation lest it be thought that I was accepting a convention which did not exist. So I publicly declared my belief that there was no practice of consultation, to try to hold the line."

2.29 When asked in cross-examination why he had not gone privately to the Government and asked it to explain to what consultation practice it was referring, the Chief Justice said that from time to time it became obvious that the Government was "unwilling to engage with me, the judiciary, and when the temperature is such that such engagement will not bring about any results, then in my judgment, knowing the situation in Gibraltar, I have to resort to other methods". He explained that the other method was that of going directly to the press and dealing with the matter through the press and that that method was open to him "because I did not want there to be perceived to be a public acknowledgment by silence that there was a process of consultation".

2.30 We think it plain that the Chief Justice did court controversy with the Government by casting doubt on the veracity of government statements on the practice of judicial appointments being made by the Governor after consultation with the Chief Minister. He was wrong to do so because there was such a practice. Contemporaneous documents produced by the Government from the time when Mr Joe Bossano was Chief Minister (1988-1996) amply bear that out. Not for the only time, the basis of an erroneous belief of the Chief Justice is said by him to come from an oral, undocumented and uncorroborated communication with Sir Alister Kneller. The interpretation which Mr Bossano himself placed on the word "consultation" in his evidence does not square with its ordinary meaning. He said that it meant being given an opportunity to change the result, so that for him consultation meant "you actually finish up with a deal that has an input from you".

2.31 In cross-examination the Chief Justice described how the issue between him and the Government had died down after he received Mr Causer's advice, but then, he said, "it resurrected itself, not in terms of funding, but in terms of the issue of consultation over judicial appointments". In reality, as was pointed out by Counsel to the Tribunal, it was the Chief Justice himself who resurrected matters by his letter to the newspaper. Instead of attempting to find out privately from the Government the basis of its claim that there was such a practice, he chose by means of a

tendentious letter to the press to raise publicly another disagreement with the Government, as well as continuing to maintain that he was constrained by the Official Secrets Acts from divulging information in his possession. As we noted in paragraph 2.28, the Chief Justice asserted that by silence he might be perceived publicly to acquiesce in a Government statement with which he disagreed. This is in marked contrast with the fact that at no time in relation to his own (or his wife's) statements and their interpretation was he prepared to acknowledge that because of the public perception of acquiescence by silence, an impression might have been created which, if incorrect, fairness would demand that he should correct.

The attendance of the Chief Minister at the Registry of the Supreme Court in December 1999

2.32 It is not in dispute that when Sir Joshua Hassan QC was the Chief Minister, he used to visit staff not only in Government departments but also the Registry of the Supreme Court and Magistrates Court during the Christmas or New Year period, by way of extending Christmas greetings to staff (who were civil servants), and thanking them for their efforts during the year. The present Chief Minister, Mr Peter Caruana QC, has followed the same practice. On 24 December 1999 the Chief Secretary and then Acting Deputy Governor, Mr Montado, sent a note to the Governor in which his first words were:

> "I feel duty bound to draw to your attention a matter concerning the Chief Justice which I consider to be deplorable."

He recorded what he had been told by the Registrar, Ms Katherine Dawson, the previous day by telephone. This was that the Chief Justice had instructed her that, were the Chief Minister to visit the Registry, as had been programmed for 30 December, he was not to be met by anyone but should be left to call at the counter and ring the bell for attention; that staff were to remain at their desks; and were those instructions not followed he would consider it an act of disloyalty towards him. Every

time the Chief Minister called before and after 1999 Ms Dawson and the staff continued to meet and greet him despite the Chief Justice's objections.

2.33 In her witness statement Ms Dawson confirmed the accuracy of Mr Montado's note, and described the atmosphere at the Registry as having been "intimidatory". In her oral evidence she accepted that it could well have been her impression (rather than the actual words of the Chief Justice) that he would consider disobedience to his instructions an act of disloyalty towards him. As for the atmosphere at the Registry being "intimidatory", she accepted in cross-examination that it might be better to say that the staff felt uncomfortable because they knew that, when the Chief Minister visited the Registry, if the Chief Justice came in he was going to be extremely unhappy. The Deputy Registrar, Mr Clive Mendez, said in his first witness statement that he knew that the Chief Justice objected to the Chief Minister's visits to the Registry and that this made him and the staff feel uncomfortable. While Ms Dawson was adamant that Mr Bossano did visit the Registry every year and that she remembered him coming, Mr Mendez said that Mr Bossano, not being a lawyer, never did. Mr Bossano said in evidence that it might well be that he popped into the Registry to have a drink with Ms Dawson because they have been friends for a very long time but that he had never made a formal visit to the Registry.

2.34 In his first witness statement the Chief Justice said that he thought it not right for the Chief Minister to treat the Supreme Court and its staff as if it were another Government department, but denied that he gave the instructions recorded by Mr Montado. He said that in 1998 he had made a "discreet suggestion" to the Registrar that she should suggest to the Chief Secretary that the visit not take place. He accepted that "very probably" he told the Registrar that "it would be appropriate if the Chief Minister were not met by a fanfare" - language disputed by Ms Dawson. He denied that he said that if staff met the Chief Minister as the Chief Minister proposed he would consider it an act of disloyalty. He also

accepted that he chose to work at home when the Chief Minister called "to avoid any collision in front of staff".

2.35 This episode demonstrates the seemingly instinctive hostility felt by the Chief Justice towards the Chief Minister. We find that there was a practice throughout Sir Joshua Hassan's term as Chief Minister to pay an informal goodwill visit to the Registry. Mr Bossano chose not to follow that practice, but the practice was resumed by Mr Caruana. The purpose of the visit was to see not the judiciary but the civil servants who staffed the Registry to thank them for their work. They liked the Chief Minister's visits. A more innocent visit at a festive time of the year it is hard to imagine, and yet the Chief Justice took grave exception to such visits. We do not find that the Chief Justice told the staff that it would be an act of disloyalty for them to disobey his instructions, nor do we find that the atmosphere was intimidatory, but we think it plain that the Chief Justice made known his opposition to such visits and that this was uncomfortable for the staff. We accept Ms Dawson's evidence that the Chief Justice indicated to her that the staff should remain at their desk and let the Chief Minister ring the bell for attention. The petty discourtesy thereby intended to be shown to the Chief Minister was obvious and unwarranted.

CHAPTER 3

2000 - 2001

This chapter deals with:

- the maids issue – events up to October 2000 (paragraphs 3.1 – 3.27)
- instructions to the Registrar of the Supreme Court in respect of expenditure in May 2000 (paragraphs 3.28 – 3.30)
- the allegations of interception of the Chief Justice's telephone communications in 1999 and 2000 (paragraphs 3.31 – 3.39)
- the defence advanced on behalf of the Chief Justice on his prosecution in 2001 for an offence under the Motor Vehicles Test Regulations (paragraphs 3.39 – 3.57).

The maids issue events up to October 2000

3.1 From at latest September 1996 until March 1997 the Chief Justice employed a Jamaican national, Ms Jackie Williams, as a domestic in Gibraltar. He did not apply for or obtain a work permit for her, but, according to his evidence, it had been left to her to regularise her own position. On 18 March 1997 the Chief Justice signed three forms for the Employment and Training Board (ETB) in respect of her: (i) a Notification of Vacancy for a domestic working 39 hours a week; (ii) a request for the issue of a work permit for her as a domestic; and (iii) a Notice of Terms of Engagement, which later showed that her terms of employment were for 39 hours per week at £3.15 per hour. On 26 March 1997 a work permit valid for one year was granted to the Chief Justice for her.

3.2 On 15 October 1997 the Chief Justice wrote to Inspector Santos of the Visa section of the Government about Ms Williams, stating that, having employed her in the Cayman Islands, he had offered her a new contract when his family moved to Gibraltar. However, that contract had been

terminated on three months' notice on 31 January 1997. She was then reemployed for three hours a day three days a week at £4 per hour. A formal notice terminating her contract, he said, was issued on 1 October 1997. In an undated document, signed by Ms Williams and apparently prepared about 17 October 1997, she acknowledged receipt from the Chief Justice of £786 in settlement of all sums due to her on termination of her employment. They included salary from 1 to 17 October 1997 of £140, a sum which is difficult to reconcile with the figures given to Inspector Santos.

3.3 On 22 October 1997 the Chief Justice obtained from the ETB copies of the forms relating to Ms Williams, and he wrote to one of its officials saying that they did not reflect the terms of service under which she was employed. Ms Williams had told Mrs Schofield that the Chief Justice had signed the forms and that the official had completed the details after speaking to him. The Chief Justice also said that he did not recall speaking to the official. He stated that he did realise that Ms Williams needed a work permit but said that his very busy schedule had not allowed him to follow up the matter.

3.4 In his fifth witness statement the Chief Justice said that the Notice of Terms of Engagement had been completed by Ms Williams who "handed it to me as I was dashing back to court one day and, rather stupidly I now realise, I signed it in blank." He said that he did not suspect that she would complete it inaccurately to ensure that she qualified for a work permit. He drew attention to some spelling mistakes typed in the Notice, suggesting that he would not have subscribed to them. It is difficult to reconcile the Chief Justice's statement that he signed one form in blank with his acceptance under cross-examination that he signed no less than three forms in blank, although he had "no positive recollection" of having done so. In re-examination, however, he said;

> "I recall distinctly now Ms Williams accosting me in the kitchen of the house as I was dashing back to court, saying --- and I can't remember that she said the [ETB], but they need me to complete these forms. Do you mind signing them, Mr Schofield? And I did."

3.5 With some hesitation we are inclined to accept that the Chief Justice signed the ETB forms in blank, that being consistent with what he told the Governor in a letter dated 16 June 2000 (see paragraph 3.11). However, the Chief Justice accepted in cross-examination that the office of a judge carries with it particular responsibilities in relation to the handling of personal affairs, all the more so in the case of the office of Chief Justice; that public confidence in that office demanded the highest standards of integrity; and that the holder should exercise particular diligence to ensure compliance with the laws which he is administering. He further accepted that his failure to obtain a work permit for Ms Williams when first employed in Gibraltar was in breach of Regulation 7 of the Employment Regulations 1994, and constituted a criminal offence by him under Regulation 5, which placed the obligation to obtain such a permit on the employer. Having left it to Ms Williams to complete the ETB forms, she was his agent in doing so, the responsibility for the accurate completion of the forms resting with him. He recognised that the forms were important, with legally significant consequences. He also accepted that it was an offence to make a false statement for the purpose of obtaining a work permit, and that the purpose of the notification of details of the proposed employment was to enable the ETB to consider whether the person in question should be granted a work permit. He could not recall taking any steps to check the position in regard to Ms Williams obtaining a work permit, but accepted that it was inconceivable that, if he had taken such steps, he would not have realised the true legal position. He also agreed that it was a matter of some importance that he complied with the laws of Gibraltar, given that he was coming to a new jurisdiction as Chief Justice. He accepted counsel for the Government's summation of his conduct that it amounted to "a reckless disregard" on his part for legally important forms.

3.6 Throughout Ms Williams' employment by the Chief Justice in Gibraltar he did not deduct any PAYE nor pay any social security contributions. He said in his fourth witness statement that she did not qualify to pay income tax because of her low salary and he made no deductions from her salary.

Nor, he said, did she qualify for the purpose of social insurance contributions. In his fifth witness statement he said that she worked less than 15 hours per week and earned £150 per month, adding "This brought her outside the limits for social security and PAYE contributions". He went on to point out that he had never been contacted by any Government department about any liability in respect of Ms Williams.

3.7 An examination of the relevant regulations relating to PAYE (viz. the PAYE Regulations 1989) showed, as the Chief Justice accepted in cross-examination, that there was a clear obligation on an employer to deduct PAYE at source, whether or not the employee had obtained a tax code from the Income Tax Office. The Chief Justice further accepted that the obligation did not depend on the number of hours worked by, or the amount of remuneration paid to, the employee. While there were tax thresholds for the employee's personal tax position, they were separate from the employer's obligation to pay PAYE. In regard to social insurance contributions, it was not in dispute that even if an employee worked less than 15 hours a week the employer was obliged to pay social insurance contributions at a reduced rate, these being the employment injuries element of the composite social insurance contribution.

3.8 In cross-examination the Chief Justice accepted that he was wrong about social insurance contributions, and that his counsel was in error in asserting that the Chief Justice was correct in making no deductions from the low salary of Ms Williams. He maintained that he believed in 1997 that there was no PAYE liability or liability for social insurance contributions, but when asked for the basis of that belief he was unable to provide an answer. He accepted once more that it was inconceivable that, if he had taken steps to check what was his position as an employer in relation to PAYE and social insurance contributions he would not have realised the true position in relation to those obligations. He confirmed that at no stage before 2000 did he take legal advice about Ms Williams or Ms Hermina Danvers to whom we will now turn.

3.9 By a written contract dated 9 October 1997 the Chief Justice employed Ms Danvers as a housekeeper/cook at a monthly salary of £450. On 9

December of that year he obtained a work permit in respect of her. She was so employed by him from December 1997 to April 2000. In April 2000 she lodged a complaint with the Ombudsman and shortly afterwards with the TGWU which took up her case that she was paid less than the Gibraltar minimum wage - an allegation which was never substantiated.

3.10 On 4 May the Chief Justice met the Commissioner of Income Tax to discuss his failure to deduct income tax from Ms Danvers' earnings and told him that he had mistakenly assumed that no tax was payable. An article in *Vox* on 26 May 2000, under the heading "M'Lord, you have broken the law", said that it was understood that the Chief Justice was due to pay arrears of income tax and social insurance contributions in respect of Ms Danvers over a period of about three years. On 30 May 2000 the Chief Justice wrote to the Governor, David Durie CMG, apprising him of the situation in relation to Ms Danvers. He said that he had approached both the Income Tax Department and the Department of Social Security, and that he had already paid the amount assessed by the latter. The Governor replied on 1 June 2000, saying that he would be making his own assessment of the matter, and issued a public statement in which he said that it was important that the issue should not be allowed to bring the administration of justice into disrepute. With a view, therefore, to making his own assessment he had asked the Chief Justice to let him have all relevant information relating to the circumstances surrounding the employment of Ms Danvers. Following the meeting on 4 May the Commissioner of Income Tax indicated to the Chief Justice that he was prepared to accept payment of tax in the sum of £2,473.20, the payments to Ms Danvers being treated as grossed up in accordance with the appropriate code. The accountant of the Chief Justice looked at the Commissioner's figures and suggested that only £990.30 was owed. This was paid on 28 June.

3.11 The Chief Justice in his oral evidence said that it was inconceivable that he did not mention Ms Williams also to the Commissioner of Income Tax, but we do not accept this as there is no mention of her earnings and tax position in the correspondence with the Commissioner. Further, the

position of Ms Williams became public only following an article in *Vox* of 9 June 2000, under the heading "The Chief Justice must now resign", in which it was suggested that the Governor should also look into the Chief Justice's employment of Ms Williams, asking "Were her contributions for social insurance and income tax paid up?". In a further letter to the Governor on 16 June 2000 the Chief Justice said that he had signed Ms Williams's work permit application form in blank but that she had completed it giving her old terms of service. His recent researches revealed that he might have been liable to pay social insurance contributions in respect of her.

3.12 When by late June the Governor had not reached a decision, some dissatisfaction was expressed to him at his delay. On 28 June 2000 five Queen's Counsel sent a memorandum to him in which they said that it was a matter of regret that some four weeks after announcing that he would assess the allegations against the Chief Justice he had not announced whether he had found any grounds for establishing a Tribunal of Inquiry under the Constitution. They said that the delay had resulted in "division between those whose views on the quality and integrity of the administration of justice permit them to regard the allegations as a storm in a teacup and those who cannot so regard them".

3.13 On 3 July 2000 the Chief Justice wrote to the Governor, informing him that he had placed the matter of Ms Williams before leading counsel. The letter continued:

> "Having perused the legislation with some care counsel has advised that by reason of its terms and the hours she worked she does not come within the legislation. [Ms Williams] did not earn sufficient wages to come within the PAYE legislation."

3.14 The Chief Justice was asked about the contents of that letter in cross-examination. He said that the counsel referred to was either Desmond de Silva QC in London or Guy Stagnetto QC in Gibraltar. The Chief Justice accepted that in 2000 he had not asked his legal advisers to advise about his obligations in 1997; that was because he felt the Williams matter was closed. He further accepted that the picture presented to the Governor

was that there was never any obligation on the Chief Justice to deduct PAYE from Ms Williams' salary because she fell outside the legislation, and that it was impossible to square this with the legislation. Although this Tribunal ruled that the Chief Justice waived privilege in respect of the legal advice he received and although the Chief Justice had said through his solicitors by letter dated 14 July 2008 to the Solicitors to the Tribunal that Mr Stagnetto QC had advised him in relation to Ms Williams, no instructions to Mr Stagnetto nor record of any advice to the Chief Justice were found in Mr Stagnetto's file. Indeed in an e-mail dated 21 July 2008 from Mr Stagnetto to the Chief Justice's solicitors, Mr Stagnetto emphasised the limited nature of his instructions from the Chief Justice. He said that the Chief Justice had informed him that Ms Williams' pay did not reach the threshold to bring her within the PAYE legislation and that he replied to the effect that, if that was so, the Chief Justice had nothing to worry about and should inform the Governor accordingly. The Chief Justice's solicitors said that Mr de Silva had no memory of any advice he might have given to the Chief Justice.

3.15 In his fourth witness statement the Chief Justice said, in relation to Ms Williams, that he co-operated completely with the Governor "and gave him a full explanation". This is plainly untrue. In his oral evidence he attempted to maintain that his explanation was full and fair "in relation to the advice I received". However, he went on to recognise, though somewhat reluctantly, that his letter to the Governor of 3 July 2000 was misleading in that it indicated that he had been advised that he had never been under any liability in respect of PAYE, whereas the advice was that he had no outstanding liability as at the date in 2000 when the advice was given.

3.16 On 23 August 2000 the Chief Justice, who had been informed by the Governor of what he was proposing to say in respect of Ms Danvers, wrote to the Governor urging him also to make a determination in relation to Ms Williams. By letter dated 31 August 2000 the Governor wrote to the Chief Justice, enclosing a copy of the statement which he proposed to

make the next day but which in the event was not issued for over a month and then in a revised form. The letter included:

> "In your letter of 23 August you raised the matter of Ms Williams. Since at an earlier date you chose not to provide me the extra information for which I asked in relation to Ms Williams, I continue to rely on the assurance which you gave me on 12 July in respect of her. I have conducted no separate investigation in her regard."

The allusion to extra information appears to be a reference to a passage in the letter from the Chief Justice of 16 June 2000 to the Governor, where he told him that he was unsure whether he could give any authority for the release of confidential information by the Income Tax and Social Security Departments.

3.17 It was not until 4 October 2000 that the Governor announced his decision. In it he said that Ms Danvers' employment had been registered and "all outstanding PAYE payments and social security contributions have now been paid". He continued:

> "It is regrettable that matters were not regularised at an earlier stage but I have accepted that the Chief Justice did not deliberately seek to avoid his obligations.
>
> The Chief Justice has also assured me, in relation to another former employee of his, Ms Williams, that he has no outstanding liabilities.
>
> I have concluded, in view of the information and assurances which I have received, that it would not be appropriate for me to take any formal action in exercise of my constitutional powers."

3.18 On 9 October 2000 the Government issued a press release in which it stated that since the Governor's statement stated only part of the facts, the Government considered that the public interest required that the facts of the cases of Ms Williams and Ms Danvers, as known to the Government, be placed in the public domain. Those facts included that in the case of Ms Williams the Department of Social Security had no record of social insurance contributions having been paid in respect of her employment and that the Commissioner of Income Tax had no record of tax having

been paid in respect of her employment and had no record of her employment. In relation to Ms Danvers it said that PAYE payments and social security contributions in respect of her employment during the period December 1997 to 3 April 2000 were made in June 2000.

3.19 In his fifth witness statement the Chief Justice said that Ms Williams was outside the limits for social security and PAYE contributions. In cross-examination he said that he realised his mistake only when he heard the Chief Minister give evidence. In the same statement he said that the Government's press release seemed to suggest that contributions were due and unpaid in respect of Ms Williams and described that as a misleading innuendo since no contributions were due and unpaid. However, in cross-examination he accepted that there was no misleading innuendo in this press release, which was entirely accurate. When asked why he had instructed his counsel to run the maids issue as part of the argument that the Government was acting in bad faith against him, he said that it was because he genuinely believed at that stage that there was no liability in respect of social insurance contributions or PAYE. It seems to us that, if he had been taking the maids issue as seriously as he should have done, he would have found out the true position before he gave formal evidence in a witness statement that he had had no obligation to make the contributions, and, even more seriously, an accusation that the Government had been acting in bad faith.

3.20 There is one other feature of the maids issue which is of some relevance. The Chairman of the Bar in 2000, Robert Vasquez, gave evidence in his witness statement of speaking on the telephone to Mrs Schofield, with whom he was then friendly, on this topic. On 29 May 2000 Mr Vasquez made a note of a telephone conversation which he had with her. In his oral evidence he corrected and expanded on his witness statement. First, he said that in April 2000 he had what he described as "a very odd conversation" with her when she asked him questions about the payment of domestic staff in Gibraltar. There was, he said, a second conversation late on 29 May 2000 when she telephoned him from London. He made a note of the conversation the next day, which he provided to the Chief

Minister because of what Mrs Schofield said about the mother of the Chief Minister, who was Mr Vasquez's aunt. Mrs Schofield said to Mr Vasquez that she was wanting to hear what people were saying about the press reports on Ms Danvers. She said that the employment of illegal domestics was widespread and that generally people did not pay social security for domestics. In this context she referred to the Chief Minister's mother, but Mr Vasquez told her that that accusation was baseless. She said it was a can of worms but if people wanted it opened, she would open it up and would go not to the local gutter press but to the international press with everything. She twice posed the question:"[W]ould Gibraltar's finance centre withstand such publicity?" She said that she was fighting for her husband and children and that if Gibraltar wanted to remove him it would have to go through the whole procedure all the way to the Privy Council and she would fight all the way.

3.21 Mrs Schofield in her second witness statement refers to this note as "not on all fours with the conversation" which she had with Mr Vasquez. However, she said that his statement did correspond with her recollection of the conversation save for two details which she did not recall saying. She also said that she told Mr Vasquez to tell the Chief Minister that if he fought her husband in the gutter she would meet him in the gutter. The Chief Justice in cross-examination accepted that his wife had told him that. We have no hesitation in accepting the note as an accurate record of the conversation between Mrs Schofield and Mr Vasquez.

3.22 There is another piece of evidence that accords with Mrs Schofield having said that she was prepared to fight in the gutter for her husband. The Attorney General, Reginald Rhoda QC, said in his witness statement that at the time when the maids issue was in the press and after court one day the Chief Justice in his chambers told him that Mrs Schofield had said to him that the Chief Justice could not be involved in a public controversy but that she could get down into the gutter and fight. The Chief Justice in his fifth witness statement said that the language attributed by the Attorney General to him was "not my language". However, the Attorney

General gave evidence of having a distinct recollection of what the Chief Justice had said. As he explained:

> "The importance of it is that it has always stuck in my mind when I saw what was happening thereafter, that what was happening thereafter was putting into practice the very thing that the Chief Justice had said to me, that Anne said she can get down in the gutter and fight."

We have no doubt but that the Attorney General's evidence is to be preferred to that of the Chief Justice on this point.

3.23 The maids issue and the Governor's decision caused considerable controversy in Gibraltar and troubled legal practitioners in particular. The Opening of the Legal Year was boycotted by the majority of barristers and solicitors. The Chairman of the Bar traditionally makes a speech at the ceremony. Mr Vasquez, who had been Chairman of the Bar since 1999, formed the view that in his speech at the ceremony on 6 October 2000 he should refer to the issue relating to Ms Danvers, as the Governor's statement on 4 October 2000 was in his opinion not entirely satisfactory. He drafted what he proposed to say and called a meeting of the Bar Council so that he could consider the views of the members on his draft. He intended to resign as Chairman if there were objections. In his draft he said that the Governor's statement fell short of repairing the prejudice caused and restoring confidence in the administration of justice, and that he did not know if the difficulties could be surmounted. No one at the meeting supported the making of a statement in terms of the draft. However, he was persuaded not to resign but instead to make no speech, simply moving the Opening of the Legal Year. He agreed to that course. After the ceremony the Chief Justice gave a drinks party following which the Bar Council gave a lunch for the judiciary and others. After the lunch as the Chief Justice left, he said to Mr Vasquez: "Robert, don't rape the Constitution". Mr Vasquez said in cross-examination that the Chief Justice was extremely gruff and angry with him. He considered the remark to be a "very, very, very pointed comment to show [the Chief Justice's] displeasure". He found it threatening. As was pointed out by the Signatories, a similar remark about the "rape of the Constitution" was

later made by Mrs Schofield in her e-mails to Mr James Neish and Mr Peter Schirmer (paragraphs 5.18 and 5.32).

3.24 The Chief Justice accepted in cross-examination that he had used the phrase "rape the Constitution", and that it was not the most dignified of expressions. In our view it was not consistent with the dignity and status of the office of Chief Justice.

3.25 The connection between the maids issue and what happened at the ceremony was readily made by the press, as can be seen from an article in the *Gibraltar Chronicle* of 7 October 2000, headed "Scofield maids controversy: Bar Council drops out of legal year speech". *Vox* on 13 October 2000 carried an article headed "Chief Justice must now go: either he resigns or he must be asked to leave".

3.26 In his witness statement the Attorney General described the maids issue as causing "reputational damage" to the office of Chief Justice. It was pointed out to us that in a letter to Mr George Kegoro of the International Commission of Jurists (ICJ) Kenya dated 25 April 2007 (paragraph 5.35) Mrs Schofield said that the maids issue had been used to call for the Chief Justice's resignation. In his oral evidence he said that he would not go so far as to say that the maids issue was an attempt to discredit him, although he acknowledged fully that he had made grave errors in relation to it. Nevertheless he did not consider in 2007 dissociating himself from any suggestion that the Government had used the maids issue as part of an attempt to drive him from office "because once I embark upon that, I then have to embark upon qualifications, explanations, which may lead us into further problems".

3.27 We agree with the Attorney General that the Chief Justice's conduct in relation to the maids issue caused damage to his office. On his own admission he committed a series of offences relating to PAYE, social insurance contributions and the work permit for Ms Williams, exhibiting a reckless disregard for the completion of important forms. When he employed Ms Danvers he again committed offences relating to social insurance contributions and PAYE, only belatedly making payment of

what was due. He had no defensible basis for his ignorance of the law. He never instructed his lawyers in 2000 or at all to ascertain the true position in 1996 – 8. We regard his communications to the Governor as less than full and frank. They were positively misleading in respect of the legal advice he purported to receive and pass on. We cannot see how any lawyer, let alone leading counsel, could possibly have advised that Ms Williams did not come within the legislation if that lawyer had given careful perusal to the legislation. From Mr Stagnetto's description of his instructions, it is apparent that the blame rests with the Chief Justice in giving incomplete and incorrect instructions. The fact that he sought to treat this matter as evidence of the Government's bad faith when he had failed to investigate the true position in law speaks volumes about the lack of judgment of the Chief Justice. His explanation for failing to dissociate himself from remarks of his wife that the Government's approach to the maids issue had been part of a campaign to get rid of him from office does not impress us.

Instructions to Registrar of Supreme Court in respect of expenditure in May 2000

3.28 The costs of publicly funded entertainment are met from a central vote under the control of the Chief Secretary. In April 1998 the Chief Secretary issued a general circular to the effect that authority to incur expenditure on official entertainment had to be sought in advance. On 20 April 1998 the Chief Justice replied to the circular through the Registrar, asking for confirmation that he could continue to entertain in his official residence, "obtaining consent to do so in advance of each occasion". On 24 April 1998 the Chief Secretary gave that confirmation. The Chief Justice through his wife arranged a cocktail party at his residence on 9 May 2000 and instructed the caterers and the suppliers of drinks, Anglo Hispano, but, the Government said, did not seek prior approval for the commitment to expenditure. On the Chief Justice's instructions the Registrar applied for the consent of the Chief Secretary, but this was refused the day before the party. The Government said that the Chief Justice then instructed the Registrar to meet the costs from the Supreme Court funds for "general

and office expenses". The Registrar on 15 June 2000 wrote to the Accountant General saying that the Chief Justice considered that the cost should come from the general expenses vote in view of the fact that permission for the party had already been refused by the Chief Secretary. On 24 October 2000 she wrote to the Chief Secretary setting out what had occurred and to put on record that she had no input into the arrangements.

3.29 The Chief Justice in his first witness statement said that he had no memory of the incident. In his second he said, having seen the documents, that it was his practice to introduce any new Governor to the members of the judiciary and Bar. When funding was refused under the entertainment budget, he asked the Registrar whether it could be paid for from the general office budget. The Registrar, he pointed out, acted as the accounting officer for the Supreme Court and had the power to disallow claims and a duty to tell the Chief Justice if he acted outside the financial regulations. To his recollection, the Chief Justice said, he hosted the party at his own expense. In his fourth witness statement he said that, having seen a letter from Sir David Durie to the Solicitors to the Tribunal dated 3 June 2008, he was reminded that the Governor sent him a cheque towards the costs of the event.

3.30 Ms Dawson accepted in cross-examination that she was in charge of the budget for the judiciary and was answerable for expenditure on entertainment.

3.31 We conclude that this issue is of only limited significance to the general issues falling for our consideration.

The allegations of interception of the Chief Justice's telephone communications in 1999 and 2000

3.32 Between October 1999 and November 2000 the Chief Justice raised concerns with the police about the security of the telephones at his residence (as well as about suspected interference with a letter to him and

about the presence on one occasion of four people caught on his own CCTV loitering outside his house). On 30 May 2000 the press reported that he and his wife had asked the police to investigate suspicions of telephone tapping at their home. The newspaper *Panorama* reported under a banner headline:

> "Police asked to investigate phone tapping claim at home of Chief Justice 'Campaign to hound my husband out of office' – Mrs Schofield."

Mrs Schofield had given an interview in which she said: "We made our initial report last October and nothing was done". The article commented that that was at the time of the crisis that developed in the wake of the stand taken by the Chief Justice on the independence of the judiciary. The article referred to the maids issue and to Mrs Schofield's comment: "They are trying to discredit my husband. They are trying to hound him out of office".

3.33 There were reports also in the UK press. In the *Sunday Express* on 11 June 2000 Mrs Schofield was reported as having accused the Government of tapping her phones, and in the *Sunday Business* of the same date the Chief Justice was said not to have made any public comment about the alleged phone tapping but to have told friends that he believed he was under surveillance because of a clash with the Chief Minister over claims of political interference in the judiciary's independence. That article drew attention to the fear of politicians and lawyers that the issue threatened Gibraltar's reputation as a growing financial centre.

3.34 On 8 June 2000 Mr Montado wrote to Mrs Schofield asking whether she had made a statement to the *Sunday Express* accusing the Government of tapping her telephone and, if not, whether she would let him know what steps, if any, she proposed to rectify the matter. Her limited reply on 12 June 2000 merely said that she had not spoken to the *Sunday Express* either directly or indirectly.

3.35 On 22 November 2000 the Chief Justice wrote to the Commissioner of Police about his concerns. On 28 November 2000 the Commissioner replied that in respect of the telephones, the police had conducted several

investigations but that no evidence had emerged supporting those complaints and he could see no operational justification for continuing any investigation. The Commissioner said of the allegedly tampered letter that the problem was probably due to inefficient machine sealing by the senders. He said of the persons seen on CCTV that it had not been possible to identify them and that they had not actually ventured upon the Chief Justice's property.

3.36 The Chief Justice said in his first witness statement that there was an unexplained problem with his telephone and that he called in a security company who made a report. He further said that he did not suggest any police involvement in phone tapping but that this was a private concern which had no implications for the performance of his duties. In cross-examination he said he had read the *Panorama* Report at the time. He acknowledged that he would have been very concerned if Mrs Schofield had been misquoted in saying that an attempt was being made to discredit him and hound him out of office. He had not considered making a public statement that it was not his view that he was being hounded out of office. He said that he and his wife never regarded the telephone tapping issue to be in any way the responsibility of the Government. As for the remarks attributed to him in the *Sunday Business,* he said that it was not his view that he was under surveillance because of a clash with the Chief Minister over claims of political interference in the judiciary's independence. He had not told friends that that was his view and he did not believe the Government was involved. He did not think it worthwhile to correct the position as represented by the *Sunday Business* which was not published in Gibraltar. However, he accepted that the international reputation of Gibraltar was of considerable importance to the financial and legal services operating in Gibraltar but said: "once one starts to rectify a report such as that, one gets into all sorts of difficulties".

3.37 In her second witness statement Mrs Schofield said that the decision to raise this matter in *Panorama* was hers and that her intention was to raise awareness in a matter of public interest.

3.38 There is no evidence that the Chief Justice's telephone was tapped. It was Mrs Schofield who chose to link the allegation of telephone tapping with the unsubstantiated allegation of attempts being made by the Government to hound the Chief Justice out of office. His unwillingness to correct what had been attributed to him and to dissociate himself from his wife's comments on this issue was not satisfactorily explained by him. He must have been aware of the damage thereby caused to Gibraltar's financial and legal reputation.

The defence advanced on behalf of the Chief Justice on his prosecution in 2001 for an offence under the Motor Vehicles Test Regulations.

3.39 On 28 July 2000 the police reported the Chief Justice for two offences: one was driving a motor vehicle without a MOT test certificate, contrary to the Motor Vehicles Test Regulations; the other was for having no valid road tax. On 17 August 2000 the police wrote to the Chief Justice saying that on that occasion a lenient view had been taken by the Commissioner of Police who had decided to issue him with a caution (the caution for the lack of road tax was later withdrawn). The Chief Justice received the letter of 17 August only on 26 August. On 25 August 2000 the Attorney General wrote to his solicitors, Stagnetto & Co., asking whether he was prepared to accept the caution. On 30 August 2000 they replied that the question of accepting or rejecting the caution did not arise on the Commissioner's letter. On 4 September 2000 the Commissioner wrote to Stagnetto & Co. stating that it is was within the discretion of the Chief Officer of Police to issue a caution if the necessary criteria were met. One of them was that the person to be cautioned accepted his guilt and agreed to be cautioned. The Commissioner said that in respect of the MOT certificate, which was out of date by over 6 months, he was still prepared to continue by way of formal caution if the Chief Justice was prepared to accept his guilt; but if he was not prepared to do so, he was left with no alternative but to progress the matter by other means. On 15 September 2000 Stagnetto & Co. replied, asserting that the Chief Justice was not required to accept his guilt or agree to be cautioned. On 22 September 2000 the Commissioner

issued a summons against the Chief Justice. According to the Attorney General in his witness statement, on the eve of the hearing he sought to avoid a detrimental situation in a small jurisdiction in which he would be prosecuting the Chief Justice. He offered that if the Chief Justice accepted a caution, costs against him would not be sought and he could make a public statement. The offer was not accepted.

3.40 Between 26 and 28 July, and on 14 and 15 November, 2001 the case was heard by the Stipendiary Magistrate, Mr Anthony Dudley (as he then was). The Chief Justice was represented by leading and junior counsel. The Attorney General described the hearing as effectively turned into 'a state trial'. At the invitation of Mrs Schofield, various parts of the hearing were observed by representatives of the ICJ and of the International Bar Association (IBA).

3.41 An application was made on behalf of the Chief Justice for a stay of the prosecution on the basis that it amounted to an abuse of the process, on the ground that the letter of 17 August 2000 had disposed of the matter finally and unequivocally, and contained no element of conditionality; it therefore amounted to a promise or representation which precluded further action. The Stipendiary Magistrate, who commented in his ruling that the application was "somewhat surprising given the nature of the alleged offence", found that the Chief Justice, albeit "acting unreasonably", was entitled to refuse to indicate his acceptance of the caution and to treat the letter as a promise or representation that the matter had been dealt with and that no proceedings would be issued against him. However, he went on to find that the Chief Justice's legitimate expectation, arising from the letter of 17 August which the Chief Justice received only on 26 August, that no proceedings would be taken against him would have been very short lived because of the letter dated 25 August 2000 from the Attorney General. He therefore held that in the circumstances of the case, and there being no evidence of bad faith on the part of the Crown and in the absence of exceptional circumstances or compelling reasons, the application for a stay should be dismissed. We should add that we are satisfied that, despite an indication to the contrary

in the Stipendiary Magistrate's ruling, counsel for the Chief Justice did not submit that he should receive special treatment by reason of his office.

3.42 In the light of the Report of Mr Justice Nicholson as its observer the ICJ was satisfied that the court procedures conformed to international standards of due process, as it announced in a press release on 10 August 2001. We have not seen his report, but it is referred to in some detail in the Report to the IBA. It is apparent from the latter that he concluded that the trial was conducted "impeccably", that the attitude and approach of the Stipendiary Magistrate was "beyond reproach" and that the trial "was completely and absolutely a fair one…both in relation to the procedure under which the trial was conducted and the manner in which it was conducted". He noted that nothing arising in the defence case at trial raised any issue that the prosecution of the Chief Justice was motivated by or the product of executive harassment of the accused.

3.43 The further hearing on 14 and 15 November 2001 was concerned with a submission by counsel for the Chief Justice that the Governor, when bringing into force the MOT Regulations, had acted ultra vires. Following the rejection of that argument by the Stipendiary Magistrate on 15 November 2001 the Chief Justice was found guilty of driving a vehicle without a valid MOT certificate, and fined £50.

3.44 The hearing on 14 November 2001 was attended by Lord Hacking as an observer appointed by the Human Rights Institute (HRI) of the IBA. He was instructed to report to the IBA on whether there appeared to be any breaches of the human rights conventions relating to the trial or to the prosecution of the Chief Justice. In paragraph 18 of his report dated 12 February 2002, he referred to a number of allegations made by or on behalf of the Chief Justice relating to his relationship with the Governor, the Government and in particular the Chief Minister and the Attorney General. He also referred to notes taken by Dr Karen Brewer of the Commonwealth Magistrates and Judges' Association (CMJA) of a "briefing meeting" which she held with Mrs Schofield between July 2000 and November 2001. In paragraph 19 he stated that he understood that representations had been made to the HRI to the effect that the

proceedings were politically motivated and improperly brought. In paragraph 20 he referred to certain differences between the Chief Justice and the Chief Minister and asserted:

> "In these differences…the Chief Minister called, on at least one occasion, for the Chief Justice's resignation. It also appears that there were calls from the Chief Minister or from other quarters of the Executive Council that the Chief Justice should be subject to an investigation under section 60(4) of the Gibraltar Constitution."

We are unaware of any factual basis for those assertions.

3.45 Despite those assertions, Lord Hacking in his report to the IBA concluded that there were no grounds for holding that the prosecution had been improperly brought or tainted by political or other improper considerations. He said that the trial was properly and fairly conducted, and he described the conduct of the Stipendiary Magistrate as "exemplary". He was, however, highly critical of the Chief Justice's conduct, which he said was "deeply puzzling". Among the questions he raised in paragraph 39 were the following:

> "(ii)…If the Chief Justice is not prepared to abide by [the MOT law] why should any other citizen of Gibraltar do so?
>
> (iii) If the Chief Justice agreed that he had an invalid Motor Test Certificate when stopped on 28th July, why did he not accept the caution procedure which was twice offered to him, and let matters rest there?
>
> (iv) Why did he instruct his lawyers to present the 'abuse of process' argument (and in doing so take up 2 ½ days of the Court's time) when all the time he was admitting that he did not have a valid MOT Certificate?
>
> (v) Why did he instruct his lawyers to present the 'ultra vires' argument which, if correct, would have (or will have) the consequence of obtaining an acquittal for him while leaving every other citizen of Gibraltar, also wrongly convicted under offences created in the Motor Vehicle Test Regulations, without redress?"

3.46 Lord Hacking said that his fundamental concern, in considering the Chief Justice's conduct, related to his position as Chief Justice. He referred in

paragraph 40 to the 'Delhi Approved Standards' of the IBA on "Minimum Standards of Judicial Independence" and to the responsibility placed on every judge "always to behave in such a manner as to preserve the dignity of his office". He said (in paragraph 41):

> "When …. a Chief Justice admits that he was not in possession, as in this case, of a valid MOT Certificate, then he should surely look to the dignity of his office before presenting the 'abuse of process' argument".

Lord Hacking (in paragraph 42) said that another disturbing aspect of the Chief Justice's decision to contest the charge, and to have his defence conducted as it was conducted, was the burden which the case had placed on the judicial system over which he presided and on the Stipendiary Magistrate and he referred to the damage inflicted on Gibraltar's judicial system.

3.47 Lord Hacking in paragraphs 44 and 45 considered the conduct of the Crown. He thought that it would have been a dereliction of duty for the Crown, upon being unable to reach agreement with the Chief Justice over the caution, not to have proceeded forward by way of prosecution. He concluded in paragraph 47 that there were no grounds for holding that the prosecution was improperly brought or tainted by political or other improper considerations.

3.48 In his first witness statement the Chief Justice denied that he refused to accept a caution, denied that any defence argument was in any way improper, and said that his view as a lawyer was that for him to have been cautioned and then asked to admit guilt or face a prosecution was improper and potentially an abuse of process. He also said that Lord Hacking did not comply with the independent trial observers' guidelines as he was not present for the whole of the hearing and he had conversations with the prosecution but not with the defence.

3.49 The Chief Justice in his fifth witness statement did not dispute that his motor vehicle licence and MOT certificate were both out of date, but relied on the fact that a period of grace for obtaining vehicle licences had been announced and was set to end on 31 July 2000. A note made by Mr

Mendez, dated 16 August 2000, and addressed to the Chief Justice states that in May 2000 he had made enquiries on behalf of the Chief Justice with the police as to whether the Chief Justice, who had a MOT appointment for his own car booked for late August 2000, could continue to use the vehicle while not displaying the new disc. He was informed that the MOT appointment was sufficient to enable the Chief Justice to continue to use the car, and he so informed the Chief Justice. A further note dated 21 August 2000 and made by Ms Dawson stated that the Chief Justice in late July 2000 had requested her to double check the rules relating to the MOT/licensing of the Chief Justice's car and that she had passed on to him the advice which she had obtained, which was that after 31 July 2000 the fact that a MOT appointment existed did not allow the owner of a vehicle to drive that vehicle unlicensed.

3.50 The Chief Justice stated that he considered, and still considers, that the decision to prosecute him was grossly unfair, a view which he repeated more than once in his oral evidence, and an abuse. Given his firm view on the unfairness of the prosecution, he took counsel's opinion and instructed him to defend the issue on the discrete point of abuse of process. He further said that when junior counsel advised him that the ultra vires argument was strong, he decided to instruct him to run that point also. He said in his third witness statement that his lawyers wanted him to widen the issues by bringing in Mr Mendez as a witness but he instructed them that he was not prepared to put him in a position of having to testify. In his fifth witness statement he said that the police had denied the conversation with Mr Mendez, and he did not want Mr Mendez's credibility to be put into question before the Magistrate any more than he wanted the Magistrate to have an embarrassing decision to make in regard to that credibility.

3.51 In cross-examination the Chief Justice accepted that he knew before the trial commenced that the ICJ and the IBA were to send observers to the trial at the request of his wife, but he said that he did not discuss with her their briefing or know its content. He knew that his wife thought the prosecution was politically motivated. He thought the prosecution

grossly unfair. When asked by the Tribunal to explain how what Mr Mendez and Ms Dawson had ascertained was of assistance to us, given that the point was not taken by way of defence at the trial, the Chief Justice said that he wanted to explain to us that he could have dealt with these factual matters but chose not to embarrass Mr Mendez, Ms Dawson and the Stipendiary Magistrate.

3.52 We are satisfied that the Chief Justice did refuse to accept the offer of a caution from the Attorney General and that he did so because he was content that the trial should proceed on his chosen grounds of defence in the presence of international observers recruited by his wife with the aid of unsubstantiated allegations against the Government. If he had thought it inappropriate that the observers should attend the trial, with the implication that the prosecution might be improper or the trial processes inadequate, he could have told them in advance that there was no need to come. We do not accept that he did not know from his wife the content of the observers' briefing, given his strong feeling of gross unfairness and his knowledge of her views. We share Lord Hacking's puzzlement as to how the Chief Justice thought his behaviour to be consonant with the proper conduct of a Chief Justice in a small jurisdiction and with the dignity of his office. His conduct of his defence betrays a remarkable lack of judgment and sense of proportion and a disregard for the damage done to the administration of justice in Gibraltar. We do not find of any assistance the fact that arguably the Chief Justice might have run a further defence based on Mr Mendez's and Ms Dawson's evidence when he chose not to do so.

3.53 Before leaving this issue we should deal with two other matters. The Chief Justice appealed against the Stipendiary Magistrate's decision and in response the Crown cross-appealed against his decision on costs. In early January 2002 the Attorney General received a telephone call from Mr Picardo, junior counsel for the Chief Justice. It is not in dispute that they discussed an extension of time for filing comments on the case stated, and a basis on which both appeals might be withdrawn. However, Mr Picardo thereafter wrote in a letter to the Attorney General dated 9 January 2002

that the latter had asked him to communicate to the Chief Justice that he should not fear that a failure to pursue his appeal might have repercussions on the renewal of his contract, and that in any event, if the Chief Justice in the course of discussions with the Governor were to raise the possibility of withdrawing his appeal, other job opportunities from other jurisdictions in the Commonwealth might be put to him as an alternative to or after the renewal date. The Attorney General replied on 10 January 2002 that he had made clear his personal opinion that a withdrawal of the appeal by the Chief Justice was not likely to have any repercussions one way or the other on the question of the contract. He also said that, in answer to Mr Picardo's asking whether there might be other job opportunities elsewhere in the Commonwealth, he made clear that that was a matter which the Chief Justice would have to raise directly with the Governor. Mr Picardo responded by letter dated 23 January, saying that he did not say that the Chief Justice was concerned that the withdrawal of his appeal might negatively influence the question of renewal of his contract, and that his recollection was that it was the Attorney General who raised the possibility of job opportunities elsewhere in the Commonwealth.

3.54 To this should be added the account given by the Governor in a letter dated 9 April 2002 to the Chief Justice of the Attorney General's recollection (which he confirmed in his written statement and orally). This was that he was adamant that Mr Picardo had stated that the Chief Justice was concerned that the withdrawal of his appeal might negatively affect the question of his reappointment. Mr Picardo had then suggested that the Chief Justice be reappointed for 3 years and, after a respectable interval, should be found a position elsewhere in the Commonwealth. It was at that stage, the Attorney General recollected, that Mr Picardo asked for the conversation to be off the record as he was not instructed to discuss those matters.

3.55 We should also refer to the terms of a letter to the Chief Justice dated 4 September 2002 from Mr (now Sir) Desmond de Silva QC, one of the counsel whom the Chief Justice had consulted in connection with the

maids issue. The letter sets out Mr de Silva's recollection of a conversation between him and the Attorney General in about August 2000 when he was on holiday in Sotogrande where the Attorney General had a house. The conversation had turned to the Chief Justice. The Attorney General told Mr de Silva that, in addition to the matter of Ms Danvers, the Chief Justice had been stopped by the police for driving without road tax and a MOT certificate. The Attorney General had said that if the matter were to be uncontested and disposed of with the minimum of fuss, then no doubt the Chief Justice would receive every assistance and help if he were to be seeking a judicial position in England or elsewhere.

3.56 In his witness statement the Attorney General recollected his having had a conversation with Mr de Silva in which the Chief Justice's position was discussed in general terms. Mr de Silva had suggested that it would be a good idea if the Chief Justice could be found something elsewhere. He had responded that it would be a good idea. He was not offering the Chief Justice help in finding a position in England or elsewhere, which he would be in no position to do. In his oral evidence he disagreed with the suggestion in Mr de Silva's letter that he had suggested a quid pro quo, namely that if the Chief Justice did not contest the case against him, he would be helped. He said that that certainly did not occur. He maintained that it was his recollection that it was Mr de Silva who raised the matter of something else being found for the Chief Justice.

3.57 In regard to the difference of recollection between Sir Desmond de Silva and the Attorney General we accept the evidence of the latter who was an impressive witness. Sir Desmond de Silva did not give evidence. It is improbable that the Attorney General would indicate the possibility of job opportunities elsewhere in the Commonwealth when that was not a matter for him or within his power, but was one for the Governor and the FCO. The same applies to the difference of recollection between the Attorney General and Mr Picardo. We accept the evidence of the Attorney General that it was Mr Picardo who raised the possibility of job opportunities for the Chief Justice elsewhere in the Commonwealth.

CHAPTER 4

2002-2006

This chapter deals with:

- the comments made by the Chief Justice in open court in February 2002 following and relating to his appointment as Chief Justice for one year (paragraphs 4.1 – 4.26)
- the conduct of the Chief Justice in respect of certain proceedings in November 2004 (paragraphs 4.27 – 4.31)
- the conduct of the Chief Justice on the departure of the former Governor Sir Francis Richards in July 2006 (paragraphs 4.32 – 4.37)
- the involvement of the Chief Justice in debate over the 2006 Constitution (paragraphs 4.38 – 4.62).

The comments made by the Chief Justice in open court in February 2002 following and relating to his appointment as Chief Justice for one year

Prior events

4.1 By letter dated 28 November 1995 the then Governor, Admiral Sir Hugo White, informed the Chief Justice that his appointment had been approved, and that he was offered the appointment on contract terms for an initial period of 3 years with the possibility of renewal or extension, depending on the circumstances prevailing at the time. At the Chief Justice's request the suggested contract terms were amended to include reference to section 60 of the 1969 Constitution then in force, which gave him security of tenure until the age of 67. On 8 March 1996 the Chief Justice signed a contract which incorporated the amendment which he had requested. By warrant of appointment dated 8 February 1996 the Governor appointed the Chief Justice for a term expiring on 7 February 1999. In 1999 the Chief Justice refused to sign a new 3-year contract

because he wished to make the point that his tenure of office was not subject to a 3-year contract. On 8 February 1999 the Governor issued a further 3-year warrant.

4.2 In his first witness statement the Chief Justice said that in the months leading up to the expiry of the initial 3 year period he was "called to two or so meetings" by the then Governor, Sir Richard Luce, at which the Governor suggested that he accept a 6 months' extension of contract. He further said that after he had handed him the new warrant for 3 years the Governor told him that his suggestion that he accept a limited contract came as a result of representations by the Chief Minister that his contract be not renewed. On this point the Chief Justice referred to his letter to the Governor, Mr (now Sir) David Durie dated 8 October 2001 in which the Chief Justice stated:

> "In the period leading up to the expiry of the last warrant of appointment, I recall that the then Governor, Sir Richard Luce, called me to a series of meetings suggesting on a number of occasions that I consider and reconsider my position only to have to admit at the end of the day that the Chief Minister had made representations that I should vacate Office".

4.3 The Chief Justice in his examination in chief maintained that in that period Sir Richard Luce had said to him that perhaps he might take a six months' extension, and had explained that he had received representations from the Chief Minister that the Chief Justice's contract be not renewed. In cross-examination he agreed that he viewed this as quite a grave matter at the time, but did not put it on record at the time by writing to Sir Richard Luce or to the Government. His explanation was that he did not think anything could be gained by doing so. The only record of the exchange with Sir Richard Luce came almost three years later in the letter which he wrote on 8 October 2001. In cross-examination he accepted that the Governor had spoken in terms of the contract not being renewed rather than vacating office.

4.4 Lord Luce, as Sir Richard Luce became, stated in his witness statement that as Governor he had held discussions with the Chief Justice in strict

confidence and trust. He was disturbed that the Chief Justice had decided to betray that trust some 8 years later and, without notice to him, had sought to report on his recollection of what he had said to him. Whilst unable to recall the exact verbatim details of their discussion, Lord Luce said that the Chief Minister never sought to undermine the Governor's sole responsibility to decide on the Chief Justice's contract.

4.5 The Chief Minister in his witness statement said that he had never asked Lord Luce, or any Governor, not to renew the Chief Justice's contract, or to issue one of a reduced or particular length, still less 6 months. In his oral evidence, he confirmed that he had never made any observation or submission that the Chief Justice be removed. In the statement which the Chief Secretary, Mr Richard Garcia, presented on behalf of the Government he referred to the statement of the Chief Justice in his proceedings for judicial review, which contained a similar account of his conversation with Sir Richard Luce. The Chief Secretary said that Lord Luce had confirmed to him that he had never said any such thing to the Chief Justice, that he had never offered the Chief Justice a six months warrant of appointment, and that the Chief Minister had never said anything to him seeking the non-renewal of the Chief Justice's contract or his removal from office and that Lord Luce had never said any such thing to the Chief Justice. In his oral evidence the Chief Secretary said that he had verified this over the telephone with Lord Luce, who had told him categorically that on no occasion had the Chief Minister made any such representation to him.

4.6 We have not had the benefit of Lord Luce giving evidence before us. Some of what he said betrays confusion between a new warrant, which is the Governor's concern, and a new contract, which is the Government's concern. However, the only record supporting what the Chief Justice said he was told by the Governor was his letter of 8 October 2001 written to a subsequent Governor and then in terms which he accepted were somewhat different from what he now says he was told by the Governor. Further, we find it surprising that, in regard to a matter which he described as "very serious" and "of grave concern", he did not

immediately put on record in 1999 that he considered the Chief Minister's involvement to be grossly inappropriate. We prefer the evidence of Lord Luce, the Chief Secretary (on what he was told by Lord Luce), and the Chief Minister, to that of the Chief Justice on this point.

February 2002

The dates in this section of the Report relate to that month

4.7 On 8 February the then Governor presented to the Chief Justice a warrant of appointment for a further period of one year. The Chief Justice on 11 February wrote to him in a tone notable for its hostility and threat, saying:

> "For you to purport to reengage me for one year sends out a signal to the public which is calculated to undermine me in Office and which is calculated to undermine public confidence in the judiciary. Security of tenure is one of the cornerstones of judicial independence and should you persist in your intention to purport to limit my tenure of Office I shall be obliged to correct public perception and to reassure the public that the judiciary is inviolate and has the protection of the Constitution".

On 13 February the Governor replied that the long-standing practice of issuing time limited warrants was not intended to, nor could it, affect the provisions of the Constitution.

4.8 In the meantime on the morning of 12 February there was a hearing in chambers before the Chief Justice in the course of a criminal trial, *R v Clinton*. Three counsel were present: Mr Charles Pitto (now the Stipendiary Magistrate) for the prosecution, Mr David Hughes for two of the defendants and Ms Anne Balestrino for another two. There is no minute book for a hearing in chambers. However, according to his supplementary witness statement, Mr Mendez the Deputy Registrar, took some manuscript notes of the hearing which were then type-written (the manuscript being later destroyed). The typed notes record the following remarks:

> "Chief Justice: Last Thursday, during this trial, Governor informed me that my appointment as Chief Justice had come to an end, which of course I do not accept. On Friday His Excellency

purported to give me a further appointment for one year. Constitution leaves me in office until 67 years of age. The effect of the Governor's purported action would leave me without independence following loss of security of tenure of office. My office would become dependent on the executive. I have told the Governor that he may not offend the Constitution or violate my independence. If the Governor has not withdrawn his purported action by close of business today, I shall want the Attorney General to be here, to address me on the validity of the Governor's purported action. I may feel that I must abandon this case and indeed suspend all sittings of the Supreme Court.

Hughes: You are right. An opposite view to yours would not even be arguable.

…

This is a grave matter. We may have to run arguments on this. You are correct in your views.

Chief Justice: Hughes, how did you know so much about this? Is it out?

Hughes: It was discussed at the Bar Council. Maybe you should ask the Chairman of the Bar to be present tomorrow as amicus curiae.

Chief Justice: If the executive interferes, I must have this out. An important organisation in London is willing to take the matter up, but I want to deal with it myself. This is a crisis not of my making. It is interference with administration of justice. I would abandon this case to avoid an appeal."

The Chief Justice is then recorded as saying that the Attorney General had 24 hours' notice that the Chief Justice wanted him there the following morning, and as repeating the warning that the Governor had until close of business that day to withdraw his purported action. Mr Pitto requested a copy of the note for the Attorney General, which was faxed to him on the same day.

4.9 On 13 February there was a hearing in court in the absence of the jury. The same counsel were present as on the previous day. The Attorney General did not attend. A transcript was made of the hearing. The Chief Justice made a statement about his security of tenure and the "purported warrant of re-engagement for one year". He referred to the decision of the High Court of Justiciary in *Starrs v Ruxton*, to his own view that he had the protection of the Constitution, and to the assurance from the Governor that the practice of issuing three year warrants was not intended to and could not affect the provisions of the Constitution, but said that he had a duty to bring the matter to counsels' attention in case it affected the propriety of the proceedings before him. Mr Hughes (with the agreement of Ms Balestrino) agreed with the view of the Chief Justice and said that the defence did not wish to challenge the proceedings. He said that the Chief Justice was independent and impartial, but that if he were not, not only would the current trial have to cease but all sittings of that Court would have to cease. Mr Pitto for the Attorney General said that the Crown did not dispute the Chief Justice's right to sit. The trial then proceeded to its conclusion.

4.10 The issuing of a one year warrant was reported in the press. In an edition confusingly dated "Wednesday 12th February 2002" (the 12th February was a Tuesday) the *Gibraltar Chronicle*, under the heading "Crisis looms as Chief Justice and Convent (the Governor's official residence) clash", referred to the Governor's decision to limit the extension of the Chief Justice's employment to one year and said that a major row was brewing, involving a crisis meeting at the Convent, and that the Chief Justice had apparently signalled that he was challenging the Governor's decision. The *Gibraltar Chronicle* continued:

> "The row is set to shake the establishment and may even suspend the Supreme Court's functions. It is understood that the judge has indicated privately that he believes the decision could undermine the independence of his standing in the Court and threaten his Constitutional position".

While it may be that the edition containing the article was published on 13 February, the newspaper was not purporting to report what had happened in the proceedings in chambers on 12 February. That prescient article, as Counsel to the Tribunal aptly described it, was plainly the product of information from a source close to the Chief Justice.

4.11 *The New People* on 15 February carried an article bearing the heading "Chief Justice in constitutional row with UK" and the subheading "British Government accused of trying to remove Chief Justice". It quoted from a letter sent by Mrs Schofield to the then Foreign Secretary, the Rt Hon Jack Straw MP, in which she claimed that there had been harassment by those hoping that it would lead to the Chief Justice departing of his own accord. She also said in that letter:

> "Your instructions violate my children's rights. My children's rights to family life, home are protected by law and it is my intention as a mother to ensure that no further damage is caused by Her Majesty's Government or by the Governor of Gibraltar to the children".

The Chief Justice said in his first witness statement that he had no hand in the raising by his wife of the issue with the Foreign Secretary and the press.

The New People also reported that it understood that Mrs Schofield was considering judicial review to restrain the British Government from interfering with her children's rights and that she might also seek damages against the British Government for pain and suffering caused to the children and herself by unconstitutional threats from British Government officials in Gibraltar.

4.12 The first matter which we have to consider is the authenticity and the accuracy of Mr Mendez's note of the hearing in chambers, which were challenged by the Chief Justice and Mr Hughes.

4.13 The Chief Justice in his fourth witness statement said that it could only relate to a discussion he had with counsel in chambers, not on 12 February, but on 11 February. He said that the tone of the note was wrong. It was "unthinkable" for him to threaten to suspend all sittings of the Supreme Court though he accepted that he might well have raised the idea that his own sittings would be suspended until the issue was resolved. He said that he would not have mentioned to counsel that he had been in touch with an important organisation in London, but he recollected that he had contacted the ICJ. The tone of the final paragraph with its warning to the Governor was, he said, "bewildering".

4.14 In his first witness statement Mr Hughes said that he was "reasonably confident" that the discussion was not as set out in the transcript. He was confident that the Chief Justice did not suggest that there were organisations in London who were willing to look into the matter and that the Chief Justice did not make any threat, such as a threat to suspend sittings of the Supreme Court. He would have remembered any such statements. He did not understand how the transcript could have been produced and that a clerk did not take a note. He pointed out that the note showed it was faxed on the Registrar's machine and on 12 February, shown as the date of the hearing in open court. He was "sure" that that did not happen until 13 February. In cross-examination he said he recalled counsel in the case going into the Chief Justice's chambers on two separate occasions. The first he thought was not a long meeting on Friday 8 February, when the Chief Justice brought to everyone's attention the fact that he had been given a one year warrant and said that he might need to hear counsel on it. He had a distinct recollection of a weekend intervening between the two occasions. He recalled a discussion of that matter at the Bar Council, which he said must have occurred on that day or the following Monday 11 February. In his oral evidence about the hearing in chambers on 12 February, he was less categorical than in his witness statement. He could not say that he was 100% certain that the Chief Justice had said that he might have to suspend the sittings of the Supreme Court, but he could say that there was no threat because it was not that type of discussion. He did not remember the Chief Justice getting

angry. He accepted that it was possible that the Chief Justice could have referred to an important organisation in London in a way which caused Mr Mendez to remember it. He did not persist in his points on the chronology.

4.15 Mr Mendez in his supplementary statement stood by the accuracy of his note. He said that clerks did take notes, and that judges never saw the countless minutes and transcripts that they produced. He had his manuscript notes typed because he could see that the whole incident had far-reaching consequences and that he foresaw he would be asked for that transcript before long, as in fact happened. The Registrar's fax machine was used all the time, but she was not present at the hearing. The trial resumed on 12 February and again the next day. In cross-examination he adhered to his evidence about the accuracy of his note.

It was normal to give a record to a party if that was requested. He accepted that he had not checked with others that his note was accurate and that he probably should have told the Chief Justice that he had given a copy to the Attorney General. When it was put to him that the Chief Justice did not say, or would not have said, that he might feel that he must abandon the case and suspend all sittings of the Supreme Court, Mr Mendez said :

> "Well I'm very satisfied with the accuracy of this note and I repeat those are things that would never occur to me, and I certainly would not invent them and put them in just like that."

When it was similarly put to him that the Chief Justice had no recollection of making any statement about an important organisation in London and did not think it was ever said, he responded that important organisations in London would not have occurred to him. He added that on that morning the Chief Justice was "a very, very angry Chief Justice".

4.16 Mr Pitto said that the first occasion on which he heard that there was any issue relating to the Chief Justice's warrant occurred was when he was approached in court by Mr Hughes and asked if he knew that the warrant was about to expire, to which he replied that he did not. Mr Hughes then

tried to persuade Mr Pitto, as the advocate appearing for the Crown, to raise the point in open court. Mr Pitto replied to the effect that if the Chief Justice sat in court, then he was entitled to sit in court. After that conversation counsel were summoned to the Chief Justice's chambers. He said that his recollection of what transpired there was corroborated by the note of the hearing, and there was nothing in it which struck him as inaccurate or misleading. He clearly recalled that he left the hearing with a sense that there was a likelihood or real danger that the Chief Justice would not sit beyond 14 February. To the best of his recollection a suspension of all sittings was mentioned. He distinctly recalled the Chief Justice asking Mr Hughes how he knew so much about this matter and Mr Hughes replying that it had been discussed at the Bar Council. In cross-examination he said that he did have a clear recollection of what was said in chambers on 12 February, in that he recalled the threat of a suspension, be it of all hearings or at least hearings before of the Chief Justice, because he recalled communicating that to the Attorney General immediately afterwards. He also recalled the Chief Justice asking Mr Hughes about his knowledge of the warrant, and Mr Hughes's response. He had no recollection of reference being made by the Chief Justice to a London organisation.

4.17 Bearing in mind the Report in the *Gibraltar Chronicle* and having had the opportunity to observe the witnesses and their demeanour, and having regard to the fact that Mr Mendez, an experienced note-taker, is the only witness to have made a contemporaneous note and had it typed very shortly afterwards, we would accept that what he recorded was actually said, unless we found Mr Hughes's attack on Mr Mendez's credibility to be persuasive. As to that attack, we reject every single argumentative point taken by Mr Hughes as being without foundation. Mr Mendez seemed to us to be patently honest, frankly accepting errors which he had made in his evidence but maintaining his account when he was sure that he was correct. It follows that we also reject the Chief Justice's account of what was said. We find that he was indeed very, very angry that morning and did say what he is recorded as saying, including the warning to the Governor.

4.18 The next matter which we consider relates to the circumstances in which the discussion in chambers took place. Mr Pitto was intrigued and suspicious at the insistence with which Mr Hughes brought up the matter of the warrant, and at the underlying assumption that there was a potential problem with the warrant. He said:

> "Why should it be assumed that there was a problem with it? Why should it be worth raising?"

He said that, in the light of the exchanges in court, what happened in chambers made him uncomfortable and suspicious. The whole situation was unique in his career.

4.19 In this context the Attorney General's oral evidence is also of relevance. He said that he had unusually not acceded to the Chief Justice's request to be present on the morning of 13 February because, after discussing it with Mr Pitto, they both felt "that there was a little bit of a set-up in this between Mr Hughes and the Chief Justice". He was of the view that he was being called in front of the Court to embarrass the Governor in some way. It may be noted that in his witness statement Mr Mendez described Mr Hughes as "in and out of the Chief Justice's chambers for private conversations constantly", Mr Mendez and the staff joking "Mr Hughes is upstairs again".

4.20 The Chief Justice in his oral evidence flatly denied that there was concerted action by him and Mr Hughes. He maintained, with the support of Mr Hughes, that it was entirely appropriate for him to raise an issue regarding the regularity of proceedings before him. Mr Hughes denied visiting the Chief Justice to speak to him privately, save on one occasion relating to his professional future in joining chambers in England. He speculated that the reason why Mr Mendez had given evidence about him visiting the Chief Justice in chambers was that he (Mr Mendez) worked for the Government. Mr Hughes said it would be a very brave civil servant who was not inclined to be helpful to the Government and was not afraid of the consequences of telling the truth. However, Mr Hughes's evidence that he knew about the warrant because it was

discussed at the Bar Council is not borne out by the Bar Council minutes. These show that the matter was not discussed by the Bar Council until an emergency meeting at 4.30 pm on 12 February, that is to say after the hearing that morning in chambers. We think it regrettable that he should have chosen by way of speculation to attack the veracity of Mr Mendez, a senior civil servant.

4.21 It is plain that the Chief Justice was deeply angered by the Governor giving him a warrant for only one year. We heard no evidence as to why the Governor chose to do that rather than give the Chief Justice the usual 3-year extension. It may be that the Governor was dissatisfied with the Chief Justice's conduct and wished to mark his disapproval in some way. But, as the Chief Justice rightly believed, his security of tenure until the age of 67 was given by the Constitution and indeed had been incorporated into his contract with the Government. The Governor told him that the practice of issuing time-limited warrants could not affect the Constitution. In *R v Clinton* no counsel for any of the parties suggested that the Chief Justice's tenure was affected, and it was clear that the decision in the *Starrs* case was distinguishable. The Chief Justice said that he had raised the issue in open court to prevent an appeal on the point, but the procedure he chose was not apt to resolve the suggested problem. Even if defence counsel conceded the point before the Chief Justice, different counsel could take the point on appeal, and defendants in other cases could take the same point and have it resolved authoritatively.

4.22 Mr Hughes produced a second witness statement after seeing Mr Pitto's witness statement and reading the transcript of Mr Pitto's oral evidence and the transcript of Mr White's closing submissions. In it he said that Mr Pitto's evidence that on 12 February he had asked Mr Pitto to raise with the court the question of the warrant did not accord with his own recollection. However, he said that it was difficult to be absolutely certain about the sequence of events nearly 6 ½ years later, but he did not accept that there would be anything suspicious about it as he thought it more appropriate for the prosecution to raise the point. We have no doubt that

the evidence of Mr Pitto, who had good reason to recall Mr Hughes's surprising request, is to be preferred to that of Mr Hughes.

4.23 Mr Hughes referred in his second witness statement to his earlier evidence that the matter of the warrant was raised by the Chief Justice twice in chambers. He adhered to that evidence and said that he did not know of the issue of the warrant before the Chief Justice asked counsel into chambers for the first time. On his evidence that would have been on 8 February. Mr Pitto's evidence was clear on this point and not subject to cross-examination by counsel for the Chief Justice. Mr Pitto first heard of the issue about the warrant when told by Mr Hughes on 12 February. The Chief Justice in cross-examination wondered whether Mr Hughes was right to say that the matter of the warrant was raised twice; but he was not sure. The only way Mr Hughes's distinct recollection of the issue being raised briefly by the Chief Justice in chambers on 8 February can be reconciled with Mr Pitto's evidence is to accept that the Chief Justice did indeed mention the issue to Mr Hughes on 8 February but also to accept that Mr Pitto was not then present, and we so find.

4.24 Mr Hughes in his second witness statement accepted that his recollection that before 12 February there was a Bar Council meeting at which the issue of the warrant was discussed might be incorrect. He said that his recollection of events was different from that of Mr Pitto, and that he could not possibly have said that he had learnt of the issue at a Bar Council meeting. However, Mr Mendez's minute on this point is clear and Mr Pitto's recollection accords with that minute. We accept Mr Mendez's and Mr Pitto's evidence.

4.25 Mr Hughes in his second witness statement said that it was simply untrue that he was involved in any kind of set up involving the warrant. We are unable to accept that evidence. We find that the Chief Justice did mention the issue of the warrant to Mr Hughes, but not to Mr Pitto, in the Chief Justice's chambers on 8 February when he indicated that he might need to hear from counsel on the issue. Mr Hughes was known to the Chief Justice as counsel who might take constitutional points. The artificial-sounding question and answer recorded by Mr Mendez as to Mr Hughes's

knowledge together with Mr Hughes's incorrect reference to a Bar Council discussion point to the fact that there was such a set up. Mr Pitto's and the Attorney General's suspicions were fully justified. The hearing before the Chief Justice in chambers was contrived to enable him to give vent to his outrage at the Governor's action.

4.26 There is one other feature of this matter to which we would draw attention. The angry tone of the Chief Justice's letter of 11 February to the Governor and the leak of his thinking to the *Gibraltar Chronicle* as appearing from its article dated 12 February is matched by the stridently indignant tone of Mrs Schofield's letter to the Foreign Secretary and the article in *The New People* of 15 February. The perception thereby given publicly is of concerted action by the Chief Justice and Mrs Schofield in response to the Governor's action.

The conduct of the Chief Justice in respect of certain proceedings in November 2004

4.27 On 18 November 2004, an application in the civil case of *Rodret AB v Osloford* came on for hearing before the Chief Justice. A Spanish property development company (the buyer) had negotiated with Rodret for the purchase of the shares in three Gibraltar companies (including Osloford) and the assignment of loans by Rodret to the companies. Prior to completion the buyer had claimed that the loans were fictitious, and applied successfully to a Spanish court in Malaga for an order requiring Rodret to transfer the shares for 11.5 million Euros and a declaration that the loans were fictitious. Rodret appealed in the Spanish court. In order to protect its position it also issued proceedings against the Gibraltar companies and obtained a consent judgment against each of them for the full value of the loan to it. The consent judgments were then registered in Spain as Spanish judgments. The buyer applied in the Gibraltar Supreme Court to have the consent judgments set aside. It joined Rodret as the sole respondent to the application.

4.28 The application had been set down for a 2-day hearing to be held on Thursday 18 and Friday 19 November, as the parties were notified on 8 November by the court. It is not in dispute that the hearing was to be in Court 2 (called "the Library") and that the Library was used by the Magistrates Court on Fridays.

4.29 At the outset of the hearing the Chief Justice took a number of points. The first was that the Gibraltar companies were not, but should be, represented. Although none of the parties had taken the view that this was necessary, Mr J E Triay QC, for Rodret, undertook to obtain instructions from the Gibraltar companies "so as not to make an issue of non representation" (according to notes made by a clerk in the court minute book). The second point recorded in the clerk's notes was that the court was available only for 18 and the afternoon of 19 November; and that counsel would "have to explain everything" as the Chief Justice had not had time to read all the papers. In an e-mail to his clients the next day Mr Javier Triay (who had appeared with Mr J E Triay for Rodret) stated that the Chief Justice told counsel that he expected them to take him slowly through the relevant facts and history in detail. Contrary to the notes made by the clerk, Mr Javier Triay reported to his clients in the e-mail that the parties were given only the option of having the case heard on the morning of 18 February and then having the case part heard until December. The third point was whether the proceedings in Gibraltar should be stayed until the appeals in Spain had been heard. It was clear that neither side wanted a stay. Mr J E Triay made it clear that he did not want a split trial. The parties agreed to an adjournment. According to his witness statement Mr J E Triay formed the impression that the Chief Justice was looking for any opportunity to postpone the hearing of the case, first by reference to the parties' representation, then the courtroom availability, then not having read the papers and lastly a stay on the ground of the appeals in Spain.

4.30 The following week Mr Javier Triay was informed that the Chief Justice had been seen leaving Gibraltar on a flight to the United Kingdom before the weekend.

4.31 Despite suggestions that the Chief Justice deliberately misled the parties as to the ability of the court to deal with their case we think it clear that the Chief Justice did not mislead or deceive anyone in the course of the hearing on 18 November. What he said about the time available that day and the next day appears to have been open to misinterpretation in view of the differing recollections, but we are inclined to accept the evidence of the clerk's minute that the Chief Justice said that the available time was that day and the following afternoon. However, we are surprised that the Chief Justice did not offer to make up the time which would be lost through the unavailability of the Library on the morning of 19 November by sitting longer hours. Because of the series of unimpressive points taken by the Chief Justice he appears to have given to Mr JE Triay and Mr Javier Triay the impression he was determined that the case should be adjourned, but we do not find that this was to enable him to be on a plane out of Gibraltar before the weekend. The evidence on that point is too inconclusive.

The conduct of the Chief Justice on the departure of the former Governor Sir Francis Richards in July 2006

4.32 On 17 July 2006 Sir Francis Richards, the outgoing Governor, left Gibraltar by sea. There was a formal departure ceremony at the naval dockyard. The Deputy Governor, Mr Philip Barton, said in his witness statement that Sir Francis had given clear instructions as to how he wished his departure ceremony to be organised. In accordance with those instructions Mr Barton arranged for there to be two groups present to say goodbye to Sir Francis and Lady Richards, one of local dignitaries and officials, the Chief Justice being placed at the head of that group, and another group placed closer to the gangplank, consisting of Mr Barton and his wife and the Chief Minister. Sir Francis wanted the final person to say farewell to him to be a representative of the people of Gibraltar.

4.33 Traditionally Governors are sworn in by the Chief Justice. Mr Barton asked the Chief Justice to swear him in as Acting Governor and this had

been arranged for a time shortly after the Governor's departure, that is to say at 2 pm on the same day at the Convent. Mr Barton said that under sections 20 and 22 of the 1969 Constitution when the office of Governor was vacant an Acting Governor needed to be appointed and sworn in formally. He was concerned that until he was sworn in, there would be no one in Gibraltar in a position to exercise the executive powers of the Governor, for example in the event of an emergency.

4.34 The Chief Justice was unhappy with the way the departure ceremony had been organised and in particular with the Chief Minister being placed, as the Chief Justice thought, ahead of him in breach of protocol. Mr Mendez described him as returning "fuming". On the Chief Justice's instructions Ms Annabelle Desoiza, the Deputy Registrar, telephoned Mr Barton to cancel the swearing in arrangements. At Mr Barton's request the swearing in was arranged for the next day but only on conditions stipulated by the Chief Justice, viz. that Mr Barton put in writing why he had made the departure ceremony arrangements in the way he did and that Mr Barton should come to the Chief Justice's chambers rather than the Chief Justice attending on Mr Barton. Mr Barton did what the Chief Justice requested. When Mr Barton saw the Chief Justice the next day, he was criticised for what he had written about the arrangements. The Chief Justice said that it was not for Her Majesty's representatives in Gibraltar to change the order of precedence laid down by the Queen.

4.35 The Chief Justice in his third witness statement said that it had never been the practice that on the departure of a Governor the Deputy Governor was sworn in. He said that he required Mr Barton to come to his chambers to demonstrate his dissatisfaction with the way Mr Barton had organised the departure of the Governor.

4.36 Mr Mendez said in his witness statement that it was not unusual for the Deputy Governor to come to the Chief Justice's chambers to be appointed as Acting Governor for short absences on the part of the Governor but that for periods of interregnum it was customary for the Chief Justice to go to the Convent and administer the oath there.

4.37 In our view every incident in this episode reflects badly on the Chief Justice. His petulant behaviour, at a time when there was no Governor, towards the senior representative of the Queen in Gibraltar, the Acting Governor, was disgraceful. He was wrong to suggest that it had never been the practice to swear in the Acting Governor. His refusal to adhere to the arrangements which he had made with Mr Barton to swear him in as Acting Governor took no account of the fact that thereby Gibraltar was left for the time being without anyone able to exercise emergency powers. His acknowledgment that by imposing conditions on Mr Barton for him to be sworn in he was demonstrating his dissatisfaction with the arrangements for the departure of the previous Governor shows that his actions were governed by pique in a manner wholly inconsistent with the dignity of his office. His dissatisfaction stemmed from the fact that Mr Barton had complied with the wishes of the outgoing Governor as to what should happen on his departure. Given Mr Barton's explanation as to the wishes of the outgoing Governor and the positions by the gangplank occupied by those present, the notion that this was in breach of the Queen's wishes on protocol is fanciful, and we cannot help noting that it was because the Chief Minister was placed in a position which the Chief Justice thought gave the Chief Minister precedence that caused the Chief Justice to be so angry.

The involvement of the Chief Justice in debate over the 2006 Constitution

The dates in this section of the Report refer to 2006, unless otherwise indicated.

4.38 In 1999 a Select Committee had been established by the Gibraltar House of Assembly to consider the reform of the Constitution. An open invitation had been issued to all members of the public or interested parties to submit their views. Following the adoption of the Report of the Select Committee on 27 February 2002 the draft text of a new Constitution had become the subject of negotiation between a UK delegation and a Gibraltar cross party delegation. The judiciary had not responded to the invitation to submit views. The Chief Justice said in evidence that he

preferred "to put his representations through the Governor". However, the period for receipt of representations had ended in February 2001, and the first indication of his communication with the Governor on this subject had been on 23 March 2005 when he submitted to him a paper with recommendations for the amendment of the Constitution. He had sent an advance copy to the Chief Minister on 7 March of that year, pointing out that "the recommendations are made after extensive consultation with my colleagues and are those of the whole judiciary". We accept the evidence of Mr Charles Pitto, the Stipendiary Magistrate, that he did not have the opportunity to consider them in detail before they were submitted. The paper had recommended a Judicial Service (or Appointments) Commission (JSC), with a membership of six, including the Chief Secretary, the Attorney General and the Chairman of the Bar Council. In late 2005 the Chief Justice sought a meeting with the legal adviser to the FCO and the legal adviser to the UK delegation. He was offered instead a meeting with another FCO official. He declined the offer on the ground that it would be inappropriate for him to meet an official who was not a legal officer but a "political" member of the UK delegation. In due course on 9 January 2006, after consulting the members of the Gibraltar delegation about a number of issues, the Chief Minister wrote to the Chief Justice enclosing a detailed matrix which showed the position of the Government in regard to the recommendations which had been made in the paper. His letter ended with the words: "I will, of course, let you know as soon as it becomes apparent, what is the likely outcome of the negotiations with the UK as they affect issues affecting the judiciary". This led to the Chief Justice making further submissions on 21 February with a modified proposal for membership of the JSC, and a recommendation that it should be provided that the Chief Justice was the Head of the judiciary. In the event the Chief Minister did not let the Chief Justice know the likely outcome of the negotiations. We will refer at paragraph 4.51 to his explanation for this.

4.39 After further negotiations, on 17 March the UK and Gibraltar delegations reached an agreement on the text of a new Constitution. On 20 March the Chief Justice telephoned the Deputy Governor, Mr Barton, and asked him

about the status of the text. He was informed that, having been agreed between the delegations, the text had gone to the Foreign Secretary, after which it would be made public. It appears that the Chief Justice did not press for a copy, and made no subsequent request for one. On 27 March the agreement on the terms of the final draft text was formally and publicly announced. A Government press release on 5 July announced that, following the confirmation by the UK Government that Gibraltar's Constitutional Referendum would constitute an exercise of the right to self-determination, the two governments had published the text of the proposed new Constitution. It was available on the Government website, and hard copies could be obtained from 6 Convent Place. This information was also published in the *Gibraltar Chronicle* on 6 July, in an article which referred to the fact that the Gibraltar Parliament had united behind a 'yes' vote, and that it was anticipated that the proposed referendum would take place in September.

4.40 Despite this the Chief Justice did not obtain a copy the text until about 4 August. In his letter to the Chief Minister dated 11 August, to which we refer in the next paragraph, he said that he had "managed, late last week, to download the Draft from the Government website." He claimed in evidence that this was due to a persistent difficulty in obtaining access to it on the website. We find this hard to believe. We also find it hard to understand why he had taken no steps to obtain a hard copy in the interim. When the Chief Justice read the text he found that it contained a number of provisions which he had not seen before. In regard to the JSC, four of its seven members would be appointed by the Government and by the Governor; and the President of the Court of Appeal, and not the Chief Justice, would be its Chairman. It should be noted that a similar, but not identical, proposal about the membership of the JSC had been drawn to the attention of the Chief Justice in January 2006, on which he had made representations in February. Article 57 (2) would enable the Governor, with the advice of the JSC, to make and confirm various judicial appointments, and exercise disciplinary control over subordinate officeholders. Article 57 (3) made provision for the Governor, with the prior approval of the Secretary of State, to disregard the advice of the JSC

where this was prejudicial to Her Majesty's service. Article 64 (7) provided that, notwithstanding sub-article (1), which provided security of tenure to the age of 67, a Chief Justice or a Puisne Judge could be appointed for a limited term, on expiry of which the office would become vacant. The Chief Justice almost immediately got in touch with the CMJA, which submitted its observations on the text to the FCO on 8 August.

4.41 On 7 August the Chief Justice wrote to the Chief Minister stating he had "just had a sight" of the draft on the website. He said that he and other members of the judiciary remained concerned at the draft, particularly sections 57 and 64(7), which were considered to "undermine the independence of the judiciary rather than strengthen it". He sent a copy of his letter to the Acting Governor and the members of the Select Committee. He followed this with a further letter to the Chief Minister dated 11 August, which enclosed "the submissions of the Chief Justice, the Puisne Judge, the Stipendiary Magistrate and the Registrar on the draft Constitution". The submissions expressed particular concern about the overriding control conferred by Article 57(3) on the Governor acting on the advice of the Secretary of State. The independence of the judiciary flowed from the appointments process. It was fundamental that such process was independent and not in the ultimate control of the executive. Giving a power of veto "contravenes universally accepted principles on the separation of powers". The majority of the members of the JSC would be appointed by the executive. The Chief Justice, as head of the judiciary, should be its Chairman. The draft did not guarantee judicial independence. It failed to demarcate the separation of powers between the executive and judiciary. It failed to deal with the question of who was head of the judiciary, or to define the office and responsibilities of the Chief Justice. The submissions concluded with the statement that the judiciary would consider all possible steps it might take to prevent these errors of principle from being promulgated, "including, reluctantly but if necessary, a petition to Her Majesty through Her Privy Council". This was evidently a reference to special reference under section 4 of the Judicial Committee Act 1833.

4.42 A meeting had taken place on 11 August between the Chief Justice, Mr Pitto and the Registrar, Ms Annabelle Desoiza, at which the Chief Justice had produced a draft which set out a number of concerns in regard to the text and concluded with a reference to a possible petition to the Privy Council. The document purported to represent the views of the whole of the local judiciary, even though the Puisne Judge, Mr Justice Dudley, had not seen it. Moreover, Mr Pitto had expressed particular concern, both at the meeting and in a subsequent telephone call, at what he considered to be the inappropriateness of including a reference to the Privy Council. The Chief Justice had responded by indicating that he considered that the Government would do nothing without this "bite" or "threat". He submitted the representations in the name of the judiciary without including any express indication of Mr Pitto's reservations. There is no indication that he had received any legal advice in support of a possible petition to the Privy Council.

4.43 On 15 August the *Gibraltar Chronicle* carried an article entitled "Chief Justice recruits Commonwealth support in bid to provoke review of draft Constitution". On the same day *Panorama* carried an article headed "Chief Justice in campaign against new Constitution". The *Gibraltar Chronicle* of 17 August carried an article headed "Opposition urges Constitution be held back pending judiciary clarification".

4.44 On 25 August 2006 Hassans wrote on behalf of the Chief Justice to the Acting Governor, Mr Barton, and the Chief Minister. They expressed "the deep concerns of the judiciary about some aspects of the proposed new Constitution", stating: "As the current proposals now stand, it is the view of the Chief Justice and his colleagues that some of its provisions would adversely affect judicial independence and the rule of law in Gibraltar, and public confidence in the due administration of justice by our courts". They also claimed that it was unacceptable that the governments had published a draft Constitution without proper consultation with the Chief Justice and the judiciary. On behalf of the Chief Justice they asked the governments "to confirm (i) a willingness to urgently engage in such a process of meaningful and transparent consultation; and (ii) that no steps

shall be taken to expedite the referendum while the consultation is pending". If the two governments were not willing to undertake a proper process of consultation, they said it would be necessary to have recourse to the Judicial Committee of the Privy Council. The most convenient course would be for the two governments to request the Privy Council to refer the Chief Justice's concerns to the Judicial Committee under section 4 of the Judicial Committee Act 1833. The Chief Justice was advised by Lord Lester QC. The *Gibraltar Chronicle* of 30 August carried an article entitled "Lawyers appointed to resolve judiciary doubts". Hassans wrote a further letter for the Chief Justice to the Acting Governor and the Chief Minister on 5 September, in which they stated:

> "Unless by noon on Friday 8th September the Gibraltar and United Kingdom Governments confirm that they agree to jointly request Her Majesty to refer the Chief Justice's concerns (in terms to be agreed) to the Judicial Committee for their consideration under section 4 of the Judicial Committee Act 1833, the Chief Justice will feel compelled to Petition the Privy Council directly and unilaterally, although of course, both Governments will be served with a copy of his Petition."

In his evidence the Chief Justice accepted that he was not aware of any precedent anywhere in the Commonwealth for a Chief Justice petitioning the Privy Council on a constitutional issue in this manner.

4.45 In letters to the Chief Minister and the Governor dated 30 August the Bar Council stated in regard to the composition of the JSC:

> "The Council felt that the Chairman or other representative of the Bar Council and a member of the public should be appointed to the [JSC]. The Council did not find it objectionable that the President of the Court of Appeal should chair the [JSC]. The Council felt that the Chief Justice should also be a member of that Commission notwithstanding the views of the judiciary that he should not unless he is also the Chairman. The Council agrees with the judiciary that the period of appointment of the [JSC] members should be specified as should other relevant provisions necessary for good governance, certainty and transparency"

The Bar Council objected to Article 57(3) on the ground that it was capable of neutralising the obligation of the Governor under Article 57(2) to act in accordance with the advice of the JSC. On 6 September the Chief Minister and the Acting Governor jointly replied to this letter. They pointed out, inter alia, that Article 57(3) had been included at the behest of the UK side, and that it formed an important element of the UK position in the negotiating process, as part of the UK's agreement to the establishment of the new JSC, which would significantly reduce the Governor's powers. Nevertheless the UK Government "would only envisage the power being used in extremely rare and exceptional circumstances", of which examples were given.

4.46 On 7 September the Chief Secretary, Mr Montado, wrote directly to the Chief Justice in response to Hassans' letter of 25 August. He pointed out that a new Constitution was in the first instance a matter for the UK legislature, while it would be for the judiciary to adjudicate on any challenge to it. He stated that the Government shared his views about the importance of "judicial independence, in all its aspects and dimensions". He repeated the substance of the joint letter to the Bar Council, including the limited circumstances in which Article 57(3) might be used. He rejected the complaints of inadequate consultation, explained how certain concerns would be met and stated that a reference to the Privy Council was neither necessary nor appropriate. In a letter of the same date to the Chief Justice the Assistant Deputy Governor, on behalf of the UK Government, rejected the Chief Justice's concerns and the suggestion of a reference to the Privy Council. The letter concluded by saying that, notwithstanding that the Chief Justice had, regrettably, turned down previous opportunities to talk to them, UK officials would be willing to see him in London to explain in more detail the UK Government's position on the judicial aspects of the draft Constitution. The Chief Justice did not take up this offer and attempt to achieve his aims by private negotiation rather than, as will appear later in this chapter, by public confrontation.

4.47 At the Opening of the Legal Year on 6 October most of the address of the Chief Justice was devoted to the draft Constitution. He stated that he was taking the opportunity to address the whole Bar on the position of the locally-based judiciary. He had taken the unusual step of distributing the judiciary's submissions on the final draft. Having referred to an address to the CMJA by the Lord Chief Justice of England and Wales on the consultation process leading up to constitutional reform in the UK, he said:

> "How then in Gibraltar do we find ourselves in a position where the judiciary is making submissions on a Draft Constitution which has been agreed between the Governments of Gibraltar and the United Kingdom? The fact is that the judiciary was not consulted at all on the provisions which give it the most cause for concern ie Articles 57 (2)(c), 57(3) and 64 (7)."

He said that the judiciary had made its initial submissions in March 2005. He had attempted without success to meet the legal adviser to the FCO who had made no attempt to contact him. On 9 January 2006 the Chief Minister had written to him providing a note of various provisions affecting the judiciary, but had not sent the text of those provisions. He quoted the closing words of that letter, pointing out that, despite the Chief Minister's assurance, he had not heard from him about the outcome of negotiations with the UK Government.

4.48 After the announcement of agreement in March 2006, the Chief Justice said, he had immediately contacted the Deputy Governor for a copy of the final draft, but was told he would be able to see it when it was made public. He had not received a copy of the draft from either government. He had not seen the draft until it was accessed by him on 7 August. He added:

> "It would appear that it was forgotten or ignored that as the Third Branch of Government the judiciary should have been fully consulted and engaged during the process which led to the Draft".

On 11 August he had made submissions to both governments, which were the submissions of himself, as Chief Justice, the Puisne Judge, the

Stipendiary Magistrate and the Registrar. They had sought consultation with the governments, and had advised that the judiciary "was considering all possible steps to prevent what it regarded as errors of principle being perpetrated". There had been no response from the Chief Minister about a meeting. He referred to the letters from Hassans whom he had briefed as his solicitors. The fact that there had been no response or acknowledgement by 5 September was "disconcerting". He continued:

> " What happened next was positively unnerving. The Governments of Gibraltar and the UK, in a letter under both Coats of Arms, replied to the Bar Council of Gibraltar in a letter dated 6th September and signed jointly by the Acting Governor and the Chief Minister. In that letter the Governments dealt with the points raised by the Bar Council in its letter of 30th August item by item and stating that they would be content for the Bar Council's letter and the response to be made public.
>
> On the 8th September, I received a response to the judiciary's submissions albeit that the letters were dated the 7th. This was at a time that the Acting Governor knew I was on my way to Canada. The Government of Gibraltar's letter was signed by the Chief Secretary. It dealt with the judiciary's submissions item by item but said that there was "no need or justification for any further process of consultation with you". The reply from the office of Governor is signed by the Assistant Deputy Governor. It deals at length with the process of alleged consultation and then asserts that the UK government rejects the judiciary's allegations that the new Constitution would adversely affect judicial independence. The letter does not answer, item by item, the judiciary's submissions although it does refer to the assurances given to the Bar Council. The letter also says that "UK officials would be willing to see you in London to explain in more detail the UK government's position on the judicial aspects of the draft Constitution" but does not suggest that this would be part of a process of consultation.
>
> What I find unnerving about this turn of events is that the Acting Governor and Chief Minister would prefer to make their positions known through the medium of the Bar Council and then respond to the judiciary through their officials. Does this bode well for the judiciary in the consultation process promised on the Judicial Services Ordinance? It

must be borne in mind that it is the judiciary's independence which is under threat, not that of the Bar Council. And what of the letter to the Bar Council under signature of the Acting Governor and the Chief Minister? One cause for concern is that the Draft Constitution provides for a JSC comprised of three members of the judiciary and two appointments of the Governor acting in his discretion and two appointments of the Governor acting in accordance with the advice of the Chief Minister. This, says the judiciary, makes for a JSC with four out of seven appointments by the executive. Not so, says the executive: it makes for a JSC with three Judicial members and two from the UK Government and two from the Gibraltar Government. But in their letter to the Bar Council of 6th September the Governments of the UK and Gibraltar have demonstrated that on judicial matters they are prepared to act jointly. What is, then, to prevent them from joining forces when it comes to appointments to the JSC to ensure that the executive gets its way in JSC matters?"

4.49 The Chief Justice also said in regard to the JSC:

> " I am also concerned that the Chief Justice is a member, but not its Chairman. This means that the Head of the judiciary will be shut inside the JSC, bound by its confidentiality, and, despite his wider constitutional responsibilities, unable to take forward any concerns over the workings of the JSC that he may have".

4.50 The Chief Justice went on to comment that the effect of Article 57(2)(c)would be to put junior members of the judiciary under the control of the executive. He knew, he said, that the Registrar was particularly concerned about her vulnerability, given that her duties straddled the administrative, quasi-judicial and judicial. Section 57(3) put the ultimate control over appointments to the judiciary in the hands of the executive. He was not sanguine about the governments' assurances that the power of veto would only be used in exceptional circumstances and was in any case subject to judicial review. He then said:

> " The issues involved are fundamental and will affect future generations of Gibraltarians. It is for the judiciary to protect its independence so that it may in turn protect the rule of law. As Head of the judiciary I have a

> duty to ensure that the Constitution together with the assurances do indeed provide the necessary safeguards. I am therefore in the process of putting together a team of constitutional experts who will give an independent opinion on whether the Constitution does provide for an independent judiciary given the recent communication from the UK and Gibraltar Governments. I shall make that opinion available to both Governments, to all members of the Gibraltar Bar, and will also make it public. If there are still issues of concern I have advised the UK Government that I shall take up their offer of a meeting".

4.51 In oral evidence the Chief Minister explained why, despite the terms of his letter dated 9 January, he did not inform the Chief Justice about the likely outcome of the negotiations between the Gibraltar and United Kingdom delegation as they affected the judiciary. He said he considered that he was simply to respond in relation to matters set out in the matrix, that he had always seen section 57(3) as giving only a power of veto, and that it was one of the matters which arose in a very short timescale at the end stage of the process.

4.52 There are a number of respects in which we find the conduct of the Chief Justice in making this speech wholly inappropriate.

4.53 First, although he purported to speak for the locally-based judiciary, it is clear that he had not consulted them about his address, provided them with advance copies or obtained their consent to the public distribution of the submissions of 11 August. He did not consult them before engaging Hassans or instructing them to write the letters of 25 August and 5 September. He was acting on his own initiative.

4.54 Secondly, it is clear to us that the Chief Justice was proceeding on the basis of an exaggerated conception of the status of the judiciary in regard to the negotiations. We have already noted that, when referring to the fact that he did not see the draft until August, he said: "It would appear that it was forgotten or ignored that as the Third Branch of Government the judiciary should have been fully consulted and engaged during the process which led to the Draft". It is evident that he considered that the judiciary had a

right to be consulted at every stage, as surely as if they were a party to the negotiations.

4.55 Thirdly, while there may have been some justification for the Chief Justice thinking that he should have heard earlier about the provisions which he found objectionable, his address was deliberately worded in such a way as to give rise to the implication that he was accusing both governments of having acted in bad faith, and we so find. His account of the consultation process was deliberately slanted and misleading. His remarks implied that information about the inclusion of these provisions in the draft Constitution had been deliberately withheld from him. It is plain that at the time his remarks were so understood. On 7 October 2006 the *Gibraltar Chronicle* carried an article headed "Chief Justice accuses Gib and UK of ignoring judiciary's role in constitutional talks". In evidence the Chief Justice said that his remarks had been misunderstood. He claimed that he could not have put out any kind of corrective statement. He said: "The difficulty is that I am not responsible for how the press interprets my remarks and if I then go into further explanations, then they may be open to further interpretations". We find that explanation unconvincing and disingenuous, and reject it. We are also satisfied that the Chief Justice deliberately implied that the governments might act together in bad faith "to ensure that the executive gets its way in JSC matters". He also implied that the letters dated 7 September had been deliberately sent to him at a time when the Acting Governor knew he was on his way to Canada, and hence that there had been bad faith in this respect also. The Chief Justice gave evidence that he had merely felt that the timing of the letters was "unfortunate", adding "I was certainly hampered in providing a response". Mr Philip Barton, who was Acting Governor at the time, said in evidence that any such implication of bad faith was untrue. The timing of the response to Hassans' letter of 25 August was, he said, determined by the time which it took to prepare it and by the deadline of 8 September in Hassans' letter of 5 September. Mr Barton was a careful and impressive witness, and we accept his evidence.

4.56 Fourthly, in his address he made no effort to present a balanced view of the text of the proposed Constitution, which (as explained in chapter 1) represented a considerable improvement for Gibraltar in comparison with the previous one, or of the process of negotiation in the course of which concessions might have to be made on either side in order to reach agreement. Furthermore, in his evidence the Chief Justice accepted that perhaps it would have been fairer if he had reflected the fact that the proposed Constitution had been produced following cross-party negotiation and was now supported by all political parties, and that it should not have been described as simply "agreed between the governments of Gibraltar and the United Kingdom".

4.57 Fifthly, his address contained a number of other significant omissions. He did not refer to the fact that, at least as regards the question of the composition of the JSC, he had been consulted. He did not take account of the reservations which Mr Pitto and Mr Justice Dudley had about the judiciary's submissions, saying that this was because if he had "given every reservation, every point in this address it would have been never ending".

4.58 Sixthly, and perhaps most importantly, the address was unmistakeably polemical in tone. He said that he wanted the Bar and the public to know why he way taking action at that relatively late stage. The action he took was the opening of a public campaign, to influence public opinion and put pressure on the Governments. In evidence he said: "I felt that if I called upon senior advisers to give a public opinion, it may change the minds of those responsible...the drafters of the Constitution". This formed a continuation of a process which had begun with Hassans' letters, the enlisting of Lord Lester as a legal adviser and the threat of a petition to the Privy Council. According to the evidence of the Chief Justice, Lord Lester took "a great hand in drafting the petition" under section 4 of the Judicial Committee Act 1833. However, according to his fifth witness statement, Lord Lester changed his mind and did not consider such a course should be pursued. Thereafter the Chief Justice sought the advice of Sir Sydney

Kentridge QC, Keith Starmer QC and Richard Tur, which was in turn the subject of publicity.

4.59 In evidence the Chief Justice accepted that he had been keen that this advice should be published before the referendum. This was reflected in the press. On 27 October the *Gibraltar Chronicle* included an article under the title "Chief Justice expects experts' Report ahead of referendum". This was three days after the Government announced that the referendum was to take place on 30 November. On 16 November the Chief Justice published the opinion which he had obtained from the three legal experts. They considered that the JSC appointments were weighted too heavily in favour of the executive, ie the Governor and the Government. They questioned why the JSC should be chaired by a "visitor", and expressed reservations about Article 57(3) where judicial review would be of little practical effect. On 16 November both governments issued press releases roundly rejecting this opinion. The *Gibraltar Chronicle* of 17 November carried a statement by the Chief Justice in which he announced the promised release of the opinion. Members of the public who wished to obtain copies could contact the Registrar. In the same newspaper was an article entitled: "Experts express 'serious reservations' with judicial aspects of draft Constitution".

4.60 On 20 November the Chief Justice and Sir Sydney Kentridge attended a meeting at the FCO. As might have been expected, there was no question of the proposed constitution being withdrawn or amended. The Chief Justice had known, since the time when they were approved by the Foreign Secretary, that the provisions in the draft Constitution were, in the words of his first witness statement, "set in stone". Two days later the *Gibraltar Chronicle* reported: "F & CO remains firm on constitution's text". However, arising from the discussion it was agreed that an addition would be made to the explanatory note, which does not form part of the Constitution, stating that the executive powers of the JSC were "subject only to an exceptional power of veto by the Governor". The Chief Justice regarded these words, in comparison with the written assurance which had been given to the Bar Council, as of far greater weight. However, his

reliance on the explanatory note was misplaced as it added little, if anything, to that assurance.

4.61 On the following day the *Gibraltar Chronicle* carried an article "Yes or No constitution debate warms. Opposition backs judiciary over concerns". On 24 November *Vox* featured "Clash over constitution could be taken to Privy Council". In the referendum on 30 November the new Constitution was approved.

4.62 In our view the Chief Justice behaved improperly by undertaking a public campaign in regard to part of the subject of the referendum. The fact that his concerns related to the judiciary or were shared by legal experts is nothing to the point. What is objectionable was the manner in which he sought to advance his views. The little that he did achieve was the result of his engaging in private discussion on 20 November. His involvement of solicitors and other legal advisers and the threat of legal proceedings in support of his campaign were in any event unnecessary and grossly disproportionate.

4.63 It is also right to point out the consequences of that campaign, which were all too plain in the evidence. The publicity which the Chief Justice sought gave the press 'a field day'. The Opposition seized on his remarks. Consensus changed to dissent. As the Chief Minister commented: "It gave the Opposition a hook on which to play politics with the Government on the referendum, when the new Constitution was a huge improvement". The Attorney General said: "The way the referendum fell out was that it almost became a vote of confidence in the Government. [The Chief Justice] was perceived as being very much part of the no campaign". Mr James Neish QC, who described how in August or September he had sought unsuccessfully to discourage the Chief Justice from, as he put it, "another ill-judged, non productive, damaging public confrontation", said: "We are a small jurisdiction which has been under close political scrutiny from a hostile neighbour. We rely on the reputation and integrity of our judicial system to be able to prosper as a financial centre. We need the users of Gibraltar to have confidence in the judiciary, and to suggest that there was some fundamental flaw in the constitution that was being

proposed was in my view a totally disproportionate and damaging line to take". Lastly, we have no doubt that the Chief Justice could never have sat in a case in which the disputed provisions required to be interpreted or applied.

CHAPTER 5

FEBRUARY –MAY 2007

This chapter is concerned with events relating to, and arising from, the following:

- the Judicial Service Bill (paragraphs 5.1 – 5.35)
- Mrs Schofield's libel action (paragraphs 5.36 – 5.42)
- the recusal application in April (paragraphs 5.43 – 5.93)
- the recusal application in May (paragraphs 5.94 – 5.102).

The dates in this chapter of the Report refer to 2007, except where otherwise indicated.

The Judicial Service Bill

The Chief Justice

5.1 Both the Chief Justice and his wife were active in commenting on the proposal for a Judicial Service Act. Since we need to examine what happened in some detail, it is convenient to deal first with the direct involvement of the Chief Justice, and thereafter with that of his wife.

5.2 On 20 February the Chief Minister wrote to the Chief Justice enclosing an advance copy of the draft Bill and of the consultation paper relating to it. The letter and its enclosures were delivered to the Chief Justice by hand that day. In his letter he said that he was sending the draft in advance as he understood that the Chief Justice would be travelling that week to Argentina. He explained that there would be a six week consultation period after which any amendments arising from the consultation process would be introduced during the Committee stage. At the end of the letter he wrote:

"Finally, since no other consultee will yet have seen the draft Bill, I must ask that you treat it confidentially and "for your eyes only" until the consultation paper issues next week."

5.3 Section 5 of the draft Bill made provision empowering the President of the Court of Appeal and the Chief Justice to make written representations before Parliament on matters that appeared to them, or either of them, to be of importance relating to the judiciary, or otherwise to the administration of justice in Gibraltar. According to section 6 there would be a new office of President of the Courts of Gibraltar, which would be held by the President of the Court of Appeal. Under sub-section (2) he would have "overall responsibility -

(a) for representing the views of the judiciary of Gibraltar to Parliament, to the Minister and to the government generally;

(b) for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of Gibraltar within the resources made available by the Government;

(c) for the maintenance of appropriate arrangements for the allocation of work within courts."

In regard to sections 5 and 6 the consultation paper stated:

"The Government believes that the judiciary is a primary player in the protection of its independence and should therefore have an appropriate and dignified method of making its views known to the Parliament, and through the Parliament to the public at large. Accordingly, section 5 provides for a mechanism whereby the President of the Court of Appeal and the Chief Justice can have their written representations laid before Parliament.

Although the Court of Appeal is an itinerant court, it is nevertheless a Gibraltar Court and its President is therefore the most senior member of Gibraltar's own judiciary. The Government no longer considers it appropriate, in the context of the new Constitution, for the Court of Appeal to "look like" an external court (even though it has never actually

been that). Accordingly, section 6 establishes the President of the Court of Appeal as the President of the Courts of Gibraltar."

5.4 In evidence the Chief Justice said that he was stunned when he received the draft Bill. His initial reaction was that section 6 was not in the interests of justice. He added: "And yes, it was the Chief Minister's way of ridding him of having to deal with me as head of the judiciary … Clearly from this I would be put in a position where I had to accept that I had in effect been demoted from head of the judiciary or resign". He immediately sought a meeting with the Governor to discuss the matter, but the latter was not aware of the draft Bill or the consultation paper as these had not yet been issued for consultation.

5.5 The Chief Justice wrote to the Chief Minister in a letter hand delivered the following day, 21 February, expressing concern about, as he put it, the functions of the Chief Justice being put in the hands of a visiting President of the Court of Appeal and despite the Chief Minister's request for confidentiality, stating that he felt that he must discuss the draft with members of the Court of Appeal while they were in Gibraltar during that week. In the light of his expressed intention to discuss the draft Bill with the Court of Appeal, the Government decided to bring forward the issue of the consultation paper by the Chief Minister, in his capacity as Minister for Justice, to that same day. On 21 or 22 February the Chief Justice consulted Mr James Levy, a senior partner of Hassans concerning the constitutionality of the proposed Act. According to his evidence Mr Levy advised him to write to the Chief Minister laying down a marker that he had his concerns about "the constitutional and contractual implications". This led to the Chief Justice writing again to the Chief Minister on 22 February, stating that he had had very little time to review the draft before he went on holiday. Accordingly he reserved any detailed comment to his return. The letter continued: "However, my immediate reaction is that I have reservations about the constitutionality of clause 6. Furthermore, the provision may well have contractual implications for me".

5.6 On 23 February, without further reference to the Government, the Chief Justice instructed the Registrar to circulate copies of the consultation

paper and the draft Bill to all members of the Bar (despite the fact that the consultation paper provided for circulation only to the Bar Council, as representing the Bar). In her covering e-mail the Registrar stated that the Chief Justice felt that the proposed Act might have wider constitutional implications, and, before he responded, would welcome the views of individual members of the Bar, which should be submitted no later than 20 March. In his evidence the Chief Justice stated that he had understood that in regard to the 2006 Constitution the Bar Council had not gone out to wider consultation with its members. He wanted to have the input of the whole of the Bar, and not every one was a member of the Bar Council (in due course he received only two papers from members of the Bar). He had not asked the Chief Minister to extend the list of consultees. He explained that his understanding of the last paragraph of the Chief Minister's letter of 20 February to which we refer in paragraph 5.2 was that, once all the consultees had received the draft Bill and the consultation paper, those documents were no longer confidential. He accepted, in the light of instructions given to his solicitors in connection with obtaining legal advice (see paragraph 5.10), that he must have been aware that the Opposition members of the Parliament would not have seen the draft Bill until 29 March. "It may be", he said, "something that I missed". He understood that once all the consultees had received their copies, the documents were no longer confidential, adding: "But clearly I may not have given that aspect of it the required thought". He denied that he had given any thought to conflicts of interest within the Bar Council, though he admitted that it was his personal view that certain of its members were partisan. He referred in particular to Mr James Neish QC, the Chairman, as being "a good friend of and ally of the Chief Minister". He accepted that he had discussed that topic with his wife over a period of time.

5.7 We find the conduct of the Chief Justice in bypassing the Bar Council by circulating copies of the draft Bill and the consultation paper to the whole of the Gibraltar Bar – and in doing so without further reference to the Government – to be not merely high-handed but deliberately provocative. We find that he was at the time well aware of the nature of the

consultation process, and in particular of the fact that the consultation process provided that opposition members of Gibraltar Parliament would first see the draft Bill on 29 March, when it was due to be debated in Parliament, but that he had felt no compunction in ignoring it.

5.8 On 24 February the Chief Justice left Gibraltar with his daughter Amanda for a three-week holiday in Argentina. On 28 February the Chairman of the Bar Council wrote to the Registrar asking why the Chief Justice had sought to "bypass the Bar Council". The Registrar replied on the same day stating that she did not know the reasons for the Chief Justice's instructions. On 5 March Sir Paul Kennedy wrote on behalf of the members of the Court of Appeal to Mr John Reyes, the Chief Minister's Legal Secretary, saying that the members of the Court of Appeal saw no reason why a senior judge such as the President of the Court of Appeal should not be given the office of President of the Courts of Gibraltar, but suggesting that, as the President of the Court of Appeal was not permanently resident in Gibraltar, section 6 should be redrafted to make it clear that the direct (as opposed to the overall) responsibility for the day to day discharge of the duties set out in section 6 (2)(b) and (c) lay with the Chief Justice. Sir Paul Kennedy concluded his letter by saying:

> "As the Chief Justice is in South America and as the consultation period is short we have not been able to consult with him in relation to the content of this letter but I am sending a copy of it to await his return."

5.9 Following his return from Argentina on 15 March the Chief Justice wrote to the Chief Minister on 26 March expressing his concern about the constitutionality of section 6 and section 38(3), the latter dealing with the exercise of disciplinary power over a senior office holder. He stated that he had commissioned an opinion from leading counsel in London. In regard to the practical implications of section 6, he questioned whether it could possibly be in the interests of the administration of justice for overall responsibility for the judiciary to be transferred from a full-time, resident Chief Justice with full security of tenure to a part-time, non-resident President of the Court of Appeal on a relatively short-term contract.

5.10 By e-mail from his English solicitors dated 26 March the Chief Justice sought the advice of Rabinder Singh QC and Alex Bailin on whether the proposed Act would be ultra vires, whether action could be brought in the United Kingdom (as he preferred) and whether he had a claim for constructive dismissal, on the basis that, as stated in the Instructions, "Since 1998, there have been major disagreements between Derek and the Chief Minister who has been trying to get rid of him, so far without success". On 28 March they provided a written opinion on the draft Bill. They advised that section 6 would be unconstitutional since "it undermines the core constitutional principle of the independence of the judiciary, which itself forms part of the rule of law". An amendment to provide that for the Supreme Court and lower courts the Chief Justice should have direct responsibility for the matters specified in subsection (2)(b) and (c) would in their opinion create "an artificial and unworkable division of functions". They considered that the independence of the judiciary, enshrined in the Constitution, required that the President of the Courts must have a degree of security of tenure which the Court of Appeal judges did not have, and the Chief Justice did.

5.11 On 2 April Sir Murray Stuart-Smith wrote to Mr Reyes referring to a letter from Mr Justice Dudley, in which he had expressed reservations about section 6 of the draft Bill, suggesting that it might be undesirable to place the titular headship of the Gibraltar Courts on an office to which a Gibraltarian could not aspire, and expressing the view that it was in any event impracticable for a non-resident judge effectively to discharge the functions specified in section 6(2). Sir Murray Stuart-Smith said in his letter that he had discussed the matter with the other members of the Court of Appeal, and that they saw force in the view expressed by Mr Justice Dudley.

5.12 On 3 May the Government issued a press release announcing the publication of the Bill. It explained that following a process of consultation the draft had been modified to reflect some of the views which had been expressed by consultees. The modifications included one to section 6 by which, subject to the President's overall responsibility, the Chief Justice

would have direct, day to day responsibility for the matters mentioned in paragraphs (b) and (c) of subsection (3), previously subsection (2), for the Supreme Court and all lower courts.

5.13 The Judicial Service Bill was debated on 15 June, and was passed with commencement on 5 July. As in the original draft, the President of Court of Appeal remained President of the Gibraltar judiciary. Subsection (3) of section 6, which was in the same terms as sub-clause (2) of the Bill, was followed by subsection (4) which was in the same terms as the modification to which we referred above. The Act received the assent of the Governor on 27 June.

Mrs Schofield

5.14 At around lunchtime on 20 February the Chief Justice discussed the draft Bill and the consultation paper with Mrs Schofield. In answer to his counsel he said: "I simply disclosed section 6 to her because I felt it may affect our stay in Gibraltar, and I felt it right that I should share that with my wife". In cross-examination he said it was his clear recollection that he did not disclose to her the remainder of the Bill or the consultation paper. When he was asked if he knew how she came to be in possession of a copy of the draft Bill on 22 February when she consulted Mr Charles Gomez (see below), he said he did not "provide" her with a copy of the Bill, meaning that he did not say "here is the Bill", though the consultation paper was "a very hot topic of conversation" at their home. The draft Bill was left in the study at his home, he thought. In his third witness statement the Chief Justice said:

> "I know that my wife was deeply upset about section 6 of the draft and the way I had been treated after eleven years of service to Gibraltar. She expressed her dismay that I had not been forewarned of the intention to remove me as Head of the judiciary so as to enable me to decide whether to make a dignified exit or accept the changes. She was also concerned about the implications on my family life …".

In cross-examination the Chief Justice said that Mrs Schofield was wounded in two areas: by section 6 and by the summary termination the

same day of her consultancy with Hassans. He described this as a very traumatic time for her particularly. On 22 February she instructed Mr Gomez to investigate the possibility of issuing proceedings challenging the proposed Act. Mr Gomez in his second witness statement said that she brought a copy of the Bill.

5.15 On 23 February *Vox* published an article referring to section 6 under the heading "Now Caruana Attempts to Twist the Law – Plans for New Judicial Service Act Erodes Role of Chief Justice". It referred to a "leaked draft", which the Chief Justice had received, and to the Chief Justice immediately seeking a meeting with the Governor. An unnamed source was quoted as saying:

> "These measures clearly usurp many of the present duties and responsibilities of the Chief Justice and would demote him to a lesser role – particularly as the President's is a part-time position held by a retired English judge … often one who has been put out to pasture."

The article went on to say:

> "Local lawyer and politician Charles Gomez yesterday confirmed that he was looking to initiate proceedings to declare the act [sic] invalid after being consulted by a "concerned citizen" who had seen a copy of the draft legislation".

5.16 The Chief Justice, when asked in examination-in-chief whether he had suggested or encouraged Mrs Schofield to "go public" in relation to section 6, said: "No. It came as a surprise". In cross-examination he said he became aware that she had been to see Mr Gomez: it may well have been before he left for Argentina. He could not recall whether he was aware of the article before he left. He did not recall discussing it with her at that time. At most at that stage he would have "skim-read" it. He agreed that even a skim read would have made it clear that the article contained some very serious allegations. He was sure that he did not discuss with his wife whether she had provided *Vox* with a copy of the draft Bill. Recently he asked her whether she was the source of the quotation. He said he thought that her answer was "Absolutely not".

When it was put to him that it might be thought somewhat implausible that he had not discussed any of these matters with her before he left for Argentina, he replied:

> "Well, you may suggest that, but I have explained that I have a very ambiguous attitude towards the weekly newspapers, and I may or may not have even seen it."

5.17 In all the circumstances, and given the reference in the article to the Chief Justice having "received the leaked copy of the draft on Monday or Tuesday of this week", we have no doubt, and we find, that Mrs Schofield and Mr Gomez with her consent provided *Vox* with the copy of the draft Bill. She was the "concerned citizen" in the article. Further, we do not accept the Chief Justice's evidence that he only discussed section 6 of the draft Bill with Mrs Schofield; that he did not know how she came by a copy of the draft Bill; that it came as a surprise to him that she "went public" in the *Vox* article; and that he may not even have read the article, and certainly did not discuss it with her, before he left for Argentina. We find that the Chief Justice showed Mrs Schofield the draft Bill and the consultation paper as soon as he received them (i.e. on 20 February); that his discussion with her about them was not limited to section 6 (although no doubt section 6 was the focus of their attention); that he left the draft Bill in his house where it was available to her: and that it was no surprise to him that she "went public" in the way she did. We further find that it was at the material time the expectation of the Chief Justice that Mrs Schofield would "go public" on the matter of the draft Bill; and that he was, at the very least, content that she should do so and supportive of her in that respect. Nor do we accept his evidence that he did not discuss the *Vox* article with Mrs Schofield before he left for Argentina. The overwhelming likelihood is that they discussed it together before he left for Argentina, and we have no hesitation in finding that they did so. We regret to say that we found the Chief Justice's evidence to us on each of these matters to be deliberately evasive.

5.18 On 25 February, that is to say, the day after the Chief Justice left for Argentina, Mrs Schofield sent an e-mail to Mr Neish about the

consultation paper and a forthcoming meeting of the Bar Council which was to discuss the draft Bill. She referred to the fact that one of the functions of the Bar Council was to consider all recommendations and other matters referred to it by any authority, lawyer or member of the public. "As a member of the public and a person who may be affected by any constitutional and contractual implications of the draft Bill" she recommended that, before discussing the consultation paper and draft, the Bar Council considered and made recommendations on a number of matters. These included a recommendation that every member of the Bar Council "discloses personal, political and business relationship with the Government of Gibraltar, Minister for Justice or any other member of the Gibraltar Government", and that "members disclose whether they had discussed the proposed Bill prior to its being referred to the Bar Council for consultation and if so, when". She went on to request the Bar Council to consider (among other things) "whether the Gibraltar Parliament had power under local legislation in the current constitutional arrangement to restructure the court structures set up under the Constitution", and "whether the role of the Chief Justice can be re-defined by local legislation". The e-mail concluded as follows:

> "I consider the matters raised as of utmost importance. I am seeking a legal opinion as to whether the draft violates the Constitution and by targeting retired judges of the court of appeal is discriminatory and unconstitutional. Whether it is intended to cleanse the office of head of the judiciary at the moment to ensure the holder or the current and future holders of the office of head of the judiciary whose experience may be from outside the UK are excluded and only retired English judges can hold the office.
>
> Looking forward to hearing from you. Please be advised that unless I hear from you by the end of the day tomorrow I shall have no alternative but to release this request to the public through the press to raise awareness on the need for informed debate by the Bar Council, the Public and Parliament on the proposed Bill. Section [6] to my mind is an "attempted rape" of the Gibraltar Constitution and the Chief Justice's office and contract. In my view it is intended to force a resignation of the

> CJ unless he accepts a demotion or to force him to sue in which case we shall hear calls for him to resign."

5.19 On 27th February Mr Neish replied on behalf the Bar Council stating that it was well aware of its functions and responsibilities and would form its conclusions independently and express such views to the Minister for Justice as it considered to be in the best interests of the Bar.

5.20 On 2 March *Vox* carried an article about the Chief Justice's decision to circulate all members of the Bar with copies of the draft Bill, under the headline "Chief Justice loses control of courts – Schofield bypasses Bar Council in legal clash". It stated that the Chief Justice doubted the impartiality of the Bar Council, believing that several of its members were partisan, and supported the Chief Minister. In a parallel move his wife had written to the Bar Council asking its members to declare any interest they might have which could affect their attitude to the Chief Minister's moves against the independence of the judiciary. The article claimed that Mrs Schofield clearly believed that if any of the Bar Council had such links they should effectively recuse themselves from any deliberations on the proposed Act and its implications. We accept Mrs Schofield's evidence in her first witness statement that she was in Kenya when this article was written, and that she had no hand in it. On 8 March she sent a further e-mail to Mr Neish in which she asked for confirmation that the Bar Council acknowledged her right to ask it to consider various facts in accordance with its published functions.

5.21 We accept the evidence of the Chief Justice (which was corroborated by his daughter Amanda) that he was not made aware of the correspondence which had taken place between Mrs Schofield and the Bar Council until after his return, and that there was no discussion between himself and Mrs Schofield about such correspondence while he was in Argentina. When he was asked by counsel to the Tribunal how he came to learn of its existence, he said:

> "She [Mrs Schofield] told me that she had sent e-mails, and I said: "Oh dear, what have you done now? I don't want to know."

He accepted she probably had told him the gist of the e-mails which she had sent. He said that she had pointed the Bar Council to matters of principle. He did not recall her telling him that she had suggested to the Bar Council that the draft Bill was an attempted rape of the Constitution, or that she had raised a number of questions about the ages of the current members of the Court of Appeal. Asked whether she had told him that she had sought a response in 24 hours, failing which she would go public, he replied:

> "No, I don't recall that … I really took very little interest in it. She was well-known to the Bar Council. The Bar Council was well known to her. I anticipated that the e-mails would be forthright, but I would expect the Bar Council to understand, given the circumstances…"

In response to further questions he said:

> "I did not pay a great deal of attention to this. I felt that that issue would blow over … that it would all be ironed out … I did not anticipate it could possibly escalate".

When he was asked if he was even interested in looking at these e-mails he responded:

> "No. At that stage I felt that was an issue between my wife and the Bar Council".

Asked whether he was not interested at all in seeing precisely how the Bar Council responded to those points of principle that she had raised, he answered:

> "I would have been interested to see the Bar Council's response to the consultation paper, but not to my wife … I think she told me, and I cannot recollect exactly, I have no doubt she told me that she had received a bland reply from them".

This conversation was, he thought, in the late afternoon of 15 March.

5.22 We regard the above passages of evidence by the Chief Justice as wholly unconvincing, and we do not accept them. In particular, we consider the Chief Justice's assertions that he "really took very little interest" in the

correspondence which had taken place between Mrs Schofield and the Bar Council, and that he "was not interested" in seeing how the Bar Council had responded to the points of principle which she had raised, to be frankly incredible. We find that the Chief Justice was, as indeed one would have expected of him in the circumstances, concerned to acquaint himself fully, and that he did acquaint himself fully, with the terms of the correspondence which had taken place. We also reject his evidence that he felt that the issue would "blow over". The overwhelming probability is, and we find, that he was fully aware that his wife intended to pursue the matter as vigorously as she could, as indeed she did.

5.23 Later on 15 March (at 7.58 pm to be precise) Mrs Schofield sent a further e-mail to Mr Neish saying that she had received information that he or members of his firm had been involved in drafting the Bill and asking whether this information was correct and, if so, whether it was disclosed at the meeting of the Bar Council when the draft Bill was considered. She continued:

> "If not, why not? Do you agree that if the information is correct, you or numbers of the firm in the council had a conflict of interest?
>
> May I assert once again I have a right to make the request in this e-mail and any assertion by any member of the council to the contrary amounts to discrimination against me."

5.24 Mr Neish responded to Mrs Schofield's e-mail of 15 March by letter dated 3 April. In the light of what followed, the text is quoted in full, as follows:

> "I refer to your e-mail of 15th March 2007, which was considered by the Bar Council last Thursday.
>
> We regard your conduct in this matter as extremely serious. Not only do you try to interfere in the affairs of the Bar in a way which you have no right to do but you set about your task in a hugely confrontational and offensive way with no compunction whatever about raising questions about the integrity of members of the Council, and mine in particular. Your hostility is manifest.

This is unprecedented conduct in Gibraltar by the wife of a Chief Justice. Notwithstanding the ludicrous fiction under which you have sought to interfere, i.e. "as a member of the public", the inescapable fact is that you are the wife of the Chief Justice acting in your common interests. Your actions cannot be dissociated from the Chief Justice and, I regret to say, impact upon his position. This is an issue which will be addressed separately.

You state in your e-mail of 15th March 2007 that "you have received information…". Is this what we have come to – the wife of the Chief Justice being accessible to "informants" and relying on their "information"? Please note that your informant is either incompetent or malicious or both. Neither I nor any member of my firm have been consulted about the provisions of the Judicial Service Bill nor have any of us been involved in any way in drafting it. The first time I or any member of my firm saw the Bill was when it was sent to me as part of the Consultation Paper.

We regret that you should have created a situation which compels me to write to you in these terms. However, we cannot stand by and allow the Bar to be subjected to conduct of this kind which can only be intended to inhibit the Bar's freedom of expression and undermine its independence."

5.25 On 3 April Mr Neish wrote to the Attorney General:

"The Bar Council has asked me to write to you in your capacity as leader of the Bar in Gibraltar and to forward copies of e-mails exchanged between Mrs Schofield and the Bar Council between 25th February 2007 and 3rd April 2007, and of an article in the Vox issue of 2nd March 2007, for such action as you may consider appropriate.

As the Chief Justice's wife whatever Mrs Schofield has written or done is liable to be construed as having the express or implied approval or knowledge of the Chief Justice or as expressing their common views. The Chief Justice has not distanced himself from Mrs Schofield's e-mails or their contents.

In the circumstances the situation is unprecedented and needs to be addressed. Not only has there been an attempt to interfere with the workings of the Bar but allegations/innuendos have been made against

members of the Bar Council questioning their integrity. The implications for the future administration of justice are obvious and do not need to be spelt out."

5.26 On the same date Mr Neish wrote to the Chief Justice as follows:

> "I am writing to inform you that the Bar Council has taken a very serious view of the e-mails addressed to it by Mrs Schofield. It has accordingly decided to send copies of the e-mails exchanged, together with the issue of Vox dated 2nd March 2007, to the Attorney General, as the leader of the Bar in Gibraltar, for the matter to be pursued as appropriate.
>
> Mrs Schofield is not an ordinary member of the public – she is the Chief Justice's wife. Her e-mails were therefore liable to be construed – as in fact they have been – as enjoying your express or implied approval or as reflecting your and Mrs Schofield's common views. We note that you have not distanced yourself from those e-mails."

5.27 The evidence of the Chief Justice was that it was only when he received Mr Neish's letter that he gave any detailed consideration to the text of the e-mails of 26 February, 6 March and 15 March. As he put it:

> "When I saw that Mr Neish was taking this further, I felt then that I ought to have a look at the e-mails … I think I had to ask my wife for copies of them. I must say, even then, I skim-read them … I thought I had better have a look."

We reject that evidence. We have no doubt, and we find, that by the time the Chief Justice saw Mr Neish's letter he was already well aware of the terms of the e-mail correspondence.

5.28 In answer to further cross-examination, the Chief Justice did not accept that the final paragraph of Mr Neish's letter contained an implicit invitation to him to distance himself from the statements in Mrs Schofeild's e-mails. He understood Mr Neish to be "making a statement … He was just making a note that I hadn't". Asked whether he had considered whether he should distance himself from the e-mails, he said:

> "I have made it clear throughout, I think, that it is well known to the Bar and it is well known to Gibraltar that my wife is an independent-minded

> individual. I did not consider in the context of the Judicial Services Act that public opinion would consider that her views were necessarily mine. And I do not consider it appropriate either to associate or disassociate myself."

He said that he did not even consider putting out a statement to the effect that her views should not be taken as his. Later in his cross-examination, the Chief Justice confirmed that he had by then formed the view that the Chief Minister was trying to rid the jurisdiction of him as Chief Justice, and that Mr Neish was partisan. However, he had not considered whether Mr Neish might have a conflict of interest. He did not think that Mr Neish's partisanship would necessarily go so far as to support the Chief Minister. He went on to say that the matter was being taken up by the Bar Council in "inappropriately serious form". He said that he "felt that the matter could have been laid to rest very easily within the Bar Council … by simply writing a bland response" to his wife. The Chief Justice was then asked again whether it had occurred to him that he should distance himself from Mrs Schofield's e-mails, to which he replied: "As I have said, … at that stage I would not give conscious thought to issuing a statement". It was not until he was asked to recuse himself (see paragraph 5.43 et seq) that he made a conscious decision not to respond or react.

5.29 It is an understatement to say that we find that the Chief Justice's evidence in relation to Mr Neish's letter, and his reaction to it, to be less than satisfactory. It must have been clear to any reader of the final paragraph of the letter, and most especially to the Chief Justice of all people, that the Bar Council considered that he ought to have distanced himself from Mrs Schofield's e-mails, and that by not doing so he had provided tacit support for the statements contained in them; and that in that paragraph the Bar Council was inviting him to remedy the situation by making a statement distancing himself from those statements. To say of that paragraph that Mr Neish was merely making a statement – that he was merely noting – that the Chief Justice had not distanced himself from Mrs Schofield's e-mails is wilfully to close one's eyes to its clear import. We regard it as highly regrettable, to put it no higher, that the Chief Justice

should have chosen to do so in his evidence before us. This is the more so given that in answer to a question from the Tribunal (Sir Jonathan Parker) the Chief Justice had no hesitation in accepting that for him, in his capacity as Chief Justice, to have sent e-mails to the Bar Council in the terms of Mrs Schofield's e-mails would have been neither proper nor appropriate. In any event, we reject the Chief Justice's evidence in this respect as palpably untrue. His unquestioned professional ability is ample testament to his intelligence. We have no doubt that, as any intelligent person must have done, he fully appreciated the implications of the final paragraph of Mr Neish's letter.

5.30 We also find it extraordinary that, according to his evidence, on receipt of Mr Neish's letter he did not even consider making a statement of some kind to the effect that Mrs Schofield's views should not necessarily be taken as representing his own. If that were true, it would, to put it no higher, reveal a complete inability on his part to appreciate that, for better or worse, others might perceive his silence on this issue as identifying him – and hence his office as Chief Justice – with statements which, as he readily accepted, would have been improper and inappropriate had he made them himself. That said, however, we find his evidence in this respect to be untrue. We are satisfied, and we find, that at the material time the Chief Justice well knew that, in the perception of others, his silence would almost certainly be interpreted as support for Mrs Schofield's views – as indeed the Bar Council had clearly implied in the final paragraph of Mr Neish's letter – and that he was more than content that should be so.

5.31 In the afternoon of 3 April 2007 Mrs Schofield e-mailed Mr Neish asking for copies of his letter to the Attorney General and of the *Vox* article referred to in that letter. Later that day she e-mailed him again saying she had now seen a copy of the *Vox* article, asking him how much of it was attributed to her and suggesting that members of the Bar Council were responsible for disclosing the contents of her e-mails to *Vox*. She continued:

"The Chief Justice has nothing to do with the exercise of my rights. The attitude of the Bar Council that a wife reflects the views of her husband is very dated and laughable. It is so caveman and dinosaur-like that I would like to meet you all in a court of law on this. Perhaps most of you are unused to a wife who asserts her rights.

I wait to see what the AG can do about the exercise of my rights. I can assure you, none of this intimidates me. I am not the only one who shares the view that the Chief Minister wants to get rid of the CJ. That is where I come in, whether the Bar Council likes it or not.

I shall continue to express my views on matters of public interest."

5.32 On 4 April Mrs Schofield sent an e-mail to Mr Peter Schirmer of *Vox* newspaper, in which she referred to his having confirmed that they had not discussed her e-mail to the Bar Council, and that he had done his own research with members of the Bar. She went on to say that the stand taken by the Bar Council had been intended to intimidate her. It was unbelievable that they asserted that the views of a wife must be those of her husband. She was now releasing her e-mail as members of the Bar had been discussing it. She complained that her use of fundamental rights was being used against her husband. She continued:

"I want to assert that I have rights like every citizen in Gibraltar unless we are to accept we are living in a similar situation as Mugabe's Zimbabwe. I have also received a letter from the Bar Council stating that I am no ordinary member of the public. I say, I am under the law.

My e-mail raised serious matters of public interest and I consider the action by the Bar Council an attempt to harass me into silence. In a matter where I assert that the Chief Minister now clothed as Minister for Justice has been trying to get rid of the Chief Justice, the use of consultation and legislation to legitimise this long held ambition is an attempted rape of the Constitution and the Chief Justice. It is the most blatant example of interference with the judiciary and I as a human rights lawyer will not sit back as some fall into the Chief Minister's clever attempt. I also regard this attempt as affecting my rights and nobody other than those who side with the attempt can criticise me for speaking out. The issue of conflict of interest is relevant to this matter and

members of the council should not be afraid to declare such interests. I regard the exchange of communication taking place a matter of public interest. I would ask that you publish at the earliest possible opportunity this letter and clarification as to how you carried out your research.

I trust I am in a free country and I have freedom of expression. I would also ask that you carry out an opinion poll to establish how many as members of the Bar and the public regard the Gibraltar Bar as independent.

Please feel free to publish this e-mail together with the e-mail to the Bar Council."

In due course there was an article in *Vox* on 13 April which was headed: "Intimidation: Chief Justice's wife accuses Bar Council. Are we living in Mugabe's Zimbabwe?" It featured, with her permission, the text of the e-mail which Mrs Schofield had sent to Mr Schirmer on 4 April.

5.33 On 5 April Mrs Schofield sent a further e-mail to Mr Neish. After acknowledging his letter of 3 April, she went on:

"That a request for you to confirm information which I had received should call for this response from a Bar Council clearly shows I have hit a sacred cow. The Issue of conflict of interest in a matter which involves the Chief Minister and the Chief Justice and which as much we all pretend is about consultation would be obvious to a nursery school child is about constitutionality and independence of the judiciary will not be swept away by accusations of my interference. This is simply spin. I am unmoved by spin. It is a game for politicians, not lawyers.

The conduct of the Bar Council raises issues of conduct unbecoming of members of the Bar. The refusal for you as a close personal friend of the Chief Minister and members of your firm who do a lot of work for the Government to recuse yourself from voting and making decisions on this issue is conduct which brings the Bar into disrepute, undermines independence of the Bar and public confidence in the Bar.

I note that there is no Code of Conduct for the Bar in Gibraltar and I am seeking an Opinion as to whether the UK Code applies. If it does, please

take note that I shall be filing a complaint against the members of the Bar Council who approved the draft.

Your letter also raises issues as to how many members of the Bar Council approved this letter and the letter to the Chief Justice. Your letter gives the impression that all members supported the decisions to write. Can you confirm how many members voted for this action. You will agree with me that your letter would be misleading if only a few members agreed with the decision. Can you provide details of how many members of the Bar Council attended the meeting on Thursday? If most of the members did not approve, do you agree that your letter is misleading?

Please note that I shall not hesitate to seek a declaration that the assertions by the Bar Council on my right as a wife violate the European Convention and the Gibraltar Constitution. This would definitely answer the question as to what Gibraltar has come to. In the meantime, I can tell you what Gibraltar has come to. No Chief Justice in Gibraltar has been put through what the Chief Justice has been put through since the current Chief Minister came to power. Nor has the judiciary been under attack in the way that has taken place in the last 10 years. S6 of the draft bill is a direct attack on independence of the judiciary. No matter how much we spin or try to deflect the real issue behind this section.

I would welcome an opportunity in a court of law to lift the veil on the true intention of the section.

By the way I am a known campaigner for the independence of the judiciary in many parts of the Commonwealth and so far as I am concerned there are no sacred countries. You can rest assured if my husband was undermining independence of the judiciary, I would not hesitate to speak out.

I shall be placing your letter before my lawyers on Tuesday. I shall also be instructing my lawyers to ask the current Attorney General to recuse himself from dealing with any issues relating to me and my husband.

Please note that I am ready and willing to protect my rights and stop abuse of office as far as this matter is concerned."

5.34 The Chief Justice said in evidence that he was not aware of this e-mail at the time when it was sent, and claimed that he was first aware of it when the proceedings before this Tribunal started. In view of what he already knew about his wife's communications with the Bar Council, let alone the fact that she was purporting in the e-mail to act in his interest, and the fact that they used the same e-mail address, we reject this evidence. It is to be noted that she stated that she intended to invite the Attorney General to recuse himself from dealing with any issues relating to her or to the Chief Justice. In evidence the Chief Justice said that she had no authority to do such a thing, and that he had not discussed that possibility with her. Despite circumstantial evidence to the contrary, we accept the latter evidence.

5.35 We should add that on 25 April Mrs Schofield sent a fax to the ICJ Kenya, copied to the UK Foreign Secretary, the Governor, the Chief Minister and the Leader of the Opposition in Gibraltar. It set out four reasons why she said that the Chief Minister had an ambition to get rid of the Chief Justice, as follows:

> "(i) In 1998 the Chief Justice at the Opening of the Legal Year announced that there had been attempts to interfere with the judiciary. In 1999 my husband told me that he had been informed by the then Governor Sir Richard Luce (now Lord Luce) that the Chief Minister (now Minister of Justice) had made representations for the Chief Justice's contract not to be renewed. It was suggested that he should renew for six months. My husband and I discussed the matter and he assured me that he had security of tenure until the age of 67. We have planned our lives on that basis.
>
> (ii) You may recall that there was an issue relating to our maid. This was immediately followed by an incident involving the Chief Justice's private vehicle. The police intended to caution the CJ on driving without a licence and not having an MOT. The licence matter was dropped as that was a period of grace. The CJ was prosecuted over the MOT. He pleaded guilty. In England and Wales at that time a judge was not required to report an MOT offence. These incidents were used to call for the CJ's resignation. He is still in post.

> (iii) In July 2000 as the MOT matter was going on the Attorney General went to see English counsel who was advising my husband: and in his words the AG said "were this matter to be not contested and to be dealt with the minimum of fuss then no doubt the Chief Justice would receive all assistance and help were he should be seeking a judicial post in England and elsewhere"
>
> (iv) During the hearings of the MOT case the Lord Chief Justice of England and Wales called my husband and told him that he had met the AG in a conference and that he had mentioned the case. He went further to say to my husband that if he did not contest the case he would be considered for a judicial post in England."

She referred to section 6 and said that her husband either "accepted this set up or resigned"(see also paragraph 3.26). This letter was featured in an article in the *Gibraltar Chronicle* on the following day. An article in *Vox* of 27 April reported a phone call from Mr Kegoro of ICJ Kenya with his response. On 2 May he faxed and wrote to the Governor and alleged an infringement of the independence of the judiciary and a breach of the Constitution.

5.36 On 4 May the Chief Minister gave a media interview about the consultation process relating to the Bill, in the course of which he commented:

> "I cannot say that the Chief Justice has limited the expression of his views to the consultation process and in the spirit of the consultation process. You know, otherwise we would not have had the unseemly rows that there have been in the Press, for what was supposed to be a consultation process at a time when all the parties consulted had the opportunity to express their views to the Government. Instead, things have found their way into the public domain through the most inappropriate of Press comments and that is deeply to be regretted."

The Chief Justice wrote a letter to the Chief Minister on 21 May, in which he challenged a number of statements which the Chief Minister had made in the interview. In regard to the passage which we quoted he said that these comments had given a wholly wrong impression. He emphasised

that he had mentioned contractual matters in his letter of 22 February in order to lay down a marker at the earliest possible moment, and that marker was still in place. He continued:

> "Perhaps you would be kind enough to clarify why you say I did not respect the spirit of the consultation process. It cannot be that it is simply because I disagreed with clause 6 because all other consultees' submissions which I have seen disagree, in some degree, with the original draft. Furthermore, in this passage you seem to connect what you describe as "unseemly rows" in the press with my submissions. As yet I have made no public comment on the Bill."

In his oral evidence the Chief Minister defended the comments which he had made. They were much more gentle than the Chief Justice's conduct had warranted. He could have said that the Chief Justice had not respected the confidential nature of the consultation, and had passed information to his wife which only he could have known. He was not willing to pretend in public that he thought that the Chief Justice had behaved properly. The consultation paper had resulted in allegations in the press attributed to his wife that the Government were hounding him out of office. He must have known that the allegations being put into the press were sourced to him. He had undermined the consultation process. We regard the Chief Justice's statement in his letter to the Chief Minister that he had as yet made no public comment on the Judicial Service Bill as highly disingenuous. We are in no doubt that the "unseemly rows" which had occurred in the Press formed part of his intention in opposing the Bill.

Mrs Schofield's libel action

5.37 On 10 April Charles Gomez & Co wrote a letter before action on behalf of Mrs Schofield to the Bar Council, saying that the allegation of improper motivation on her part contained in Mr Neish's letter dated 3 April amounted to a serious defamation which was false and unjustified and which had caused Mrs Schofield considerable distress and

embarrassment. The letter went on to ask for a list of all those to whom the allegations had been repeated, and to require an immediate undertaking on behalf of all Council members not to repeat them, failing which they were instructed to apply for an injunction without further notice.

5.38 The Bar Council met at 5.30 pm on 12 April and decided unanimously that no undertaking should be given, that a response should be sent to Charles Gomez & Co, and that if Mrs Schofield were to issue the threatened proceedings Mr Neish should ask the Chief Justice to recuse himself from hearing any matters involving members of the Bar Council or their firms, namely Triay Stagnetto & Neish, Triay & Triay, Hassans and Attias & Levy.

5.39 On the same date and following the meeting Mr Neish, on behalf of the Bar Council, responded by letter to Charles Gomez & Co denying that Mrs Schofield had any cause of action; maintaining that in any event the Bar Council had a duty to inform members of the Bar at the forthcoming AGM of the Gibraltar Bar Association (which was due to take place on 17 April) about what had transpired and to make available copies of all correspondence exchanged; and declining to give any undertaking. The letter concluded by stating that the Bar Council would resist strongly any proceedings which Mrs Schofield might institute.

5.40 On 13 April Mrs Schofield filed an action claiming damages and injunctive relief against Mr Neish as sole defendant, based on an alleged libel in his letter to her dated 3 April (2007 No 85). In the Particulars of Claim he was described as the Chairman of the Bar Council. In those particulars she alleged that the words "the ludicrous fiction" in the letter meant, and were understood to mean, that her communications with the Bar Council were "a dishonest and cynical manoeuvre and that she was motivated exclusively by a desire to protect her personal interests by inhibiting the Bar's freedom of expression and undermining its independence". She also stated in those Particulars:

> "The Defendant circulated his letter not only to those Bar Council members who attended the meeting at which a response to the Claimant was agreed but also to those members who were not present at that meeting and had no part to play in the drafting or approval of that letter."

She alleged that there was a threat of repetition of the libel at the meeting of the Bar Council on 17 April, and sought an injunction to restrain repetition. According to Mr Gomez, Mr Neish was selected as the defendant as he was the only person who was known to have been involved in the drafting of the letter complained of.

5.41 Mrs Schofield's action against Mr Neish was reported in the *Gibraltar Chronicle* of 16 April under the headline: "Row turns sour as Chief Justice's wife serves writ on Bar Council Chairman". On 17 July she applied for various declarations, to which we refer later at paragraphs 6.17 – 6.18. The action has not yet been determined. We say nothing as to its merits.

5.42 The evidence of the Chief Justice was that he knew nothing of the libel proceedings until after they had been issued and that he could not recall any prior discussion with his wife of her intention to issue them. However, he agreed that it was possible that she told him that she had sent a letter before action although he could not specifically recall her having done so. When he was asked whether he should have dissociated himself from the libel action, he replied that this would not have been appropriate. It would not have been proper for him as Chief Justice to interfere with his wife's legal rights. It would have sent out a message of disapproval. As for his speaking privately to Mr Neish, the latter would know, he said, that he had nothing to do with the action. Mr Neish knew her as an independent minded person. We consider the Chief Justice's evidence to be highly implausible. We find that he was aware of Mrs Schofield's intention to issue libel proceedings, although we are willing to accept that he was not aware of the detailed nature of those proceedings until after they had been issued. His explanation for not having dissociated himself from her action was evasive.

The recusal application in April

5.43 It is now necessary for us to retrace our steps to the stage at which the Bar Council decided to seek the recusal of the Chief Justice (see paragraph 5.38 above)

5.44 In discussions between members over the weekend of 14/15 April the Bar Council confirmed that, notwithstanding that the libel proceedings had been issued against Mr Neish alone, its decision that Mr Neish should ask the Chief Justice to recuse himself from hearing any matters involving members of the Bar Council or their firms should stand. In his witness statement Mr Stephen Catania, a partner in Attias and Levy, described the rationale for this decision. He pointed out that by 12 April Mrs Schofield had threatened to issue proceedings against all members of the Bar Council. He continued:

> "Her letter before action was addressed to all but then James Neish was singled out and proceedings were issued against him alone. We had agreed that we would take a joint stance, and my perception and I believe that of the others was that we saw legal proceedings issued by her as having been commenced with at least the approval of the Chief Justice. In the light of this, the members of the Bar Council agreed that we could not go on to appear in court before him and that we would ask for his recusal at the first opportunity."

The events of the morning of 16 April 2007

5.45 A case management conference in *Sonia Bossino v Attorney General* was listed to be held before the Chief Justice at 9.30 am on 16 April. This was the first case following the Bar Council resolution in which one of the signatory firms was involved. In that action Hassans acted for the claimant. Immediately before the hearing Mr Neish handed to the Chief Justice a letter, dated that day, which informed him of the decision of the Bar Council. According to the transcript, Mr Neish appeared on behalf of the Bar Council and, along with Ms G Guzman of Hassans, for the claimant (Mr Neish accepted in evidence that he had not been instructed

to appear for the claimant, but said that Ms Guzman had wanted someone from the Bar Council to make the application). He informed the Chief Justice that the members of the Bar Council would be asking him to recuse himself from hearing any matters involving members of the Bar Council or their respective firms. The application was based, he said, on the exchange of e-mails between Mrs Schofield and the Bar Council. The Chief Justice inquired how the e-mails affected him. Mr Neish responded that the e-mails did affect him, and that he was not prepared to argue the matter fully "because of a turn of events where there is obviously a clear breakdown in relations" between the Chief Justice and Mrs Schofield on the one hand and the Bar Council on the other (in evidence, Mr Neish explained that this referred to the series of e-mails from Mrs Schofield culminating in the issue of the libel proceedings).

5.46 After some discussion, the Chief Justice commented that he had only looked at the e-mails in question for the first time some 7 to 10 days previously, and that he had not seen them before, nor had he taken any interest in them. He pointed out that he had only recently returned from a holiday in Argentina with his daughter. The following exchanges then took place between the Chief Justice and Mr Neish:

> "Chief Justice: [W]ould you in fairness read out the basis upon which Mrs Schofield wrote to you.
>
> Mr Neish: Mrs Schofield says: "As a member of the public and a person who may be affected by any constitutional and contractual – and contractual – implications of the Bill".
>
> Chief Justice: Yes.
>
> Mr Neish: Contractual, affecting yourself, My Lord.
>
> Chief Justice: Yes, affecting herself.
>
> Mr Neish: No, affecting you, My Lord. Contractually, your contractual position as Chif Justice. So she is not speaking as far as the constitutional aspect is concerned, she is speaking about your Lordship's own position. Members of the public, My Lord, were not consulted by the Chief

Minister in his consultation paper. The consultees were the Bar Council …

Chief Justice: Yes.

Mr Neish: … your Lordship, the Puisne Judge and the Stipendiary Magistrate. So in those circumstances, My Lord, members of the public do not know what is going on unless they are told by one of the consultees. And I understand that Your Lordship had prior access to the consultation paper before Your Lordship left for Argentina.

Chief Justice: In fact I did not … Oh yes I did, as did all members of the Bar, because I circulated all members of the Bar.

Mr Neish: Yes, this is the …

Chief Justice: Let us not go into that matter at this stage because what you are doing, with greatest respect, is winding the situation up. What I am suggesting is that we need proper argument on this matter and I do not at this stage, on the basis of what you have said, intend to recuse myself. If members of particular firms wish to pass their briefs over to someone else in, say, undefended divorce matters, or if they wish to apply in individual cases for adjournments, that is a matter for them. But at this moment in time, if you are not prepared to argue the matter, let us then adjourn it to a day when you will come fully armed and fully prepared."

5.47 The Chief Justice ultimately agreed to adjourn the recusal application to 2.30 pm on the following day, 17 April (see paragraph 5.81).

5.48 In his first witness statement Mr Gomez described the events which took place on the morning of 16 April 2007 as "… a means of causing the Chief Justice as much damage as possible for the purpose of forcing Mrs Schofield to withdraw her libel action". In evidence he said that the fact that Ms Bossino, as he understood, had never been consulted about the recusal application aggravated his concerns that its purpose was to bring pressure on Mrs Schofield to drop her libel action.

5.49 In evidence Mr Neish said that the recusal application was necessary because Mrs Schofield's e-mails had expressed views that were totally detrimental to members of the Bar Council, accusing them of being incapable of reaching honest and objective decisions, and they were expressions which, in their view, impacted on her husband's ability to sit in cases in which they were involved. It was "absurd" to suggest that the purpose of the resolution to make the application was to stifle Mrs Schofield's libel action and to cause damage to the Chief Justice himself. In cross-examination it was put to him that, had Mrs Schofield not commenced proceedings, the Bar Council would not have decided to make the application. He replied:

> "It wasn't that we were asking the Chief Justice to recuse himself in retaliation for his wife issuing libel proceedings against the Bar. That is not the way we focused it. We focused it on the basis that here is the wife of the Chief Justice suing publicly, or threatening to sue in a public way, the Bar as a whole. We can't possibly appear before the Chief Justice now. That was our reason. Whether it was mistaken or not, that was our reasoning. What I must emphasise is that contrary to this proposition that is being bandied about that we asked the Chief Justice to recuse himself in retaliation for his wife's issuing of proceedings is simply not the case. … It was the final straw in a sequence of actions."

5.50 We accept that evidence and find that, as Mr Neish put it under cross-examination, so far as the Bar Council was concerned the libel action was not the "causa belli"; it was "the last straw … the last drop for the cup to overflow". Whether it was procedurally correct or not (and that is not a matter which need concern us), the recusal application was, we find, born out of a genuine fear on the part of the members of the Bar Council that in the circumstances, culminating as they did with the commencement of Mrs Schofield's libel action, they and their clients would not in the future receive a fair hearing from the Chief Justice.

The events of the afternoon of 16 April

5.51 Following the above hearing Mrs Schofield telephoned Mr Gomez to inform him of the proposed recusal application. Mr Gomez had not been

present in court when the matter of recusal was raised, and was previously unaware that an application for this purpose was to be made. She instructed him to appear on her behalf at the adjourned hearing of the application. She also informed him that the editor of the *Gibraltar Chronicle* had been present in court that morning.

5.52 Some time during the morning or early afternoon the Chief Justice was contacted by two partners of Hassans, who invited him and Mrs Schofield to meet them. The Chief Justice passed on this request to Mrs Schofield, and they agreed that it would not be proper for the Chief Justice to attend such a meeting as Hassans were involved in the recusal application. Mrs Schofield met them later that afternoon. In her first witness statement she stated that they informed her that at the forthcoming AGM of the Gibraltar Bar, which was due to be held the following day, 17 April, a vote of no confidence in the Chief Justice was to be proposed. Mrs Schofield went on to say that she took the view that the purpose of the vote of no confidence was to put pressure on her because she had commenced the libel proceedings. Immediately following that meeting Mrs Schofield went to see Mr Gomez and instructed him to contact the Supreme Court Registry to seek an appointment before the Chief Justice "to inform him of the information".

5.53 When Mrs Schofield arrived in Mr Gomez's office following her meeting with the partners of Hassans, she was, according to Mr Gomez, in an agitated, anxious state. Having been informed by her of the proposed motion of no confidence in the Chief Justice he concluded, to quote from his first witness statement, that Mr Neish and the other members of the Bar Council "were embarked on a manoeuvre to permanently damage the Chief Justice's standing as a reprisal for the defamation proceedings". Based on that perception of the purpose of the recusal application, he advised her that in his view the application was a serious and unprecedented abuse of the court's process. He also took the view that the motion of no confidence was likely to be passed. In his first witness statement, he said:

> "Mrs Schofield instructed me to bring this situation to the attention of the Chief Justice for his information and guidance generally and thereafter to apply to Mr Justice Dudley for an injunction to restrain the tabling of the no confidence motion."

5.54 In accordance with Mrs Schofield's instructions, Mr Gomez telephoned Mr Mendez, the Deputy Registrar. According to a memorandum of Mr Mendez, which we accept as accurate, Mr Gomez telephoned him shortly after 4 pm and told him that he was with Mrs Schofield, and that they wished to appear before the Chief Justice urgently, without papers. Mr Mendez informed Mr Gomez that the Chief Justice had left his chambers for the day, but that Mr Justice Dudley was available. Mr Gomez responded that the matter concerned "Mrs Schofield's case" and that they did not wish to appear before Mr Justice Dudley as Mrs Schofield did not wish to cause him any difficulty or embarrassment (a reference to the fact that it was anticipated that Mr Justice Dudley would in due course be hearing Mrs Schofield's libel case). Mr Gomez urged Mr Mendez to telephone the Chief Justice at home "as is done in the case of urgent injunctions". Mr Mendez tried to contact the Chief Justice at home, but without success. When Mr Gomez was informed of this, he suggested that he and Mrs Schofield should wait, "in case the Chief Justice returns to chambers".

5.55 Not long after this the Chief Justice arrived in chambers, evidently as a result of a telephone call from his wife who informed him that he might be needed in chambers later that afternoon. It may be noted that the Chief Justice made no mention of this call in any of his witness statements. In his first witness statement he said:

> "I was told in the afternoon that a very senior member of the Bar, Charles Gomez, wanted to see me urgently on a without papers matter and I think (although I am not sure) that I was told my wife was with him."

5.56 This is a misleading statement in so far as it suggests (a) that he was first told of the possibility that he might be needed in chambers by a third party (e.g. Mr Mendez), and (b) that he was unsure whether Mrs Schofield was involved.

When counsel to the Tribunal put to him that, by failing to mention his telephone conversation with Mrs Schofield, he had thereby failed to present a full picture of what occurred, he responded that he had forgotten about that conversation and had been reminded of it only recently. However, we cannot avoid the conclusion that the absence of any reference to this conversation was due, not to any lack of recollection on his part, but rather to his sensitivity to the criticism that his conduct on that afternoon was inappropriate and improper.

5.57 The Chief Justice gave a variety of accounts as to his understanding as to why he was required in chambers. In his first witness statement he said he thought that Mr Gomez wanting to see him "would be to do with the recusal application as I knew that I could not hear any application in the libel proceedings". In his third witness statement he said that he had "no idea" to what it related. In cross-examination he insisted that he did not ask Mrs Schofield for any details as to why he might be needed in chambers, but said that he assumed that it was something to do with her meeting earlier that day with the partners of Hassans.

5.58 In examination-in-chief, Mr Gomez described the purpose of his and Mrs Schofield's attendance on the Chief Justice as follows:

> "The principal point, obviously, was to inform the Chief Justice of what was happening. We perceived that if notice was given of the proposed vote of no confidence, and that if it was made public, that would have a severe impact on the Chief Justice and, by extension, to our case, to the libel case. You can say – in fact I think it has been confirmed – that the entire matter was linked. In other words, the correspondence between Mrs Schofield and Mr Neish, the allegedly libellous statements made by Mr Neish, the issue of proceedings, and immediately thereafter the recusal application, and finally as part of …what seemed to us to be a campaign linked to the libel action, a vote of no confidence at the Bar Council.
>
> The first and dominant intention was to bring this to the Chief Justice's attention, to see whether he might have to take advice or steps on his own account. What I had at the back of my mind was that perhaps he would have referred the matter to the Attorney General, seeing as I considered

> the matter to be an abuse of process, and a way of circumventing the judicial process, by the defendant himself. So that was the main concern. In other words, that the Chief Justice should be aware of what was happening.
>
> Secondary to that was to obtain guidance generally as to how he considered we might best proceed in order to protect the integrity of the judicial system basically in so far as it affected the libel case."

Asked how he considered it appropriate to appear before the Chief Justice on behalf of his wife, Mr Gomez replied that he regarded it as "essential" that he should do so. Asked why, if it was at the back of his mind that the Chief Justice might refer the matter to the Attorney General (a possibility which he had not mentioned in his witness statements), he had not considered contacting the Attorney General himself, Mr Gomez replied that he had considered at the time that the appropriate course would be for the Chief Justice to do so.

5.59 It is at least apparent from the above evidence that Mr Gomez's purpose in seeking an appointment before the Chief Justice was to protect Mrs Schofield's position as claimant in her libel action, and to obtain the Chief Justice's guidance as to how that might best be achieved. Indeed, this is confirmed by the Chief Justice's own evidence, in his third witness statement, that Mr Gomez "wished to seek guidance as to how to protect [Mrs Schofield's] interests in relation to the libel action". We are satisfied that the urgency with which Mr Gomez and Mrs Schofield sought an appointment before the Chief Justice was dictated entirely by their understanding that at the AGM of the Bar which was due to take place the following day a vote of no confidence in the Chief Justice was to be proposed; and that the proposed vote of no confidence was the focus of the guidance which Mr Gomez was seeking from the Chief Justice.

5.60 How did the Chief Justice perceive the proposed attendance on him of Mr Gomez and Mrs Schofield? Asked by his counsel why he decided to receive them he replied:

> "Because I knew that my wife had had this meeting with the partners [in Hassans]. I also knew that neither Mr Gomez nor my wife would seek that I should do anything improper, and I felt if I had to hear what they had to say in an informal context, it may be that I would have to convene the court later that day. So I felt it sensible to hear them."

In cross-examination he expanded somewhat on that evidence, saying:

> "When I learned that there was an application by Mr Gomez which involved my wife, I had to consider: was it appropriate that I should see them in chambers or should I say no. Of course, it went through my mind, well, if my wife comes home and over a cup of tea relates events which require me to convene the court, then we have to go back after court hours to do it. So…,knowing full well that my wife and Mr Gomez would not expect me to do anything improper, and of course knowing full well that I would not myself do anything improper, I decided I would hear them in chambers."

Later in his cross-examination, the Chief Justice confirmed that it was "within [his] contemplation that there was a possibility of some sort of application". He continued: "I really did not know what it was all about, and I had them in and I sat there to hear them". Asked why he had not simply refused to hear them, the Chief Justice replied:

> "It was quite clear to me that I could make no order. It was also quite clear to me that once he mentioned the recusal proceedings – that I was the person seised of the recusal proceedings – I wanted to know what information he was going to impart to me…I had been faced with something which not many judges have ever faced, and that is the Chairman of the Bar coming in and telling you that a number of members of the Bar are seeking my recusal because the Chairman of the Bar had been served with libel proceedings. If there was something that I ought to know, then I felt I ought to hear it."

5.61 Later during the Chief Justice's cross-examination the Tribunal (Sir Jonathan Parker) returned to this topic, and the following exchanges took place:

"Q. I just wanted to ask you about your state of mind before the attendance of Mr Gomez and his wife before you in chambers. I understand your evidence to be that this was to be in some way a formal application, or formal appointment of some sort?

A. Yes, there was a possibility that it was. Certainly something was going to be formally communicated to me.

Q. Well, I think you said in answer to Mr Fitzgerald that you preferred it in effect to be on a formal basis because you felt that if you had to hear what she had to say in an informal context it may be that you would have to convene the court later that day.

A. Yes. Clearly if there was something that had to be formally imparted to me which my wife and Mr Gomez considered ought to be done in a formal context, I ought to hear them in a formal context…rather than hear it at home and perhaps come to a decision that something ought to be done.

Q. So you were receiving them into your chambers in your official capacity as a judge?

A. Yes.

Q. And I also understand from your evidence – although correct me if I have it wrong – that you were not at all clear exactly what application, if any, was to be made, or what would transpire when they arrived.

A. Absolutely.

Q. And you were also aware, as you said, of the judicial guidelines, and you had personal experience of this in Kenya and so forth.

A. Yes.

Q. My question is this: in those circumstances did it occur to you that it might be, to put it no higher, unwise for you to entertain any sort of application, address, whatever it may be, from Mr Gomez

who was counsel for your wife, who was also present in your chambers at the time? Did that occur to you?

A. I knew that my wife knew the constraints upon her appearing before me. So I felt that she must have considered those constraints before seeking to come before me.

Q. Well, can you answer my question, please? Did it occur to you that it might be highly unwise for a judge to entertain this sort of proceeding?

A. I considered that there were dangers, and that is why I asked the Registrar to come in.

Q. But you thought it appropriate nevertheless to proceed with the hearing, if I can call it that?

A. Yes, I did."

5.62 We are at a complete loss to understand how any judge, let alone a judge of the Chief Justice's intelligence and experience, could conceivably have thought it either appropriate or proper to entertain any kind of formal attendance on him by his spouse, who was currently a litigant in his own courts, and/or by her lawyer. Plainly it was both inappropriate and improper for him to have done so, as any judge with a degree of sensitivity to the requirements of his office must have appreciated. No judge should ever allow himself to be placed in the position in which the Chief Justice found himself on this occasion. Furthermore, we find it profoundly disturbing that, when giving evidence before this Tribunal, the Chief Justice still appeared unable to comprehend this. Nor does the fact that he was not clear as to the precise purpose of Mr Gomez's and Mrs Schofield's attendance on him make any difference: if anything, it makes matters worse.

5.63 There is a difference of recollection between the witnesses as to the length of the hearing, ranging from 5 minutes to about half an hour. We find, on the basis of Mr Mendez's note, that it lasted about 20-25 minutes. At the outset, the Chief Justice instructed Ms Desoiza, whom he had instructed to attend, not to take notes – on the face of it, a most surprising instruction.

She was unsure why he gave that instruction. He gave her no explanation. She confirmed that if she was going to do the clerking for a hearing, she would normally take notes. She told us that, apart from this occasion, she could not recall any other occasion when she had been instructed by the Chief Justice not to take notes, or had been asked to attend a hearing in his chambers. In his first witness statement, the Chief Justice said that as his wife was present in his chambers he specifically asked the Registrar to attend "to ensure that nothing improper took place". However, if that was indeed his concern, one would have expected it to have led him to insist not merely that the Registrar attend but that she took a note of everything that was said. Furthermore, his statement suggests that had his wife not been present, he would not have thought it necessary to ask the Registrar to attend: a suggestion which we find extremely surprising. In cross-examination he said that his intention was that no note should be taken until it became clear precisely why Mr Gomez and Mrs Schofield had attended on him. He referred to the fact that no file had been provided and that no application notice had been lodged. When it was suggested to him that his very uncertainty as to what was about to transpire should have led him to require a note, the Chief Justice replied:

> "In hindsight I wish a note had been taken. I did not anticipate that this would blow up as it did. Of course in hindsight I wish we had made a note."

5.64 In instructing the Registrar not to take a note of what was said the Chief Justice was, in our view, simply compounding his initial serious misjudgment in allowing Mr Gomez and Mrs Schofield to attend on him formally in his chambers. If it were true that the Chief Justice did not expect the matter to "blow up", then he would, once again, stand convicted out of his own mouth of a complete insensitivity to the requirements of his office. However, we are satisfied that that evidence is not true. The truth, as we find, is that at the time he gave no consideration to the possible consequences of his allowing Mr Gomez and Mrs Schofield to attend on him in his chambers; rather, his focus throughout was on the need (as he saw it) for Mrs Schofield's position as claimant in her libel action to be protected.

5.65 On 2 May the Chief Justice instructed Ms Desoiza to prepare a note of what had happened in chambers. She prepared a note that day from memory and with the aid of a post-it on which she had jotted 3 or 4 words shortly after the hearing. According to the note, which bore the heading of '*Schofield v Neish*':

> "Mr Gomez addresses the Chief Justice. States that he is here on an application in this case and also as an interested party in the case of *Bossino*. Informs the Chief Justice of events leading up to the information being acquired that vote of no confidence in the Chief Justice is to be proposed at Bar Council meeting to be held tomorrow and explains the impact this is to have on his client's case. Discusses the possibility of an injunction.
>
> Chief Justice asks on what basis is the injunction sought and says that in any event such a matter should be referred to his brother Judge.
>
> Mr Gomez explains the basis on which an injunction could be sought.
>
> Chief Justice – discards the basis as need to write to Bar Council beforehand asking them to refrain from holding a vote of no confidence.
>
> Application concluded – no order made."

5.66 In an attendance note made subsequently but undated, Mr Gomez recorded:

> "Attended before the CJ with Mrs Schofield.
>
> Explained that Mrs Schofield was concerned that JN [James Neish] and others may be about to air the issues the subject of the defamation claim before the Bar Association, and that this could prejudice her case.
>
> Mrs S had been called to a meeting by Fabian Picardo and Lewis Baglietto. They had told her that they had nothing to do with the applications to have the CJ recuse himself from cases and that they were worried that there were moves now to ask the Bar Association for a vote of no confidence in CJ arising from the issue of the claim and the underlying issues. They also told her that they had been told that the Governor was going to London for advice on the issue.

> I said that since most members of the Association were salaried employees of the big firms it was likely that such a vote would be carried without much difficulty or debate and this would imply to the public, (including potential jurors) that…in bringing the proceedings Mrs S had done something wrong.
>
> I said that we were concerned to bring this to the CJ's attention since it affected him in his office and arose from the litigation but that any applications in the case which we might have to make would be to Mr Justice Dudley.
>
> CJ said that he did not think that AJ [Mr Justice Dudley] should deal with the defamation case either and there was really nothing that he could do or add. He said that he would not make any comment."

5.67 In his Preliminary Response, the Chief Justice gave this account of what transpired:

> "On the afternoon of 16th April he [i.e. the Chief Justice] was asked to hear a matter without papers and in private. He had no prior notice of the case or its title…It is not correct that this was an application in the libel proceedings brought by his wife, although it may be that her solicitor [i.e. Mr Gomez] was unclear; rather, it was a request for procedural guidance by his wife's solicitor in relation to the recusal application made that morning. *Mrs Schofield was in possession of information that the Bar Council* [sic] *was to meet the next day to vote on a motion of no confidence in the Chief Justice. That motion, if passed, would have prejudged the issues to be determined in the recusal application and would therefore be a contempt of court.* Mr Gomez on behalf of Mrs Schofield sought to make an application to the Puisne Judge for an injunction in the recusal proceedings, but since the recusal proceedings were reserved to the Chief Justice, Mr Gomez was not able to go before the Puisne Judge without an order from the Chief Justice. *He therefore sought the Chief Justice's guidance as to the proper way to apply for injunctive relief…The Chief Justice viewed any application in the matter as premature and declined to take it further or to put the matter before the Puisne Judge.*" (Emphasis supplied)

5.68 Mr Gomez stated in evidence that it was never his intention, nor that of Mrs Schofield, that the Chief Justice should make any order at this

hearing, but it is difficult to reconcile that statement with the Chief Justice's understanding (as set out in his Preliminary Response as quoted above) that Mr Gomez was seeking an order of some kind. When that understanding was put to Mr Gomez, he maintained that, to the extent that this passage was attempting to summarise his approach at the time, it was erroneous.

5.69 In paragraph 34 of his third witness statement the Chief Justice summarised what transpired in his chambers on this occasion as follows:

> "…the "application" was in the context of matters as they progressed in the recusal proceedings to which she was not a party. As the applicants in the recusal application relied upon the fact that my wife had issued libel proceedings and on the subject matter of that litigation…he was concerned that a contempt might be committed in the recusal application and wanted to know the correct procedure for making an application in the recusal proceedings which were reserved to me. So the subject matter of the application concerned the libel action, but the proceedings were the recusal proceedings. I simply told him that any application was premature. I said that I could not deal with any application in the libel proceedings. I was not asked to make any order and I made none."

5.70 In cross-examination, the Chief Justice gave the following description of what occurred:

> "They imparted to me information which I think they could have imparted in private. They chose to do it in the formal context of my chambers. But they could have done that privately. They thought clearly that this was more appropriate – for them to do it in a more formal context…I knew I could make no order, and it transpired that the only application made to me was that the matter should be referred to my brother judge. [Such an application] was mentioned. In fact what happened during the course of the proceedings [was this.] I said: Well what do you want me to do about all of this? I recall distinctly my wife leaning over to Mr Gomez and saying – and I heard her – if anything is done, it has got to be referred to the other judge. That was what Mr Gomez said to me…Mr Gomez did mention that there was the possibility of an injunction to prevent the Bar Council discussing this matter. I did

not [ask him to explain the basis for the injunction] because I would not issue any injunction. I did say to him: Well, have you written to the Bar Council? And he said: I haven't. And I said: Well, all this is premature. …I did not enter into the merits. I simply said: Have you written the letter? I just asked him the question. I was not going to involve myself in any application for an injunction."

5.71 Regrettably, however, the Chief Justice undoubtedly did involve himself in a possible application for an injunction in so far as he engaged with Mr Gomez and addressed Mr Gomez's concerns by inquiring whether he had written to the Bar Council (plainly he had in mind that before applying for an injunction Mr Gomez should first ask the Bar Council to give an undertaking) and by expressing the view that, absent such a letter, any application for an injunction would be premature. There is no evidence that it occurred to the Chief Justice at any stage, as it should have done, (a) to inquire whether advance notice of this hearing before him had been given to the Bar Council, or to Mr Neish, or (b) to consider whether such notice should have been given.

5.72 As indicated in Mr Mendez's memorandum to Ms Desoiza, no application notice had at that stage been filed; nor were there any papers. In the circumstances, it is not surprising that Ms Desoiza found the situation extremely confusing. She was not clear what application was being made. She remembers that there was some discussion about the Bar Council. She also recalls that at one point Mrs Schofield's libel action was mentioned, and that the Chief Justice said that he could not hear anything to do with that. In the evidence before us the accuracy of Ms Desoiza's note was not substantially challenged, save that the evidence of the Chief Justice, and of Mr Gomez, was that the Chief Justice had said that he did not think that it would be appropriate for the injunction to be heard by Mr Justice Dudley. In his witness statement Mr Gomez said that, in view of the Chief Justice's comment, Mrs Schofield decided not to apply for an injunction.

5.73 Plainly there was a high degree of confusion not only on Ms Desoiza's part but, more significantly, also on the part of both Mr Gomez and the

Chief Justice as to what application (if any) Mr Gomez was seeking to make, and in what proceedings. However, the following facts at least are, as we find, clearly established:

- Mr Gomez appeared before the Chief Justice as the lawyer acting for Mrs Schofield in her libel action;
- Mrs Schofield was present throughout;
- the Chief Justice was there in his official capacity as a judge, and in a formal context (equivalent to a "without papers" application);
- from the outset, the Chief Justice was conscious that Mr Gomez might ask him to make an order of some kind – hence the formal nature of their attendance on him;
- Mr Gomez explained to the Chief Justice that he was concerned to protect his client's position as claimant in the libel action in the face of the perceived threat of a vote of no confidence being passed at the forthcoming AGM of the Bar;
- Mr Gomez had in mind throughout, as a possible means of meeting that concern, that Mrs Schofield should seek an injunction against the Bar Council restraining it from proposing a vote of no confidence, and he sought the Chief Justice's guidance in that respect;
- the Chief Justice engaged with Mr Gomez (and hence with his client Mrs Schofield) at least to the extent that he expressed the view that an application for such an injunction would be premature since the Bar Council had not been invited to undertake not to propose such a vote: and he thereby gave the guidance which Mr Gomez sought.

5.74 In the light of the above facts, we regard the Chief Justice's conduct on the afternoon of 16 April as demonstrating a reckless disregard for the requirements and reputation of the office of Chief Justice. In the first place, he should never have allowed Mr Gomez and Mrs Schofield to attend on him formally; the more so since (as we find) he well knew that their request to attend on him was directly connected with Mrs Schofield's

position as claimant in her libel action. In the second place, having mistakenly allowed them to attend on him, he should have taken the first opportunity to bring the proceedings to an end. Instead, he went so far as to offer guidance to Mrs Schofield (via her lawyer Mr Gomez) in relation to the possibility of an application by Mrs Schofield for an injunction against the Bar Council in order to protect her position as claimant in her libel action against its Chairman. All in all, the Chief Justice's conduct on the afternoon of 16 April 2007 constitutes, in our view, judicial misconduct of the most serious kind.

5.75 The following morning Mr Mendez faxed Mr Gomez requesting an application notice and fee for the "without papers" application. According to Mr Mendez, the Chief Justice had remarked that he saw no need for an application notice, since no formal application had been made, but he was informed this was in accordance with normal procedures, to which he did not demur.

5.76 Later that day Gomez & Co sent Mr Mendez a cheque for the court fee, which Mr Mendez returned as it was without any papers. After further requests on 19 April Gomez & Co lodged an application notice relating to the hearing on the afternoon of 16 April, signed by Mr Gomez, and headed in the matter of Mrs Schofield's libel action. It gave notice of intention to:

> "… inform the court that arising from the issue of the proceedings herein the Defendant and others propose a vote of no confidence against the Honourable Chief Justice at the forthcoming Annual General Meeting of the Gibraltar Bar Association."

5.77 On 25 April Triay & Triay wrote to Mr Gomez informing him that they had been instructed to act for Mr Neish in Mrs Schofield's libel action, and saying that they had advised Mr Neish that the action had no prospect of success. In the final paragraph of their letter, they said this:

> "We note that an ex parte application was made to the Chief Justice on April 16th, although from the application notice in our hands it would appear that no relief was sought, which seems an extraordinary state of

affairs. Could you please explain what the precise purpose of the application was, and why this was conducted in the absence of the Defendant? Please also provide us, by return, with a typescript of counsel's note of that hearing which we shall await as a matter of urgency."

5.78 In response, Mr Gomez sent Triay & Triay a copy of the attendance note which we set out in paragraph 5.66. Thereafter on 2 May the Chief Justice requested Ms Desoiza to make a note of the hearing on the afternoon of 16 April (see paragraph 5.65). In cross-examination he said that he made this request because he was aware that Triay & Triay were making inquiries, and he considered that it was appropriate that Ms Desoiza should record her recollection of what had occurred on that occasion, "lest there be any mischief about it". He went on to say that he feared that "something more serious could be made of it", referring to the fact that his wife's counsel had appeared before him ex parte. He maintained that he had had nothing to do with the drafting of Ms Desoiza'a note, and said that he had not asked to see it once it had been prepared. Ms Desoiza took the heading of her note from the application notice. When the Chief Justice saw that the note was so headed he contacted her again, sounding (according to her) "horrified", and told her that he had thought that the hearing was in the matter of *Bossino v. Attorney General*.

5.79 On 3 May Triay & Triay, acting for Mr Neish in Mrs Schofield's libel action, wrote to Mr Mendez asking for a photocopy of the judge's note of the ex parte application which they understood had been made on the afternoon of 16 April. On 4 May Mr Mendez replied saying: "The Chief Justice states that no notes were taken. He further states that the matter which was brought before him was not *Schofield v. Neish* but the *Bossino* recusal application". This was in accordance with a manuscript note in the hand of the Chief Justice. He said in evidence that he understood that the request related to notes taken by him. We have no hesitation in rejecting that evidence as no more than an afterthought by the Chief Justice, in an attempt to explain what was – as he no doubt fully appreciated by the time he gave evidence before us – a highly misleading statement. With some hesitation we are prepared to accept that in stating

that no notes were taken the Chief Justice was not seeking deliberately to conceal what had transpired in his chambers on the afternoon of 16 April, but the very fact that he was content to make that statement betrays, to put it no higher, a highly cavalier attitude to what had occurred on that occasion. On 9 May Triay & Triay wrote again to Mr Mendez, expressing surprise that the Chief Justice had taken no notes of the hearing on 16 April and asking for a copy of the note taken by the court clerk in attendance at the hearing. A copy of Ms Desoiza's note was then supplied to them.

5.80 On 17 May Mr Gomez wrote to Mr Mendez saying that, as it had never been intended that the Chief Justice should be involved in the libel action, the filing of the application notice was an error and potentially misleading. He said that it should be amended to bear the title of the *Bossino* case. On 22 May Ms Desoiza responded to Mr Gomez's letter dated saying that she had no power to do what he asked, and suggesting that he might wish to apply to a judge for that purpose. It appears that no such application was made.

The adjourned hearing on 17 April

5.81 On the morning of 17 April Mr Gomez e-mailed Mr Neish concerning the proposed motion of no confidence in the Chief Justice (described by him as "a one-sided affair") in which members of the Bar Association would be expected to pass judgment on matters which were sub judice (a reference to Mrs Schofield's libel action). He expressed the hope that they would have the intelligence not to vote in favour of the motion. He continued:

> "I have made my misgivings known to the Chief Justice since he is dealing with your application that he recuse himself from the unrelated case of *Bossino v. A-G* and your application in this case is [premised] on the claim which Mrs Schofield has issued against you. I have asked permission to address the Chief Justice at Friday's adjourned hearing of the *Bossino* case since his decision there could affect my client's rights.

> Meanwhile, I repeat my request for your undertaking that you will not allow any discussion at today's Association meeting on our case. I believe that such discussion could not only aggravate the defamations complained of but also constitute a breach of the sub judice rules and might lead to contempt of court."

5.82 In the event, no motion of no confidence in the Chief Justice was tabled at the AGM of the Bar held that day. Instead, a vote of confidence in the Bar Council was passed unanimously.

5.83 At the outset of the adjourned hearing of the *Bossino* case, Mr Neish informed the Chief Justice that the four firms intended to make a general application for recusal. The Chief Justice observed that Mr Gomez was also in court, having asked to be present for "certain limited reasons". At that point, Mr Gomez addressed the court, as follows:

> "My concern arises from a claim which my client, Mrs Schofield, has issued against my learned friend…And the concern is as to how the issues in that case are apparently already being canvassed in Mrs Bossino's case…And clearly in my view that is an abuse of the process of the Court and I mean to stop that as soon as possible."

5.84 The Chief Justice asked Mr Gomez for the reference to Mrs Schofield's case. Mr Gomez gave the reference, explaining (quite unnecessarily, since the Chief Justice was well aware of it) that the case was "a defamation case".

5.85 The Chief Justice went on to say that, having considered the matter overnight, he had come to the conclusion that the matter required the assistance of an amicus curiae, and that he proposed to instruct London counsel to act in that capacity. He accordingly adjourned the recusal application until 24 April.

The adjourned hearing of the recusal application on 24 April

5.86 On 18 April the Chief Justice attended a conference with Mr James Dingemans QC in London concerning his possible appointment as amicus curiae in the recusal application. Mr Dingemans recalls that there was some discussion about the duties of an amicus curiae, and how a judge

facing a recusal application could adduce evidence relevant to the application. This step was taken by the Chief Justice entirely on his own initiative, without, at that stage, any involvement by or on behalf of the Attorney General. In cross-examination he gave this explanation:

> "To my recollection, I had no experience of appointing an *amicus* before. So I did not think it improper for me to identify someone myself when I saw Mr Dingemans. I had a meeting to explain the situation to him. He said: Well, I've got to be instructed through – he may have referred to the Attorney General. It may have been through the Registrar. But he told me he had to be appointed in that way."

5.87 At the adjourned hearing of the recusal application on 24 April Mr Neish appeared for the Bar Council, Mr D Dumas QC for the claimant, Sonia Bossino, Mr Yeats for the Attorney General, along with representatives of the four firms involved in the recusal application, including Mr Stephen Catania, a member of the Bar Council and a partner in the firm of Attias & Levy.

5.88 Also present was Mr Gomez who presented a written skeleton argument in support of Mrs Schofield being given permission to be represented at the hearing, on the basis that the arguments of the applicant firms "arise from the very issues which are the subject of her claim against Mr Neish". The skeleton argument maintained that "it would be unfair for issues which are the subject matter of the defamation case to be argued by or on behalf of the Defendant in that case without Mrs Schofield being given the opportunity to contest those arguments, to the extent that they affect her personally in general and more particularly as claimant in that case". It was also maintained that the court would be assisted in its determination of the request for recusal if it heard Mrs Schofield's version of events, in connection with which she wished to clarify certain matters, which were specified.

5.89 At the outset of the adjourned hearing, Mr Neish informed the Chief Justice that "following developments in the course of the last week" (referring to the presentation of the Signatories' memorandum) it was no longer intended to proceed with a general application for recusal. He

said that in the circumstances he was content to leave it to the Chief Justice to consider whether it was appropriate for him to recuse himself from hearing any matter in which the Signatories' firms were involved. Mr Dumas was granted a short adjournment to take instructions as to whether to apply on his client's behalf for the Chief Justice to recuse himself. Meanwhile the Chief Justice granted the application of Mr Gomez to remain in court to protect the interests of Mrs Schofield while Mr Dumas made his submissions. The transcript records these exchanges:

> "Mr Gomez: My Lord, may I ask to remain in this application, because as you know I represent Mrs Schofield, who is the claimant in the case against Mr Neish, and I'm very concerned that all this flurry of applications is actually meant to put pressure on Mrs Schofield in those proceedings, and it is for that reason that, if you don't mind, My Lord, I'd like to stay.
>
> Judge: Oh, absolutely. In fact it is open Court and if Mr Dumas does slip and say something which you wish to take exception to then I'm sure Mr Dumas would have no objection to at least you making representations. But I don't think we are going down that route, are we?
>
> Mr Dumas: Well, My Lord, my friend has made a scandalous allegation that somehow we're seeking to put pressure on his client.
>
> Mr Gomez: We see it another way, My Lord".

5.90 In his third witness statement the Chief Justice observed in regard to this hearing:

> "At that stage no objection was made about Mr Gomez appearing. I did not address nor was I asked to address the implications of Mr Gomez' appearance. I was facing a situation which, as a judge of many years' experience, I have not faced before and which I venture to suggest not many judges have faced. Quite frankly my focus was not upon Mr Gomez or his client; it was to preserve sanity in the difficult and unfolding situation".

5.91 In his fourth witness statement the Chief Justice observed in regard to this hearing:

> "Mr Gomez was present but he did not make any formal application to be joined to proceedings and I did not rule on any such application. He was not therefore an interested party and was merely given permission to stay at the hearing which was in open court. He did not make any applications on behalf of his client".

This may be contrasted with his acknowledgement in his first witness statement that his wife was seeking the court's protection (see paragraph 5.92 below). In his evidence the Chief Justice accepted that he was not "particularly comfortable" at Mr Gomez being present on behalf of Mrs Schofield.

5.92 When the hearing resumed, Mr Dumas informed the Chief Justice that he had not been able to get instructions to make a recusal application. He had had instructions to hold the claimant's case in abeyance pending Mr Neish's general recusal application. The Chief Justice responded by informing Mr Dumas that, on the basis that the general application would be made, he had identified an amicus curiae, namely Mr Dingemans QC, who was set to come to Gibraltar for the hearing of the application. The Chief Justice went on to say that he could understand Mr Neish personally asking him to recuse himself in matters affecting him and his client. He would give instructions to the Registry accordingly. In the absence of a recusal application by Mr Dumas, he would release Mr Dingemans, and there was no need for Mr Gomez to come in as an interested party.

5.92 In his first witness statement the Chief Justice observed in regard to this hearing:

> "If my wife's actions are raised in proceedings before me, she is entitled to the same protection as any other litigant…No objection was taken by any party to my wife's counsel's intervention".

This statement seems to us to betray a complete lack of understanding on the part of the Chief Justice of the perception which would inevitably be created if he were to be the provider of such protection.

5.93 In treating Mrs Schofield as an interested party in a prospective application that he recuse himself based upon the correspondence which had passed between her and the Bar Council and which had culminated in the issue of her libel action, the Chief Justice was, to put it no higher, giving a degree of judicial credence to Mr Gomez's submission that the purpose of the recusal application was to stifle the libel action (see in particular the Chief Justice's answer "Oh absolutely" in the exchanges set out in paragraph 5.89 above). This he should not have done. Rather, he should have recognised that the continuing involvement of Mrs Schofield in the recusal application was yet another reason for his recusal, and his failure to recuse himself can only have inflicted further damage on his office as Chief Justice. Fortunately, however, since in the event the recusal application was not pursued no further harm was done in that respect.

The recusal application in May

5.94 On 22 May the Chief Justice heard an application for the claimant company in *Gibraltar Commercial Property Co v. Attorney General (suing on behalf of Selina Ltd)* that he should recuse himself from hearing the trial in that case. Mr Stephen Catania acted for the claimant company, which was wholly owned by the Government. Mr Dumas acted for Selina Ltd. On the afternoon of the previous day Mr Catania had telephoned the Supreme Court to ask if counsel could see the Chief Justice in chambers to explain, as a matter of courtesy, that their respective clients had instructed them to make an application that he recuse himself from hearing the trial of the action. This request was referred to the Chief Justice, who wished to know the reason for it. In response Mr Catania supplied skeleton submissions.

5.95 In these submissions Mr Catania maintained that the surrounding circumstances were such as to give rise to an objective appearance of bias on the part of the Chief Justice against his clients. The circumstances to which he referred were the various public statements made by Mrs Schofield and the public comment to which they had given rise, from which the Chief Justice had chosen not to dissociate himself. Mr Catania referred in particular to the articles in *Vox* on 2 March (see paragraph 5.20) and 13 April (see paragraph 5.40), and to the article in the *Gibraltar Chronicle* on 26 April (see paragraph 5.42). Applying the test of bias formulated by Lord Bingham of Cornhill in *Magill v. Porter* [2001] UKHL 67 at 103, Mr Catania submitted that in the circumstances a fair-minded and informed observer would conclude that there was animosity on the part of the Chief Justice towards the Government, which the Chief Justice perceived as attempting to deprive him of his livelihood, and hence a real possibility of bias on the part of the Chief Justice against the Government and companies associated with it: i.e. against his clients.

5.96 At the hearing Mr Catania, on behalf of the claimant company and the Government, informed the Chief Justice that his clients had instructed him to request the Chief Justice to recuse himself from hearing the case, on the basis of "certain public statements by your wife which Your Lordship had not dissociated yourself from" and which "give the appearance of bias". He pointed out that, in contrast to the previous recusal application, this was an application by a client. Mr Dumas adopted a neutral stance.

5.97 The Chief Justice observed:

> "If you followed the previous recusal applications, you will have known that I was seeking the assistance of an *amicus*. That situation cannot have changed on this application…And secondly you will, if you were following the previous aborted recusal proceedings, have realised there was an interested party…That means, does it not, that I will have to put this matter out for the *amicus* to be briefed again, and I think it would be proper, would it not, for you to consider notifying the interested party. Not only that, you had not put in an application notice until very late yesterday, and that was because I sought one. I have not seen attached to that application notice any affidavit or statement from your client".

In these circumstances the Chief Justice decided that the application should be adjourned, and that in the meantime he should not proceed with the trial. Before doing so, he insisted, contrary to the submission of Mr Catania, that there was an interested party, namely his wife. He said:

> "I think at least the interested party who came into the last recusal application may have a view on that, and may wish to come in…It may well be that the interested party in the other application has a different view and they have a right to be heard…if they wish to come into the proceedings".

Mr Catania submitted that it would be improper if his wife were to be represented. He referred to the Guide to Judicial Conduct of England and Wales, paragraph 7.2.1 as a further ground for the Chief Justice recusing himself. The Chief Justice observed that the only person who could deal with the recusal application was the judge who was seized of the case.

5.98 We see force in the point made by Mr Catania, in the course of his cross-examination by counsel for the Chief Justice, that there was no need for an *amicus* to assist the court in relation to the *Selina* recusal application. As Mr Catania put it:

> "The Chief Justice tries cases which have very grievous consequences for a lot of people and he does that without an *amicus*. He hears the parties and he makes decisions. He is a professional judge of many, many years' experience. I would have addressed him as to the law and he could have made up his own mind: simple as that."

5.99 In examination-in-chief, the Chief Justice accepted that the *Selina* recusal application was not his "finest hour in court". Indeed it was not. As he now appreciates, there was no conceivable ground upon which Mrs Schofield could sensibly have been treated as an interested party in the *Selina* recusal application. His failure to appreciate this is yet another example of his inability to comprehend the constraints and responsibilities of his office, in particular where Mrs Schofield is concerned.

5.100 Thereafter the Government intimated an intention to make a recusal application in the case of *Baldechino v. Attorney General* on the same

evidence as in the *Selina* case. In connection with these applications the Chief Justice issued a statement of facts. We note that in this statement, unlike his statement in his proceedings for judicial review (see paragraph 6.19 et seq), the only reference he made to any attempt on the part of the Chief Minister to have him removed from office was to his alleged representations in 1998 - 1999.

5.101 On 7 September Mr Dingemans provided a skeleton argument as amicus curiae in the recusal applications in the *Selina* and *Baldechino* cases. He stressed that it was for the court to determine the applications in the light of all the relevant evidence. He drew a distinction between an appearance of bias against the Chief Minister and an appearance of bias against the Government, in that whilst a fair-minded and informed observer would be likely to conclude that, in any case in which the Chief Minister was to be a witness there would be an appearance of bias if the Chief Justice were to act as the judge, it did not follow that there would be an appearance of bias on the part of the Chief Justice in cases involving the Government of Gibraltar in which the Chief Minister did not appear as a witness and in which no policy decision of the Chief Minister was in issue. The answer to the recusal applications, he argued, depended on factual material relating to the involvement of the Chief Minister in the two actions.

5.102 The substantive hearing of this recusal application was fixed to be heard in September 2007, with Mr Dingemans briefed to appear as amicus. In the event it did not proceed since it was overtaken by the suspension of the Chief Justice.

CHAPTER 6

AUGUST – DECEMBER 2007

This chapter is concerned with:

- the cancellation of the ceremony for the Opening of the Legal Year 2007-2008 (paragraphs 6.1 – 6.8)
- Mrs Schofield's complaint against Freddie Vasquez QC (paragraphs 6.9 – 6.14)
- the Chief Justice's application for judicial review (paragraphs 6.15 – 6. 16)
- comparison with orders sought by Mrs Schofield in her libel action (paragraphs 6.17 – 6.18)
- the Chief Justice's statement in support of the application (paragraphs 6.19 – 6.36).

The dates in this chapter of the Report refer to 2007 unless otherwise stated.

The cancellation of the Opening of the legal year 2007-2008

6.1 On 11 July Mr Mendez, then Acting Registrar, circulated the following curt message to all chambers in Gibraltar:

> "I am directed to inform you that the Chief Justice will no longer be holding a Ceremonial Opening of the Legal Year, this with immediate effect."

This was immediately reported in the press. In the *Gibraltar Chronicle* there was an article headed "Gloom on legal profession as Schofield calls off legal year ceremony". In his witness statement the Attorney General said that the Chief Justice's decision was deeply resented by the Bar, and that the reason for it never became clear. Mr Catania's evidence was that in taking this decision the Chief Justice was "chastising the Bar for confronting him".

6.2 However, two days later the Government issued a press release which stated that, whilst the ceremony was a matter for the courts and the legal

profession, it was also an established part of Gibraltar's history and heritage. It announced that the ceremony would be conducted by Sir Murray Stuart-Smith, in his capacity as President of the Courts of Gibraltar, and would take place on 24 September. In an article which appeared on the same day in the *Gibraltar Chronicle* the Chief Justice was reported as saying that he had "undertaken to give a full explanation of why he has called off the ceremonial opening of the legal year". The ceremony took place on 24 September, conducted by Sir Murray Stuart-Smith.

6.3 In his witness statement Mr Mendez stated that at the time the Chief Justice explained his decision by saying that as he was no longer the head of the judiciary it would not be right for him to preside at the ceremony. He also recalled that the Chief Justice asked him for how many years the ceremony had been held, and that when he replied that it had been held for about 60 years the Chief Justice commented that that was not a very long time. In the circumstances, it is hardly surprising that Mr Mendez understood, as he did, that the Chief Justice was intending to discontinue the ceremony not only for the year 2007 but indefinitely. As Mr Mendez put it in cross-examination:

> "I don't think he said "this year". [Had he done so] I would have understood it and I would have written that circular in very different terms. As I say, the fact that he was saying: I am not the head of the judiciary, I cannot do it; it was implicit in that that he would never be able to do it, as long as the Judicial Service Act is in place".

6.4 The Chief Justice explained his decision in his third witness statement as follows:

> "The opening of the Legal Year is a Supreme Court function…Under the Constitution the President of the Court is not entitled to sit in the Supreme Court and the [Judicial Service Act] had no effect on this position. We now had a Head of the Judiciary who could not preside over the Opening of the Supreme Court Legal Year. I was observing the situation and was still contemplating whether I should issue judicial review against what I considered to be unconstitutional provisions. I was

> concerned about the effect that the Opening of the Legal Year ceremony could have on the jurisdiction in the light of events which had occurred during the course of 2007. I was concerned that the event could be used to undermine the office of Chief Justice and I had in mind the boycott of the ceremony by senior members of the Bar in 2000. There was a danger that addresses would be made which would undermine public confidence in the judiciary."

He went on to say:

> "I therefore came to the conclusion that it would be best to cancel the ceremony for that year and instructed Clive Mendez to circulate the members of the Bar accordingly. To my dismay, he circulated as if it was a decision for all time. Once there was public criticism I felt that a correction of the error would only fuel the situation and in any event I did not want to embarrass Mr Mendez. In truth I should have checked the circular before it went out and take responsibility for the mistake."

6.5 In his fifth witness statement he accepted that he had not discussed the matter in advance with other members of the judiciary. He accepted that he would be open to criticism for not attempting to contact the President of the Courts. He also accepted that he did not handle the situation in relation to the Opening of the Legal Year as well as he should have done. As he put it in examination-in-chief, this episode was "not [his] finest administrative action". In cross-examination the Chief Justice said that, in the light of the announcement that Sir Murray Stuart-Smith would conduct the ceremony, he felt that any statement from him at that stage would have been "totally inappropriate".

6.6 It should be noted that although the Chief Justice referred a number of times in the course of his evidence to his no longer being "Head of the Judiciary", no office bearing that title existed in any formal sense prior to the enactment of the Judicial Service Act, nor was such an office created by that Act.

6.7 We accept Mr Mendez's recollection of this episode as accurate. We find that the Chief Justice gave Mr Mendez the clear impression that his intention was that the practice of holding a ceremony to mark the opening of the legal year should be discontinued until such time as the office of President of the Courts of Gibraltar should be held by the Chief Justice; that is to say, for so long as section 6 of the Judicial Service Act remained in force unamended. We do not accept the Chief Justice's evidence that his intention at the time was that the ceremony to mark the Opening of the Legal Year should be suspended for the year 2007 only. Such an intention would have been inconsistent with the rationale which he gave for his decision, namely that by virtue of section 6 of the Act the President of the Court of Appeal, and not the Chief Justice, held the office of President of the Courts of Gibraltar. We find that the Chief Justice's intention was that the ceremony should be discontinued for so long as that situation continued; and that, far from being "dismayed" when it became apparent that that was how his decision was perceived by the Government, the Bar and the public, he was content that that should be so. It is our clear impression that it was for that reason, and not by reason of any embarrassment that might be caused to Mr Mendez or by reason of the fact that the ceremony would be conducted by Sir Murray Stuart-Smith, that the Chief Justice did not issue any corrective statement. As for his expressed concern that the ceremony might be the occasion for addresses "undermining public confidence in the judiciary", his real concern was that he should not afford those whom he perceived as hostile to him an opportunity to criticise his conduct or to challenge his views.

6.8 This episode illustrates the extent to which the Chief Justice's motives and actions were governed and directed by his perception that the enactment of section 6 was (in Mrs Schofield's words) an attempt by the Chief Minister to hound him out of office; or, as he put it in his statement in the judicial review proceedings (which he signed about a month later) "to diminish my powers as Chief Justice because I would not leave". His decision to cancel the ceremonial Opening of the Legal Year was yet another deliberately provocative act which only served to exacerbate existing tensions.

Mrs Schofield's complaint against Freddie VasquezQC

6.9 On 21 August Mrs Schofield made written complaints against Freddie Vasquez QC to the Registrar of the Supreme Court. The complaints were: first, that he was in breach of the Code of Conduct for Barristers "by making public submissions through the press on issues which are the subject of proceedings before the court in a matter where he represents Mr Neish", ie her libel action; and, secondly, that he had misled the public and sought to undermine the Chief Justice in the eyes of the public.

6.10 This arose out of a letter from Mr Vasquez which was published in the *Gibraltar Chronicle* of 14 August. The letter responded to a letter from Mr Gomez in the same newspaper, in which he had asserted that the Judicial Service Act, and specifically the designation of the President of the Court of Appeal for Gibraltar as head of the Gibraltar judiciary, amounted to an unconstitutional interference with the independence of the judiciary. Mr Vasquez stated in his letter that by convention, and not by any specific constitutional provision, the Chief Justice had traditionally acted as the head of the judiciary in Gibraltar, in a position comparable to that of the Lord Chief Justice in England. However, while the Lord Chief Justice was the senior and most eminent judge in England and Wales, the Chief Justice in Gibraltar was the equivalent only of a High Court judge in England. He went on to point out that in fact the present Chief Justice also regularly heard cases in England as a Recorder, a post more junior than a High Court judge. Modernising changes, he said, had been made in the new Constitution and by the Judicial Service Act. He drew attention to the fact that the President of the Gibraltar Court of Appeal, like his brother judges, was a recent member of the Court of Appeal in England and as such would always be a far more experienced and eminent judge than any Chief Justice of Gibraltar. He pointed out that Mr Gomez did not explain how the alteration of the hierarchy of Gibraltar's independent judiciary impeded or interfered with the ability of any judge in Gibraltar to judge any case, let alone how the Act could possibly amount to an unconstitutional interference with the independence of the judiciary which he so readily asserted.

6.11 The complaints were referred to the Admissions and Disciplinary Committee. After protracted delay the complaints were heard on 3 April 2008 in the absence of Mrs Schofield who had complained that the members of the Committee, including the Attorney General and the Speaker of the Parliament, were biased against her. The Committee dismissed both complaints on 15 April. In their written decision they observed that they had some concerns as to whether the complaints had been made in good faith. They found it difficult to see what possible harm the complainant could have felt herself to have suffered as a result of Mr Vasquez's letter. They also were surprised that the complainant should have thought fit to complain that Mr Vasquez had contributed to correspondence which her own lawyer had commenced and continued.

6.12 In her second witness statement Mrs Schofield said the decision to make a complaint against Mr Vasquez was hers and was in good faith. She claimed that the Attorney General, who chaired the Committee, had a conflict of interest. He had been "mentioned in the applications before the court".

6.13 In his third witness statement the Chief Justice accepted that he might have seen the complaints during the drafting process. Mr Vasquez went further and maintained that the Chief Justice had tacitly endorsed the complaint in regard to his office in that he had said it was well made.

6.14 We note that in his second witness statement the Chief Justice stated that he took independent exception to Mr Vasquez's letter as it publicly sought to undermine the status of the office of the Chief Justice. This seems to us to be an over-reaction to the letter, and yet another example of a tendency on the part of the Chief Justice to overreact to what he perceived, but no objective observer would have perceived, as slights against the dignity and status of his office.

The Chief Justice's proceedings for judicial review

The application

6.15 On 30 August 2007, the Chief Justice filed an application for judicial review as Chief Justice in the Supreme Court of Gibraltar. He sought declarations that sections 6 and 37(3) of the Judicial Service Act were ultra vires the Constitution and therefore null and void. According to the grounds attached to the claim form section 6 "amounts to an unconstitutional re-definition and demotion of the office of Chief Justice, inconsistent with proper judicial independence". Advance publicity for these proceedings was given by an article in *Gibraltar Chronicle* of 24 August, entitled "Chief Justice Schofield set to challenge Gibraltar Parliament with local law suit", and incorporating a statement by the Chief Justice. An article to similar effect was carried in *Panorama* of the same date. *Vox* of that date had the headline "Bombshell as Chief Justice challenges Caruana". Two days later he submitted his response to the Signatories' memoranda. On 13 December he withdrew his application for judicial review after a hearing at which the court refused his application for adjournment until the conclusion of the proceedings before this Tribunal. In explanation of his decision to withdraw the Chief Justice said that he could not have coped with both proceedings at the same time, and that he could not have pursued an action as Chief Justice while he was suspended.

6.16 In evidence the Chief Justice said: "I was extremely reluctant. In fact, at one stage I had firmly decided that I was not going to take proceedings within my own court". He had sat on the opinion of Rabinder Singh QC (see paragraph 5.10), who had advised him that he could not seek judicial review until the Act came into force (which it did on 5 July). His immediate reaction had been that the Act was unconstitutional. He had waited to see how, "in the light of events", the Act was working in practice. After a month or so he had realised that section 6 was "a sham", and that its sole purpose must have been to remove him as head of the judiciary. It was, he said, unworkable. The President had no office in Gibraltar or in England. His telephone was often on answer-phone and

his only e-mail connection was through his daughter. There had been no indications about discussions as to the division of responsibilities. The practical aspect had not been thought through. Being head of the judiciary meant directing the way the courts operated, responding to complaints, deciding whether the Woolf reforms were to be adopted and so forth. On any major decision in relation to the courts of Gibraltar he, the Chief Justice, would have to have recourse to someone who was outside the jurisdiction, and was not as familiar with the jurisdiction as he was. Neither the President of the Court of Appeal nor the Minister for Justice had communicated with him. He expected the President to contact him to discuss how the Act would work. He had decided that he owed it to the Gibraltar jurisdiction to take these proceedings: he was primarily concerned with the administration of justice. He consulted Geoffrey Robertson QC and Kirsty Brimelow to whom he passed Mr Singh's advice. He instructed David Hughes (mentioned at paragraph 4.8 *et seq*). He realised that he would have to take action within a fairly short timeframe. However, the only specific event which occurred before he raised proceedings arose out of his decision, announced on 11 July, to cancel the Opening of the Legal Year, which (as we have noted in para 6.5) he accepted was "not (his) finest administrative action".

Comparison with orders sought by Mrs Schofield in her libel action

6.17 A striking feature of the application by the Chief Justice was the strong similarity between it and the orders for which Mrs Schofield applied in her libel action on 17 July, which had attracted publicity. The *Gibraltar Chronicle* of 21 August carried an article entitled "Chief Justice's wife mounts legal challenge to Judicial Service Act".

6.18 In each case the claimant sought a declaration that sections 6 and section 37(3) were ultra vires the Constitution and therefore null and void. In each case it was claimed that the Act undermined, diminished, or was inconsistent with, judicial independence; demoted the office of the Chief Justice, which had been set up in 1877; and questioned the independence of the JSC. Each referred to an assurance given to the Chief Justice at the meeting in the FCO in November 2006 that there was no intention to

reduce his office. The Chief Justice said in evidence that he had no foreknowledge of his wife's action. He had done nothing to approve it. He accepted that there were similarities between the orders sought, but denied that there had been any collusion, claiming that the similarities were because the issues were the same and he and his wife, both lawyers, were likely to articulate matters in the same way. He also accepted that some exhibits were common to both actions, but this was, he said, because there was a "family file" which contained copies of formal documents. According to his second witness statement his wife had had no hand in the filing or drafting of his application for judicial review. This was, in our view, misleading. Papers disclosed by his solicitors included an e-mail from his wife to them dated 18 August in which she expressed her views on some legal questions with which his action was concerned. He commented in cross-examination: "I can imagine that she would find it very hard to resist putting her finger in the pie, but it was not to be encouraged".

The Chief Justice's statement in support of the application

6.19 In support of his application for judicial review his solicitor filed a statement by the Chief Justice, in which he made a number of remarkable and disturbing claims. One of the headings of the statement was entitled "Personal attempts to remove me from office". Under this heading there appeared the following:

> "14 In the course of late in 1998 and early 1999 I was called to a number of meetings with the then Governor Sir Richard Luce. Sir Richard asked me to consider my position as Chief Justice, and ultimately suggested that I accept a six month warrant of appointment. When I pressed him as to the reason for his suggestions he told me that the Chief Minister had made representations that my "contract" be not renewed. I made it clear to the Governor that I had security of tenure under the Constitution and would stay in post as per the Constitution.
>
> 15 1n 1999, at the ceremonial opening of the legal year, I spoke publicly of instances in which the delay or denial of funds by the

Government had had the potential adversely to affect the administration of justice….

16 I referred to two particular incidents. Firstly, I had sought funding to attend a Judicial Studies Board seminar on the Woolf reforms, which were to be introduced into Gibraltar. Gibraltar has no equivalent of the Judicial Studies Board. Funding for this was refused by the Government, although the UK government eventually provided funding.

17 Secondly, I had initiated discussions with the Government to institute a system of part - time acting Stipendiary Magistrates, similar to recorders or deputy district judges in England & Wales. The benefit of this would have been twofold. It would have assisted in reducing backlog in the magistrates' court. It would also have provided a pool of local practitioners with judicial experience, which would have been valuable when making future judicial appointments. The Government were willing to agree to this, provided that they had some say in who was appointed. I considered this to be unacceptable.

18 In February 2002, whilst I was sitting in a criminal trial, I was presented by the Governor with a warrant purporting to appoint me Chief Justice for 1 year. I asked counsel in the criminal trial to consider the position. My view was that, if the warrant did limit my appointment to 1 year, I would not be an independent tribunal as required by the 1969 Constitution then in force.

19 Counsel for two of the defendants (who is also one of my counsel in this matter) made representations that, pursuant to the 1969 Constitution, a Chief Justice appointed held office until the age of 67, or until removed by the constitutionally established procedure. Counsel for the other defendants (a member of the same firm) adopted these representations. Counsel for the prosecution (a member of the Attorney General's chambers) did not address the court in any meaningful way.

20 I received no explanation from the Governor as to the powers he considered he had to circumvent my tenure of office.

21 I had expressly asked the Attorney General to attend the Court and address me on the warrant. He did not do so, nor did he provide any explanation for why he did not do so.

22 On 04.09.2002, Sir Desmond de Silva QC wrote to me, to record that he had received an approach from the Attorney General, indicating that I would be assisted in finding judicial employment elsewhere if I were to leave Gibraltar….

23 I considered and consider that I would be untrue to my oath if I were to accept such an inducement or bow to such pressure."

6.20 Next, under the heading "Legislative attempts to remove me from office/diminish the office of Chief Justice", he stated:

"24 The pressure to leave office moved into legislative format. When the draft of the 2006 Constitution was published I attempted to raise objections in relation to the judiciary provisions. I sought to convey these concerns privately, but found an unwillingness to address their substance. I obtained an opinion from three distinguished jurists, Sir Sydney Kentridge QC, Keir Starmer QC and Richard Tur, Benn Fellow, Oriel College Oxford, who opined that the (then draft) Constitution was defective in certain respects ….

25 Although comment was made to the media about these aspects of the draft Constitution, at no point was their substance addressed.

26 I spoke publicly of these issues in my address at the opening of the Legal Year in October 2006.

27 In November 2006, I attended a meeting at the Foreign and Commonwealth Office, with Sir Sydney Kentridge QC and Richard Tur, at which my concerns regarding the Constitution were discussed. Although this did not result in any amendment to the text of the Constitution, an addition was made to the explanatory note to the Constitution.

28 At the said meeting, one of the concerns expressed by the jurists was the apparent diminution of the office of Chief Justice, by appointing the President of the Court of Appeal Chairman of the

JSC. I was assured that this was in no way intended to diminish the office of Chief Justice, who was still the most senior judge in Gibraltar.

29 On the 20th of February 2007, three days before I was due to go on a scheduled vacation to Argentina with my daughter, I received a consultation paper in relation to the JSA bill. My holiday date was well-known to the Chief Minister.

30 However, I did respond to the draft, albeit briefly because of the timing of the consultation, and more fully upon my return…

31 Further, the General Council of the Bar in Gibraltar made representations that certain provisions of the JSA may be inconsistent with the Constitution ….

32 The executive appeared determined to press ahead with the Bill. I believe that this determination was bourn (sic) out of a desire to diminish my powers as Chief Justice because I would not leave. Further, downgrading the office of Chief Justice ensures that future Chief Justices will retain independence but little power to use it should the necessity arise."

6.21 At paragraph 41 of his statement the Chief Justice, referring to the membership of the JSC, alleged: "The Attorney General has, at the very least, allowed himself to be the conduit for improper inducements to be made to myself". The basis for this claim appeared to be the conversation between the Attorney General and Sir Desmond de Silva in August 2000. For the reasons given in paragraph 3.57 we preferred the evidence of the Attorney General as to this conversation. The same applied to the conversation between him and Mr Picardo.

6.22 In evidence the Chief Justice said that he had signed the statement after taking legal advice and in good faith. He considered that there was an evidential basis for everything he had stated. He confirmed that it was his belief that he had been the victim of a series of personal and legislative attempts to remove him from office. In his fifth witness statement he maintained that section 6 was "a legislative device to demote me and that the guiding force was the Chief Minister, who had recently appointed

himself Minister for Justice"; he had a duty to discuss with the Chief Justice the proposed amendments prior to the publication of the consultation paper but had failed to do so and had displayed hostility in defence of the Act. The Chief Justice also believed that the Attorney General was knowingly involved in an improper attempt to remove him from office.

6.23 Mr Hughes said that these claims were included in order to show that the Chief Justice's concerns were not theoretical, and that there had been moves that were consistent with an insufficient respect for judicial independence. The Chief Justice said that he had been reluctant to include these claims, because he knew that this would be criticised, and initially he had not been persuaded that they were necessary for a constitutional challenge. He said that there had been a series of telephone calls, ending with his accepting the advice of Ms Brimelow that "we ought to tell it like it is". We do not accept the evidence of the Chief Justice. It is plain, and we find, that he was far from reluctant to include these claims. An e-mail of 17 August (from the e-mail address which the Chief Justice shared with his wife), showed that the Chief Justice had sent to Mr Hughes an "original draft" containing a series of allegations to the same effect as those in his statement in the judicial review proceedings. The Chief Justice accepted that he must have prepared this draft. An attendance note made two days before the issue of proceedings recorded that the Chief Justice "wanted … the whole story to be told".

6.24 In addition to these claims counsel for the Chief Justice put to the Chief Minister in his cross-examination "the various matters which the Chief Justice says supports his reasonable suspicion that he is being or has been encouraged" to leave office. The first was "whether you in the run-up to the renewal of the contract in February 1999 made representations to Lord Luce that you didn't want him to continue as Chief Justice?" The second was "the simple denial of funding in 1999 when it's just simply said... you can't have funding to go, it is not appropriate and not relevant to [Gibraltar]?". The third was the Government press release of 9 October 2000 in connection with the maids issue. The fourth was "the 2002 one

year appointment". The fifth was "the failure to consult with the Chief Justice over the 2006 Constitution, that is to say to get back to him". The sixth was "the Judicial Service Act designed to reduce his status and his role in the judicial system in Gibraltar".

6.25 Were these allegations well founded and justified?

6.26 In regard to the alleged remarks of Sir Richard Luce in 1998 or 1999 we preferred his evidence and that of the Chief Secretary and the Chief Minister to that of the Chief Justice (see paragraph 4.6).

6.27 As to the second matter, we concluded in paragraphs 2.17 and 2.18 that the Chief Justice's references to funding at the Opening of the Legal Year in October 1999 were seriously inaccurate and misleading, and that there was no basis for the suggestion that a delay of denial of funds by the Government had had the potential to adversely affect the administration of justice. In these circumstances paragraphs 15-17 of the Chief Justice's statement were grossly misleading.

6.28 As to the third matter, despite the fact that counsel for the Chief Justice founded on the press release of 9 October 2000 in his cross-examination of the Chief Minister, it is evident that, by the time he came to be cross-examined, the Chief Justice had had second thoughts on the matter. As we noted in paragraph 3.19, he did not dispute that the Government had been acting in good faith.

6.29 As to the fourth matter, as we remarked in paragraph 4.21, we do not know why the Governor chose to give the Chief Justice a warrant for one year in February 2002. However, the Governor told him that the practice of issuing time limited warrants could not affect his security of tenure under the Constitution. We stated in paragraph 4.25 that the hearing in chambers was contrived to enable him to give vent to his outrage at the Governor's action. We should add that we see no connection between the action of the Governor and the Government.

6.30 As regards the 2006 Constitution, we note that the Chief Justice's position was expressed in more than one form. In his statement in the judicial

review proceedings (paragraph 6.20) he complained about a failure to address his objections to the text which was published in July 2006. As we noted in paragraph 6.24, the point which was put on his behalf in cross-examination of the Chief Minister was his failure to get back to the Chief Justice after his letter of 9 January 2006 (see paragraph 4.47). However, in cross-examination the Chief Justice accepted that the 2006 Constitution did not represent a legislative attempt to remove him from office. The claim by the Chief Justice in paragraph 25 of his statement that at no point was the substance of his objections addressed was untrue. The Chief Justice claimed in his oral evidence that his written statement in his proceedings for judicial review had been drafted very quickly. He had been about to go to the Commonwealth Law Conference in Nairobi. He remembered discussing his statement with his counsel who said it might have to be amended later. He took as much care as he could, adding that it "may have been more happily phrased".

6.31 Even making allowance for the fact, as he saw it, that there was a need to take proceedings without delay, we find it extraordinary that the Chief Justice chose to include among a set of very serious and controversial allegations a complaint in regard to the 2006 Constitution from which he so readily retreated in cross-examination. It is unclear what points, if any, were not covered by this concession. However, we are certain, in the light of our observations in paragraphs 4.52 – 4.57 and 4.61 – 4.62, that, far from the Chief Minister or the Government seeking to remove him or encourage him to leave, it was the Chief Justice who behaved improperly and inappropriately.

6.32 Whatever may have been the merits of the arguments against section 6 in the context of Gibraltar, the Chief Justice's claim that the section was enacted at the behest of the Government as a means of removing him from office, or, in the less ambitious language used by his counsel, for the purpose of encouraging him to leave, does not bear examination.

6.33 In his evidence the Chief Minister flatly denied there had been any long-standing intention or attempt to remove the Chief Justice or encourage him to leave. He said that, while the Government had been very unhappy

with some of the conduct of the Chief Justice over the years, it had exercised considerable restraint. He also pointed to a series of decisions over the years when the Government had acceded to requests by the Chief Justice, for example to increase his salary, to waive rent on his official residence and to pay a proportion of his terminal gratuity in advance, all of which were inconsistent with the alleged intention or attempt. What the Chief Minister described as "the beginning of the terminal process" was, he said, probably Mrs Schofield's statements about the Chief Justice being hounded out of office, when the boundary of what society and the Government ought to be expected to tolerate was beginning to be crossed. That process was concluded by the Chief Justice's witness statement in his proceedings for judicial review when he openly accused the Government of using executive and legislative means to remove him from office. "At that point", said the Chief Minister, "I think the Government decided that this is it. One of us has to go". He went on to say that the system of government in Gibraltar, and in the United Kingdom, was not built to withstand this degree of antagonism in the public domain. However, it had not been the position of the Government that it would seek to bring about the removal of the Chief Justice – until, that is, the Governor decided to convene the Tribunal and suspend the Chief Justice. Over the years there had been long periods of complete normality of relations. That was why, the Chief Minister said, he could not understand the idea that going back to 1998 there had been some sort of machination for his removal, trying to create the impression that the Government was "a sort of serial attempted remover".

6.34 The claim that the Government had been seeking the removal of the Chief Justice since 1998 or 1999 is, in our view, without foundation. We should add that we would have reached the same conclusion even without regard to the evidence of the Chief Minister.

6.35 Once again we draw attention to the effect of the conduct of the Chief Justice. It is plain that these allegations were also bound to cause public controversy, and to have a profound effect on the well-being of the relationship between the Chief Justice and the Government, the Chief

Minister and the Attorney General. The Chief Justice accepted that he would have "problems" in hearing cases in which the Chief Minister was personally involved. The same we find would be likely to apply in the case of the Attorney General in view of the Chief Justice's remarks about him.

6.36 There is another aspect. On his own evidence the Chief Justice never gave thought to whether, in taking the stance which he had done, he might be seen as aligning himself with the Opposition which had opposed the passage of the Act and had pledged to repeal it. According to his evidence he was disinterested, concerned only for the constitution and the administration of justice. However, the Leader of the Opposition was quick to take the benefit of the challenge which the Chief Justice had mounted. On 3 September 2007 the Gibraltar Chronicle carried an article entitled "Schofield 'well placed' to question legal standing of Judicial Service Act – Bossano".

CHAPTER 7

CONCLUSIONS

This chapter contains–

- our general conclusions as to the conduct of the Chief Justice on the basis of our findings in the previous chapters (paragraphs 7.1 – 7.27)
- the grounds for the removal of a Chief Justice (paragraphs 7.28- 7.33)
- our assessment (paragraphs 7.34 – 7.42)
- our advice (paragraph 7.43).

The conduct of the Chief Justice

7.1 In the course of giving our conclusions we will have occasion to have regard to the *Bangalore Principles of Judicial Conduct* (2002) and the 2008 edition of *Guide to Judicial Conduct*, published by the Judges' Council of England and Wales, to which we were referred by Counsel to the Tribunal and counsel for the Government. We will do so, not for the purpose of deriving from them any definitive test for the application of "inability" or "misbehaviour" in terms of the Gibraltar Constitution, but in order to give us some assistance in seeing whether, and to what extent, the conduct of the Chief Justice fell below the standard expected of a judge. The standards with which we will be mostly concerned are those relating to a judge's integrity and the propriety of a judge's conduct.

7.2 As we narrated in chapter 3, the conduct of the Chief Justice in regard to the maids issue was previously considered by the Governor in 2000, with a view to the possible establishment of a Tribunal of Inquiry under the then Constitution. In evidence the Chief Justice acknowledged that he

had made grave errors in regard to the payment of PAYE and social insurance contributions in respect of Ms Danvers.

7.3 The decision of the Governor on 4 October 2000 caused considerable controversy in Gibraltar and legal practitioners in particular (paragraph 3.23). So far as concerned Ms Williams, the Governor relied on the Chief Justice's assurance that he had no outstanding liabilities. In the light of the discussion at the directions hearing on 8 April 2008 we were satisfied that we should revisit this issue (see the Second Schedule). This led to investigation of the circumstances in which Ms Williams was employed, the results of which were the subject of evidence before us. This demonstrated that the Chief Justice had been in breach of the law relating to work permits, taxation and social insurance contributions in her case. This was in addition to his having irresponsibly signed work permit forms for her in blank, which he accepted showed "reckless disregard" (paragraphs 3.5). Furthermore we found that his communications to the Governor were less than full and frank. They were positively misleading in regard to the legal advice he purported to receive and pass on (paragraphs 3.13 – 3.15). We have no doubt that the damage to the reputation of the Chief Justice which was caused by the maids issue in 2000 would have been all the greater if the full facts in regard to Ms Williams had been known.

7.4 It is also plain that when he made his fifth witness statement to this Tribunal the Chief Justice continued to take an attitude towards compliance with the law which was nothing less than cavalier, in that he asserted that he had had no obligation to make contributions in respect of Ms Williams and accused the Government of having acted in bad faith. When he gave evidence before us he conceded that he was in error in both respects (paragraph 3.19).

7.5 It hardly needs to be pointed out that integrity is essential to the proper discharge of the judicial office. A judge must maintain high standards in private as well as public life. His or her conduct has to be "above reproach in the view of a reasonable observer" (*Bangalore Principles* paragraph 3.1). "Judges have to accept that the nature of their office

exposes them to considerable scrutiny and puts constraints on their behaviour which other people may not experience... Behaviour which might be regarded as merely unfortunate if engaged in by someone who is not a judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on their behaviour of others" (*Guide to Judicial Conduct*, paragraph 4.1).

7.6 We now turn to the evidence about other matters. It soon became evident during the course of the hearing that the Chief Justice's conduct repeatedly took a number of inappropriate forms. While it is convenient for the purpose of description to set them out under separate headings, it is plain that many of them are inter-related.

7.7 First, his conduct repeatedly fell far short of what befitted the dignity of his office. This included a tendency to over-react to perceived slights. He did not, however, appear to be alive to that. We refer to the following examples:

(i) His behaviour in regard to the attendance of the Chief Minister at the Registry of the Supreme Court and Magistrates Court in December 1999 showed unwarranted hostility and petty discourtesy (paragraph 2.35).

(ii) His remark to Robert Vasquez in October 2000, in the aftermath of the maids issue, that he should not "rape the Constitution", was inconsistent with the dignity and status of his office (paragraph 3.23).

(iii) The conduct of his defence when he was prosecuted in 2001 betrayed a remarkable lack of judgment and sense of proportion and a disregard for the damage done to the administration of justice in Gibraltar (paragraph 3.52).

(iv) He behaved petulantly towards the Acting Governor and without regard to the constitutional consequences of his action because he took the view that the Acting Governor had wrongly given the

Chief Minister precedence over him on the departure of the former Governor in July 2006 (paragraph 4.37).

(v) In February 2007 he flagrantly disregarded the Chief Minister's stipulation when providing him with a draft copy of the Judicial Service Bill that he should treat the draft confidentially and for his eyes only by showing the draft to his wife and leaving it available to her with the consequence that it was leaked to the press, and he took provocative action in bypassing the Bar Council by circulating copies of the draft to members of the Bar, without reference to the Government (paragraph 5.7).

(vi) In allowing his wife and her counsel to attend on him formally in his chambers on the afternoon of 16 April 2007, and in acceding to their request for guidance in relation to a possible application for injunctive relief against the Bar Council, he acted in flagrant disregard of accepted standards of judicial behaviour; yet even before us he appeared unable to appreciate that (paragraphs 5.51 - 5.62).

(vii) He cancelled of the Opening of the Legal Year 2007 - 2008 without attempting to contact the President of the Courts of Gibraltar (paragraph 6.5 and 6.8)

(viii) In his proceedings for judicial review of provisions of the Judicial Service Act he made very serious allegations against the Government and the Chief Minister which he either abandoned or which we found to be without foundation (paragraphs 6.15 ff).

We should add that the tendency of the Chief Justice to resort to combat with the Government by press release or a letter to the press, not to mention legal proceedings or the threat of them (to which we refer below), was hardly becoming the impartial dispenser of justice.

7.8 Secondly, the confrontational manner in which the Chief Justice addressed what he claimed were threats to judicial independence, in reality the status of his office and his continuance in that office, was in our view

improper in nature and in any event inappropriate and disproportionate. As we have seen, this included his courting publicity for serious accusations, and that without having adequately discussed or checked matters with the Government. His statements were frequently inaccurate and liable to lead to public speculation, yet he showed no inclination to explain them even when aware that they had been misunderstood or distorted, let alone any understanding of their effect on the respect in which the judiciary should be held.

7.9 The Guide to Judicial Conduct states at paragraph 5.1(6), in words derived from the Bangalore Principles, that "a judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary". The Guide goes on in paragraph 8.2.2 to counsel that, in participating in public debate, a judge should take care to avoid causing the public to associate the judge with a particular organisation, group or cause. We should add that the reason for such guidance is obvious. It is essential that the judge has, and is seen to have, the detached, unbiased, unprejudiced, impartial, open-minded and even-handed approach which is the hallmark of a judge. If a judge enters the political arena and participates in public debate by expressing opinions on controversial subjects which do not directly affect the operation of the courts, the independence of the judiciary or aspects of the administration of justice, by entering into disputes with public figures or by publicly criticising the government, he or she may well be perceived as not impartial when presiding in court in cases relating to such controversies or involving such figures or the government. For that reason, it is of the utmost importance that the judge's public statements are accurate, and that they are suitably restrained, and not framed in inflammatory or tendentious terms.

7.10 These public statements by the Chief Justice, which were highly critical of the executive, betrayed a complete lack of grasp of the need for restraint. The fact that the subject matter was said by him to be the independence or

position of the judiciary or the administration of justice does not, in our view, significantly affect the position since what mattered was the manner in which, and the context in which, his interventions were made.

7.11 We refer to the following examples:

(i) The remarks which he made in his public address at the Opening of the Legal Year in October 1999 about the Government delaying or withholding funding suggested that the independent functioning of the judiciary had been at risk of improper restraint by the Government. They were inaccurate and without foundation. They were in language which was so unspecific as to create an obvious risk of speculation. The Chief Justice appeared to fail to understand the concern which his remarks had created. His claim that for him to have explained his remarks would have run the risk of misinterpretation was unconvincing. His claim that the matters to which he alluded were or might be confidential and could not be disclosed without risk of contravention of the Official Secrets Act was without substance (see paragraphs 2.17 - 2.24).

(ii) His letter to the *Gibraltar Chronicle* dated 11 November 1999 about consultation in regard to judicial appointments courted controversy with the Government and was inaccurate (see paragraphs 2.30 – 2.31).

(iii) In February 2002 after receiving only a one year warrant of appointment he readily accused the Governor of a calculated attempt to undermine him (paragraph 4.7). He made angry remarks at a contrived hearing to enable him to give vent to his outrage at the Governor's action and threatened the suspension of sittings. Although the hearing took place in chambers, the substance of his complaint was leaked to the press by a source close to him (paragraphs 4.18 – 4.25)

(iv) The remarks which he made in his public address at the Opening of the Legal Year in October 2006 on the subject of the draft Constitution followed his threat of legal proceedings against the

executive. He did not have the full backing of the local judiciary for these remarks. They were misleading and unbalanced (he claimed in evidence that he was not responsible for how the press interpreted them). They represented his opening of a public campaign with the referendum in mind. This was improper. His involvement of solicitors and other legal advisers and his threat of legal proceedings in support of that campaign were in any event unnecessary and grossly disproportionate. That campaign became part of Gibraltar politics (see paragraphs 4.53 - 4.63).

(v) His engagement of at least three teams of legal advisers in response to the Judicial Service Bill showed again an over-reaction to what he claimed was a threat to judicial independence (paragraphs 5.5, 5.10 and 6.16).

7.12 Thirdly, we refer to his hostility towards the Government and the Chief Minister in particular, against whom he made serious and unfounded accusations. The *Guide to Judicial Conduct* observes in paragraph 2.1, in connection with the subject of judicial independence, that the relationship between the judiciary and the legislative and executive arms of government "should be one of mutual respect, each recognising the proper role of the others". It is plain, particularly in the case of a Chief Justice, that along with mutual respect there needs to be a positive and constructive relationship with the executive arm. There were failures in both respects, for which the Chief Justice was directly responsible.

7.13 The Chief Justice's proceedings for judicial review of the Judicial Service Act represented a constitutional challenge by the head of the resident judiciary to the legislative and executive arms of government. In support of his application he not only questioned the power of the legislature to enact certain provisions of the Judicial Service Act, but also alleged that the Government had had for a long time attempted to have him removed from office. In the course of the hearing before us these allegations were either departed from or shown to our satisfaction to be unfounded (paragraphs 6.26 – 6.34). As we observed in paragraph 6.35, these allegations were bound to cause public controversy, and to have a

profound effect on the well-being of the relationship between the Chief Justice and the Government, the Chief Minister and the Attorney General.

7.14 They would moreover affect the ability of the Chief Justice to discharge the functions of his office. In evidence the Chief Justice accepted that he would have "problems" in presiding over any case in which the Chief Minister was involved personally, either as a witness or because a policy of Government with which he was concerned was in issue (paragraph 6.35). According to the evidence of Mr Mendez, the Government is involved in only about 10% of civil cases, and less than 10 judicial review cases were heard each year. However, we do not think it correct to confine attention to Government cases with which the Chief Minister is directly connected. Mr Catania gave evidence that any attempt to draw a clear distinction between them and Government cases which were unconnected to the Chief Minister might be problematic in a jurisdiction as small as Gibraltar. "In Gibraltar", he said, "people see Government involvement in everything that happens, and obviously with the Government comes the head of Government". In any event it is clear that cases involving the Chief Minister would be expected to be among the most important in their impact on the public. In addition one should not underestimate the potential effect of the Chief Justice's allegations on his reputation for impartiality in cases at large.

7.15 Counsel for the Tribunal also pointed to further implications which could arise from these allegations. He submitted that it was difficult to see how the concession which the Chief Justice had made in respect of the Chief Minister would not also extend to cases involving the Attorney General, in the light of the Chief Justice's evidence that the Attorney General had been knowingly involved in improper attempts to remove him from office. Further, Counsel to the Tribunal argued, there was a risk that any interventions which the Chief Justice made in regard to the administration of justice, such as making representations in accordance with section 5 of the Judicial Service Act, could be undermined by the perception of the fair-minded observer that the Chief Justice might be motivated by animosity towards the Chief Minister, rather than by a desire to address

matters of substantial concern. In his evidence the Chief Justice accepted that in "certain situations" this might "perhaps" be the case. That was a considerable understatement. We accept these submissions. We would add that the Chief Justice's known antipathy towards certain members of the Bar Council, in particular Mr Neish, would be likely to affect the ability of the Chief Justice to be seen to do justice in individual cases.

7.16 We now turn to the question of whether the Chief Justice supported, or was associated with, the statements and actions of Mrs Schofield.

7.17 Before coming to the events in 2007 relating to the draft Judicial Service Bill, we should point out that all along she made no secret of her determination to fight what she claimed were attempts to remove him from office. As for the Chief Justice, we are in no doubt that he was content that this should be known, even when he knew that there was no foundation for the claim.

7.18 He was aware in 2000 that she had said that if the Chief Minister fought him in the gutter she would meet him in the gutter. The Attorney General gave evidence, which we accepted, that the Chief Justice had remarked to him that he could not be involved in a public controversy but she would get into the gutter and fight (paragraph 3.22).

7.19 The Chief Justice was aware, in connection with alleged phone tapping, that she had given a press interview in which she had claimed that "they are trying to hound him out of office", and that it was also reported in the press that he believed that he was under surveillance because of a clash with the Chief Minister over claims of political interference in the judiciary's independence. He said in evidence that he had not considered making a public statement to contradict either statement. As we observed in paragraph 3.36, his unwillingness to correct what had been attributed to him and to dissociate himself from her comments was not satisfactorily explained by him. In paragraph 2.31 we drew attention to the completely different approach of the Chief Justice when concerned about a Government statement with which he disagreed but which he was anxious not to be perceived to approve by staying silent.

7.20 He was aware that, at the invitation of his wife, observers from the IBA and the ICJ were present at his trial in 2001, apparently briefed by her that the prosecution was politically motivated, a claim which formed no part of his defence and was in any event without substance. Yet he was quite content with the attendance of these observers (see paragraph 3.52).

7.21 As we stated in paragraph 4.26, the perception given publicly in February 2002 was of concerted action by the Chief Justice and his wife in response to the action of the Governor in presenting him with a one year warrant of appointment.

7.22 It is thus clear that, before the issuing of the draft Judicial Service Bill in February 2007, Mrs Schofield was well known for campaigning against what she claimed were attempts to have the Chief Justice removed from office. On certain occasions she and the Chief Justice gave the impression that their actions were co-ordinated. However that may be – and we return to that aspect below – we have no doubt that in the absence of his distancing himself from her statements, a fair minded and well informed observer would have considered that she had spoken with his approval.

7.23 As regards the draft Judicial Service Bill, we have found that the Chief Justice expected that his wife would "go public"; that he was content that she should do so and supported her in that respect (paragraph 5.17). He was aware that she intended to pursue the matter of her correspondence with the Bar Council as vigorously as possible (paragraph 5.22). While he accepted that it would have been improper for him to have sent the e-mails which she sent to the Bar Council, he was reckless as to the effect which they had on his position, in the absence of any attempt to distance him from them (paragraph 5.29). There was, in our view, abundant evidence that the Chief Justice would have been perceived as supporting, or at any rate approving, her statements, hence improperly associating himself with her communications with the Bar Council.

7.24 The events that followed provided confirmation for that perception. Showing reckless disregard for the requirements and reputation of his office the Chief Justice allowed his wife and her solicitor to attend on him

formally in connection with her libel action and then offered guidance for the protection of her position (paragraph 5.74). He thereafter treated his wife as an interested party in regard to an application for him to recuse himself in the light of her conduct (paragraphs 5.93 and 5.97). These actions were in themselves improper.

7.25 A further example of grounds for the perception that the Chief Justice and his wife were acting in concert was provided by the strong similarity between the orders sought by her in her libel action, and those sought by him, not long afterwards, in his proceedings for judicial review (paragraphs 6.17 – 6.18)

7.26 To this we add evidence given by the Attorney General which is relevant to Mrs Schofield's involvement in her husband's concerns. In his witness statement and orally he described an occasion when both the Chief Justice and his wife came to see him "quite early on in my time as Attorney General" (he was appointed to that office in 1997). They complained that the circulation list for the Revision of Laws Bill had read: "Governor. Chief Minister. Chief Justice". The Chief Justice was, he said, very affronted and wanted to know why he had not intervened to get the order changed. He described this as a threat to the independence of the judiciary. The Attorney General had replied that this had nothing to do with the independence of the judiciary, but was to do with the standing order of precedence. He said he had wondered why Mrs Schofield was "quite so involved in something that I would have thought really only concerned her husband". He regarded it as an example of them acting in concert. He also recalled an evening when, for at least an hour, he was harangued by them about the alteration of the order of precedence and how this interfered with the independence of the judiciary, which struck him as "a completely disproportionate response".

7.27 Finally, we have noted that the Chief Justice gave evidence that he was concerned by a press report in April 2007 of an e-mail in which his wife listed the maids issue as one of the reasons why she claimed that the Chief Minister wanted to get rid of him (paragraph 5.35). He said that he did not share that view but had not considered dissociating himself from that

suggestion "because once I embark on that, I then have to embark upon qualifications, explanations, which may lead us to further problems"(paragraph 3.26). We again find that explanation unconvincing and his inaction inappropriate.

The grounds for the removal of a Chief Justice

7.28 Section 64 (2) of the Gibraltar Constitution provides:

> "The Chief Justice, a Puisne Judge, the President of the Court of Appeal or a Justice of Appeal may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour…".

These grounds for the removal of a judge, which are similar to statutory provisions in other jurisdictions, are in harmony with protocol 18 of the UN Statement on the Basic Principles of the Independence of the judiciary, which states:

> "Judges shall be subject to suspension or removal only for reasons of inability or misbehaviour that renders them unfit to discharge their duties".

The requirements of section 64(2) are clearly stringent, and rightly so, since a judge's security of tenure is essential for securing the independence of the judiciary, which is fundamental to the proper functioning of a democratic society.

7.29 Counsel to the Tribunal submitted, in our view correctly, that inability is a broader concept than disability and embraces more than physical or mental infirmity. It might also extend to an accumulation of matters which taken together, were indicative of a lack of ability to perform fundamental duties. He referred to *Stewart v Secretary of State for Scotland* 1998 SC (HL) 81. In that case it was found, in the light of what happened in eighteen cases, that the conduct of a sheriff had been improper and that it stemmed from a defect of character which rendered him unable to

perform the judicial functions of a sheriff. It was held that the removal of the sheriff from office by reason of "inability" was justified.

7.30 Counsel for the Chief Justice placed reliance on a passage in the speech of Lord Jauncey of Tullichettle in *Stewart* at page 85 where he adopted a statement by Lord Coulsfield in the Inner House: "What has to be shown is that [the sheriff] is not really capable of performing the proper function of a judge at all". He also submitted that, leaving aside cases of infirmity, this ground for removal of a judge required some inherent or acquired failing, some personality defect or some other similar cause.

7.31 We make two comments on the submissions by counsel for the Chief Justice. First, we note that when adopting the statement of Lord Coulsfield Lord Jauncey was seeking to contrast "mere lack of efficiency or competence *per se*", which was "very unlikely to measure up to inability". The implication of Lord Jauncey's remarks is, in our view, that "inability" is concerned with incapacity in one or more fundamental respects. Secondly, it seems to us that the submissions of counsel for the Chief Justice tended to treat the facts of *Stewart* as if they provided a definition of "inability", that is to say, where there was no question of infirmity. However, the words "or any other cause" do not restrict the scope of what may give rise to "inability".

7.32 As regards "misbehaviour", counsel for the Chief Justice submitted that the threshold was a high one. In the light of the history of that ground, it imported serious misconduct, such as corruption, partisanship or gross neglect in office, or some crime of moral turpitude outside office. He pointed out that almost all of the recent cases in which "misbehaviour" had been given serious consideration involved conduct amounting to a crime. He referred to a number of examples, including *Clark v Vanstone* [2004] FCA 1105. He emphasised, by reference to a passage in the judgement of Gray J at para 85 of that case – a passage approved by the Privy Council in *Lawrence v Attorney General of Grenada* [2007] 1 WLR 1474 – that the content of its meaning was to be determined by reference to the effect of the conduct on the capacity of the person to hold office. Gray J continued :

> "In turn, the capacity to continue to hold office has two aspects. The conduct of the person concerned might be such that it affects directly the person's ability to carry out the office. Alternatively, in addition, it might affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed. In either case, the danger is that the office itself will be brought in to disrepute as a result of the conduct of its holder. If that is likely to be the case, then the conduct is properly characterised as misbehaviour for the purposes of relevant legislation".

7.33 This quotation demonstrates that the significance of both inability and misbehaviour as a well-founded ground for the removal of a judge is ultimately the same, namely that the judge is shown to be unfit to hold office. In each case that unfitness must lead to removal since it undermines public confidence in the judiciary and the administration of justice. However, the route by which inability or misbehaviour comes to be a ground for removal is somewhat different. Inability, in whatever respect it applies, goes to the root of the judge's ability to discharge the functions of his office. It is of a fundamental character. By contrast a judge may be guilty of misbehaviour without it necessarily constituting a ground for his removal. That will depend on whether it is such as to show him to be unfit for his office (cf *Therrien v Canada (Minister of Justice)* [2001] 2RCS 3 at para 147). Only then will it be misbehaviour within the meaning of the statutory provision.

Our assessment

7.34 Counsel for the Tribunal and counsel for the parties represented before us were agreed that it was for us to reach our own conclusion as to whether the facts found by us showed any inability on the part of the Chief Justice to discharge the functions of his office or any misbehaviour on his part; and if so, to reach our own conclusion as to whether such inability or misbehaviour should warrant the removal of the Chief Justice. We are

satisfied that this would be consistent with section 64 of the Gibraltar Constitution.

7.35 We are in no doubt that in a number of instances there was misbehaviour on the part of the Chief Justice, without our going so far as to say that any single instance amounted to such misbehaviour as to show that he was thereby unfit to hold office. We give as examples:

(i) his unfounded complaints about funding in 1999, which he sought to exploit in order to embarrass the Government;

(ii) the maids issue, where he persisted in a reckless disregard for compliance with the law and made a less than frank disclosure to the Governor;

(iii) the way in which he assisted his wife to make attacks on the Bar Council which it would have been improper for him to make; and heard her counsel in chambers of on the afternoon of 16 April 2007; and

(iv) his serious and unfounded allegations against the Government in 2007.

7.36 The conduct of the Chief Justice which we have summarised earlier in this chapter directly affected the way in which he discharged part of the responsibilities of his office, such as his relations with the Governor and the Government (covering such matters as funding, proposed legislation and appointments), and his relations with the representatives of the Bar. The conduct stemmed, in our view, from a number of characteristics of his personality and attitude, as follows.

7.37 First, the Chief Justice did not seem to be alive to the boundary between what was and what was not proper for someone in his position to do or say. He repeatedly showed a lack of judgment in this respect. He also showed the lack of a sense of proportion, and tended to over-react to perceived slights. He did not observe appropriate restraint or respect for accuracy in his public pronouncements.

7.38 Secondly, he showed a pre-occupation, bordering on an obsession, with judicial independence. He claimed that it was under threat when this was not the case. This led to his responding in an improper or excessive manner to executive action of which he disapproved. Allied to this was his pre-occupation with the status of his office and his continuance in office. This showed itself in a number of ways ranging from petty discourtesy to the Chief Minister to the unfounded accusation that the Government had long sought to have him removed from office.

7.39 Fourthly, he showed himself to be unable to restrain himself from supporting his wife in her attack of the members of the Bar Council or her libel action against its Chairman. Although he affected a lack of interest in her communications with the Bar Council he was more than content that his silence should be interpreted as support for her communications. He knew that it would have been improper for him to have sent them. He was unable to grasp that his association with them would have been seen by a fair minded and well informed observer as improper.

7.40 Fifthly, the perceptions arising from the conduct of the Chief Justice inevitably rendered it impossible for the Chief Justice to sit in a significant number of cases.

7.41 At the same time the Chief Justice showed himself to be indifferent as to the effect, or the perceived effect, of his conduct on his relations with the Government and the Bar, the standing of the judiciary and the administration of justice in Gibraltar. This would inevitably affect the reputation of his office. In the particular context of Gibraltar, which is a small jurisdiction as a number of witnesses reminded us, the significance of public perception is inevitably magnified. In his witness statement Mr Neish observed: "The public in Gibraltar is much closer to public figures than in the case of say, England. Their scrutiny is more intense and their actions more directly felt". While it is true that public opinion in Gibraltar is not unanimous in its disapproval of the conduct of the Chief Justice we are in no doubt that its effect has been to polarise public opinion in a way which is damaging to the reputation of the office, and hence to the

interests of good governance of Gibraltar. By his conduct he has antagonised a large number of those who practise before him.

7.42 In these circumstances we conclude that the Chief Justice is unable to discharge the functions of his office. We are satisfied that this inability warrants the removal of the Chief Justice from office.

Our advice

7.43 Accordingly, in terms of section 64(4)(c) we advise the Governor that he should request that the question of the removal of the Chief Justice should be referred by Her Majesty to the Judicial Committee of the Privy Council.

Dated 12 November 2008

Cullen of Whitekirk

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The Rt Hon Lord Cullen of Whitekirk KT

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The Rt Hon Sir Peter Gibson

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The Rt Hon Sir Jonathan Parker

First Schedule

Procedural history

1. At the first directions hearing, which was held in public in London, with a video-link to Gibraltar, on 31 January 2008, we ruled that the Signatories and the Government should be entitled to be represented before the Tribunal in accordance with section 11 of the Commissions of Inquiry Act 1888 (the 1888 Act) which applies to the Tribunal by virtue of subsection (5) of section 64 of the Constitution. We also invited various named individuals and entities to make representations relevant to the Memoranda, the Chief Justice's Preliminary Response and our terms of reference. Directions were also given for the preparation and service of a draft Statement of Issues, with opportunity to the Chief Justice to identify any issues which he contended fell outside the our proper remit. Other directions were given for production of documents and the service of witness statements collated by the Solicitors to the Tribunal.

2. Representations were thereafter received from the Signatories, the Government, Mrs Schofield, the Attorney General of Gibraltar, the Registrar and the Deputy Registrar of the Supreme Court of Gibraltar, a number of members of the legal profession in Gibraltar, the Legal Adviser to the FCO, the ICJ and the IBA. The Gibraltar Government supported the view of the Signatories that the Chief Justice should be removed from office.

3. At the second directions hearing, which was held in public in Gibraltar on 8 April 2008, we heard and decided two applications by the Chief Justice. The first application was that we should not inquire into certain fresh matters introduced in representations made by the Signatories and the Government or into other matters which were said to have been already

determined. The second was that, in relation to all or some of the allegations, there was no case to answer. In the result, save in respect of certain of the issues in the draft Statement of Issues, these applications were dismissed. The reasons for our decisions were issued on 23 April 2008, and are reproduced in the Second Schedule. In the light of that decision a revised Statement of Issues was prepared and issued to the participants. Its headings in respect of factual issues in chronological order are set out in the Third Schedule. The evidence arising out of the investigation of the matters referred to in the revised Statement of Issues is the subject of the chapters of this Report.

4. At this hearing we also made a recommendation, as agreed by the Chief Justice and the Government, as to the costs of the representation of the Chief Justice, in accordance with section 13 of the 1888 Act.

5. We granted an application by Mrs Schofield that she should be entitled to be represented by counsel before the Tribunal. We were not persuaded that it was appropriate that her representation should be publicly funded. The text of our rulings in respect of Mrs Schofield, issued on 23 April 2008, is reproduced in the first part of the Fourth Schedule.

6. By letter dated 16 June the Solicitors to the Tribunal informed the solicitors for the Chief Justice of the Tribunal's decision in relation to applications which they had made on his behalf. It was satisfied that certain witnesses should be added to the current list of proposed witnesses. It was also satisfied that his counsel should be permitted to cross-examine each of the witnesses giving oral evidence, subject to the qualifications that such cross-examination was limited to matters of factual dispute of which the witness had personal knowledge; that the issues on which cross-examination was to be pursued, and time estimates for the same, were identified in advance; and that the time permitted for such cross-examination was subject to such reasonable limits as might be directed by the Tribunal, and consistent with the time frame allocated for the hearing. Further, all cross-examination permitted by the Tribunal was subject to its overriding power to intervene at any time in order to regulate its own procedures and to control the proceedings, in the

interests of justice, fairness and proportionality. Cross-examination proceeded on that basis.

7. The full hearing was held in public in Gibraltar. It commenced on 7 July with opening submissions of counsel supplementing written submissions which had been provided earlier. We refused a written application by Mrs Schofield for permission to cross-examine certain witnesses in regard to certain matters. We did so for the reasons advanced by Counsel to the Tribunal, namely that there was no reason to believe that counsel for the Chief Justice could not pursue such lines of questioning as were relevant to the issues before the Tribunal.

8. The full hearing concluded on its twelfth day (28 July) with closing submissions by counsel orally and in writing.

9. The following was the representation before us:

- The Chief Justice by Mr Edward Fitzgerald QC and Ms Caoilfhionn Gallagher, instructed by Messrs Bindmans LLP of London
- The Government of Gibraltar by Mr James Eadie QC, instructed by the Government.
- The Signatories by Mr Antony White QC and Mr Robert Vasquez, of Triay & Triay, Gibraltar
- Mrs Schofield was not represented before the Tribunal

10. The witnesses who gave evidence before the Tribunal did so on oath or affirmation. Their written statements were supplied to the participants in advance and spoken to. With the exception of the Chief Justice, each of the witnesses was examined by Counsel to the Tribunal, and cross-examined by counsel for the Chief Justice. The Chief Justice was examined by his counsel and cross-examined by Counsel for the Tribunal, and, in respect of one area of inquiry, by counsel for the Government. The written statement of each witness and his or her oral evidence were directed to the matters covered by the revised Statement of Issues so far as relevant to that witness.

11. In the order in which they commenced their oral evidence the witnesses were as follows:

- Mrs Katherine M Dawson, formerly Registrar of the Supreme Court and the Court of Appeal of Gibraltar
- Mr Clive J Mendez, Deputy Registrar of the Supreme Court and the Court of Appeal of Gibraltar
- Mr Robert M Vasquez, Barrister, Gibraltar
- Mr Alfred Vasquez QC, Gibraltar
- Mr Francis J Triay, Barrister, Gibraltar
- Ms Annabelle Desoiza, Registrar of the Supreme Court and the Court of Appeal of Gibraltar
- Mr Charles Gomez, Barrister, Gibraltar
- Mr David Hughes, Barrister, Gibraltar (now practising as a solicitor in the United Kingdom)
- Mr James Neish QC, Chairman of the Bar Council
- Mr Richard Garcia MBE, Chief Secretary to the Gibraltar Government
- Mr Peter Caruana QC, Chief Minister of Gibraltar
- Mr Reginald Rhoda QC, Attorney General of Gibraltar
- The Hon Philip R Barton, CMG OBE, Deputy Governor of Gibraltar
- Mr Joe Bossano, Leader of the Opposition, formerly Chief Minister
- Mr Stephen Catania, Barrister, Gibraltar
- Mr J E Triay QC, Gibraltar
- The Chief Justice
- Mr Charles Pitto, the Stipendiary Magistrate, Gibraltar

12 The Tribunal was also provided with written statements of a number of persons who did not give oral evidence, but whose evidence was considered by the Tribunal. Their statements were likewise directed to the matters covered by the revised Statement of Issues so far as relevant to them. They were:

- Mr Felix Alvarez, Chairman of the Equality Rights Group, Gibraltar
- Bishop Charles Caruana, Gibraltar
- Mr James Dingemans QC, London
- Mr David J V Dumas QC, Gibraltar
- Mr Byron Georgiadis, Barrister, Nairobi
- Ms Gillian M Guzman, Barrister, Gibraltar
- The Rt Hon Lord Luce KG
- Mr Fabian Picardo, Barrister, Gibraltar
- Mr Peter Schirmer, Associate Editor, *Vox* newspaper
- Miss Amanda Schofield
- Mrs Anne W Schofield

The second part of the Fourth Schedule sets out the circumstances in which Mrs Schofield did not give evidence.

13. Following the conclusion of the hearing on 4 August a further written statement of Mr David Hughes was tendered to us. Having invited and considered submissions from the other participants we decided that it should be taken into account along with the rest of the evidence.

14. On 11 August 2008 the Signatories made an application to us that that we should recommend to the Governor that our Report should be disclosed to the Chief Justice, the Government and the Signatories and that it be made public. Having invited and considered the submissions of the participants on this subject we refused the application for the reason

advanced by Counsel to the Tribunal in his submissions, namely, in short, that it was not part of the function of the Tribunal to make such a recommendation. We stated that any submissions of the interested parties for the publication of the Report should in due course be addressed to the Governor.

Second Schedule

Rulings on applications by the Chief Justice at the directions hearing on 8 April 2008

1. At a directions hearing in Gibraltar on 8 April 2008 we heard and decided two applications by the Chief Justice, notice of which had been served on 26 March 2008. We indicated at the end of the hearing that we would give the reasons for our decisions later. The following are our reasons.

The first application

2. It was for a direction or order in the following terms:

> "Remit: The Tribunal may not inquire into fresh matters not originally referred to the Tribunal in September 2007 or into matters that have already been determined"

3. The members of the Tribunal were appointed by Governor of Gibraltar by letters dated 14 September 2007, and, in the case of its Chairman, dated 11 December 2007, under section 64 (4) (a) of the Gibraltar Constitution Order 2006 and in accordance with the advice of the Judicial Service Commission (JSC), to advise him on the matter of the Chief Justice. The letters of appointment stated:

> "The Tribunal should inquire into and report on whether the Chief Justice is unable to discharge the functions of his office by reason of inability or for misbehaviour having regard to the Memorandum and Supplementary Memorandum with two Appendices submitted by 13 senior representatives of the legal profession on 17 April 2007 and any other

submissions and evidence which may be placed before it and report on the facts thereof to me and advise whether I should request that the removal of that judge should be referred by Her Majesty to the Judicial Committee".

4 For The Chief Justice Mr Fitzgerald explained that the "fresh matters" mentioned in the application extended, not only to entirely new material contained in the representations of the Signatories and the Gibraltar Government in response to the Tribunal's Directions Ruling No 1 of 31 January 2008, but also to the inclusion in such representations of new detail of allegations that were previously wholly unparticularised or vague.

5. Mr Fitzgerald maintained in the first place that consideration of the fresh matters would be unconstitutional. Removal of a judge for inability or misbehaviour was subject to two key safeguards. In compliance with subsection (8) of section 64 the Governor had to act in accordance with the advice of the JSC. As a matter of fairness, he also had to afford the judge an opportunity to be heard (cf *Rees v Crane* [1994] AC 173). The fresh allegations had not been subjected to the "constitutional filter", namely the identification by the Governor, acting on the advice of the JSC, of specific allegations when he decided, in terms subsection (4), that the "question of removing the Chief Justice... ought to be investigated". The latter allegations were "the matter" into which the Tribunal had to inquire in accordance with subsection (4)(b). The filter was intended to prevent vexatious or frivolous complaints from reaching the Tribunal. The lack of such a filter would remove the Chief Justice's ability to make representations before matters proceeded beyond the stage of the JSC. Mr Fitzgerald recognised that the inclusion in the Tribunal's terms of reference of the phrase "and any other submissions and evidence which may be placed before it" supported what he referred to as "the uncertain, ever-growing approach to the Tribunal's remit favoured by the Government and the Signatories". However, the terms of reference fell to be read restrictively as subject to section 64, and, where there was a conflict, the Constitution was to be preferred. Mr Fitzgerald sought to draw a parallel with the direction of the Tribunal, communicated by the

letter from Clifford Chance dated 21 December 2007, that insofar as it might be suggested that there was any discrepancy between the terms of reference and section 64, the text in the Constitution was to be preferred. To the extent that the terms of reference supported the "roving brief" approach, they were unlawful and did not bind the Tribunal.

6. Mr Fitzgerald enlisted in support of this submission the Report of the Tribunal chaired by Lord Mustill, dated 14 December 2007, in regard to the Chief Justice of Trinidad and Tobago. It was concerned with a similar constitutional framework. At paragraph 6 of its Report the Tribunal stated:

> "The task must therefore be to ascertain what...is 'the matter' which the Tribunal is authorised and required to investigate. Plainly, this cannot be a question completely at large whether the Chief Justice is fit to continue in office. The Tribunal cannot have been intended to trawl through his past behaviour, to see whether faults of any description could be brought to light which might qualify as 'misbehaviour'".

Mr Fitzgerald pointed out that the Mustill Tribunal determined that its remit was set by the terms of the reference letter, and, more importantly, the documentation which had led the Governor to determine that there was sufficient prima facie evidence justifying its appointment.

7. We were satisfied that the "fresh matters" fell within the scope of the words "and any other submissions and evidence which may be placed before it" in our terms of reference, and that there was no ground for restricting those words in the way contended for by Mr Fitzgerald. Section 64 does not, expressly or impliedly, prohibit a tribunal considering additional information which was not before the JSC or the Governor. We accordingly rejected the notion that section 64 contains some kind of "constitutional filter", as submitted by Mr Fitzgerald. Mr Otty, Counsel for the Tribunal, was, in our opinion, correct in submitting that "the matter" referred to in subsection (4)(b) is "the question of removing the Chief Justice...from office for inability... or for misbehaviour". It is on the facts of that "matter" that a tribunal is required to report. Section 64 nowhere envisages a set of allegations which is to define the scope of

inquiry. We found no merit in Mr Fitzgerald's argument that, if the terms of reference were not given a restricted meaning, there would be a failure to observe safeguards and a "constitutional filter". By means of the arrangements which were made for the making of representations and a draft Statement of Issues at an early stage in the proceedings the Chief Justice was given an opportunity to object to the inclusion of the "fresh matters". We should add that we did not consider that the observations of the Mustill Tribunal on which Mr Fitzgerald relied were in point in the present case. That Tribunal was essentially concerned with a single allegation of a very serious character, and it is not surprising that it chose to focus on that allegation, on which the question of possible removal turned. In the present case it is clear that from the outset there was seen to be a need to investigate a number of allegations relating to the conduct of the Chief Justice over a number of years. Furthermore, there is no question in the present case of the Tribunal pursuing the question of the fitness of the Chief Justice "at large". The procedure which has been followed by the Tribunal is designed to identify the issues at an early stage, and to ensure that fairness to the Chief Justice is observed throughout. We would add that in any event the Tribunal is not competent to entertain a challenge to the lawfulness of our terms of reference. Such a challenge could only be made in proceedings for judicial review, and it is now too late for that. For these reasons we rejected the first submission.

8. Mr Fitzgerald submitted in the second place that inclusion of the "fresh matters" would be extremely oppressive and unfair. He pointed out that many of them were almost a decade old. The Signatories could have raised many of them in 2000, when a complaint about the Chief Justice was before the then Governor, but evidently chose not to do so. Neither they nor the Government had raised any of them between April 2007 and the meeting of the JSC, or at the time when the reference to the Tribunal was made. They raised them when the Chief Justice had been suspended from office and had no access to his office or relevant papers. The "fresh matters" were plainly the result of a trawl through his career – the kind of result-oriented, historical fishing expedition expressly ruled out by Lord

Mustill. The Chief Justice had been denied the opportunity to be heard in response to these matters before the reference was made to the Tribunal. He could not be expected to meet "a continually moving target". Mr Fitzgerald went on to express sharp criticism of the way in which the "fresh matters" had been raised. He questioned the impartiality of the Chief Secretary and the Attorney General who were members of the JSC. He suggested that these ministers had taken advantage of the licence which the JSC had given, by reason of the width of the terms of reference, to introduce allegations which could have been made and disposed of at an earlier stage. This was an abuse of process.

9. We found much of these submissions to be misguided. The proceedings of the Tribunal are inquisitorial in nature. Under its terms of reference this Tribunal has a public duty to inquire into matters which come to its attention from whatever source where such matters have a potential bearing on the question of the inability or misbehaviour of the Chief Justice. This is subject, of course, to its duty throughout to ensure that he is fairly treated. There are no parties in the ordinary sense in which that term is used in litigation or prosecution. Persons may be represented only in accordance with section 11 of the Commissions of Inquiry Act. There are no pleadings and no indictment. It follows that the dilatoriness or motive with which such a person is alleged to have behaved in raising matters before the Tribunal does not provide a ground for excluding them. What does matter is whether, because of the stage at which they are raised or for some other reason, considerations of fairness would require their exclusion. There is no question of the Chief Justice being expected to meet "a continually moving target". As we have already explained, the procedure followed by the Tribunal has been designed to avoid that.

10. The submissions of Mr Fitzgerald were primarily directed to the wholesale exclusion of the "fresh matters". In the alternative, he invited us to exclude certain of them, as set out in a Schedule, on a number of grounds including that of fairness. We were not persuaded, at least at the present stage in the proceedings, that it would be inconsistent with fair treatment of the Chief Justice for us to entertain the generality of the

"fresh matters". Accordingly we rejected Mr Fitzgerald's primary submission. Since the Schedule invoked several different grounds for exclusion we will deal with it below.

11. The last part of the first application sought the exclusion of "matters that have already been determined". This referred to the outcome in October 2000 of the assessment by the then Governor of allegations made about the employment by the Chief Justice of Ms Danvers as a domestic employee. It had been alleged that the Chief Justice had failed to make punctual payment of PAYE and social security contributions relating to that employment. According to a news release dated 5 October 2000 (6/2551) the Governor announced:

> "The information I have received shows that Ms Danvers' employment was registered with the Employment Training Board and that all outstanding PAYE payments and social security contributions have now been met. It is regrettable that matters were not regularised at an earlier stage but I have accepted that the Chief Justice did not deliberately seek to avoid his obligations. The Chief Justice has also assured me, in relation to another former employee of his, Ms Williams, that he has no outstanding liabilities. I have concluded, in view of the information and assurances which I have received, that it would not be appropriate to me to take any formal action in exercise of my constitutional powers."

12. Mr Fitzgerald submitted that we might derive assistance from Regulation 14 (1) (g) of The Judicial Discipline (Prescribed Procedures) Regulations 2006 of England and Wales under which a complaint about a judicial office holder fell to be dismissed if "it raises a matter which has already been dealt with ... and does not present any material new evidence". It would be an abuse of process and contrary to natural justice to allow this matter to be re-opened, particularly where, he said, it was not claimed that there was any new evidence relating to it. It had not been rekindled by the Chief Justice or indeed his wife. There was no evidence that in 2000 the Governor had been misled. The Governor had accepted the Chief Justice's explanation in mitigation and decided that investigation of the question of his removal was not warranted. That disposal of the matter

gave rise to a legitimate expectation on the part of the Chief Justice that it would not be revisited.

13. We were not persuaded that there was sufficient to give rise to such an expectation. In the first place the Governor did not go so far as to say, or imply, that the conduct of the Chief Justice could not be considered along with other matters in connection with a later investigation of the question of his removal, let alone that his conduct in regard to the employment of Ms Danvers had been beyond reproach. This Tribunal is required to consider a considerable number of complaints about the conduct of the Chief Justice along with that relating to her employment. In the second place, as was pointed out by Mr White for the Signatories, the Tribunal had before it a complaint relating to the employment of Ms Williams, which arguably constituted material new evidence. As Mr Otty submitted, the regulations to which Mr Fitzgerald referred to are no more than a guide and do not preclude consideration of other matters along with an earlier complaint. In these circumstances we also rejected this submission by Mr Fitzgerald.

The second application

14. It was for a direction or ruling in the following terms:

> "In relation to all or some of the allegations, there is no case to answer as a matter of law, and/or as a matter of fact"

15. Mr Fitzgerald submitted that the Tribunal should consider whether the allegations against the Chief Justice, even if true, could conceivably reach the constitutional threshold of "inability to discharge the functions of (his) office" or "misbehaviour", which he referred to as the "8 April test". "Inability" suggested, he said, a high threshold: a personal incapacity to perform as a judge at all due to some inherent or acquired failing, some personality defect or some similar cause, as in *Stewart v Secretary of State for Scotland* 1998 SC (HL) 81. It was plainly not enough for the removal of a judge that he had a difference of opinion with the executive, or that he made controversial statements in public. Nor was it enough that there was a lack of confidence in him among society or some practitioners. A

perception that the Chief Justice was biased, as was alleged, could only affect his sitting in some cases. There was no evidence that he had made it impossible for himself to sit in a substantial proportion of the cases which came before the court.

16. It was important, he said, to keep the concept of "misbehaviour" distinct from that of "inability". "Misbehaviour" imported serious misconduct, typically of a criminal, or morally abhorrent or grossly unprofessional nature, which constituted an affront to the standing of the high office of judge. It originated from the common law crime of misbehaviour in a public office (*Boulanger v the Queen* [2006] 2 SCR 49). Any lower test would create an unwarranted threat to a judge's security of tenure. All the recent cases on "misbehaviour" were concerned with criminal conduct. He accepted, however, that "misbehaviour" did not always have to be criminal, as was observed by the Mustill Tribunal at paragraph 87 of its Report. In the case of the most senior judge in a given jurisdiction the meaning of "misbehaviour" must be different from its meaning in the case of a civil servant or office-holder as in *Lawrence v Attorney General of Grenada* [2007] 1 WLR 1474, which should be distinguished from the present case. *Clark v Vanstone* [2004] FCA 1105 and *Vanstone v Clark* [2005] FCAFC 189 supported the view that, in order to suffice for removal from office, misbehaviour, even if it was criminal, must also render the judge unfit to hold office. None of the allegations made by the Signatories and the Government could amount to "misbehaviour" on the part of the Chief Justice. There was no significant criminality or suggestion of wrongdoing, apart from some contrived allegation of misrepresentation. Some of the allegations were manifestly insufficient. The Signatories and the Government had wrongly gone on to the question of perception of unfitness without laying a basis for a finding of "misbehaviour".

17. Mr Fitzgerald accepted that "inability" might be inferred, as it was in *Stewart,* from a number of incidents. However, "misbehaviour" could not be constituted by the cumulative effect of a number of instances of conduct, where none of them was in itself "misbehaviour".

18. Some of the matters alleged were, he said, irrelevant. For example, the conduct of the Chief Justice's wife could not be a foundation of the case against him. It might justify an application for the Chief Justice to recuse himself in a particular case, but that could not justify a finding of "inability" or "misbehaviour".

19. Mr Fitzgerald also invited us to consider in addition or alternatively whether there was a realistic prospect of our reaching the conclusion that the allegations were proved beyond reasonable doubt, which was the standard of proof applied in the Mustill Report (see paragraph 82). In regard to all or some of the allegations there was no case to answer as a matter of fact. Many had too weak an evidential basis to go forward to full hearing; some were wholly unsupported by evidence. As regards the conduct of his wife, the Chief Justice denied any involvement with her activities. She had not acted as his proxy. There was no evidence to the contrary. Without any evidence that she had acted as proxy for him that could realistically reach the appropriate standard applied in the Mustill Report, this would leave only the extraordinary assertion that he was responsible for her actions.

20. It may be noted that in arguing that there was "no case to answer" – an expression redolent of adversarial proceedings – Mr Fitzgerald addressed not only the "fresh matters" introduced by the Signatories and the Government, but also the original allegations in the Supplementary Memorandum. His submissions, in effect, challenged the decision of the Governor, on the advice of the JSC, that the question of removing the Chief Justice ought to be investigated. This entailed that the Tribunal should not do what it was appointed to do, namely to "inquire into the matter and report on the facts of to the Governor...".

21. We did not, however, require to rely on these considerations in dealing with this application, since we were not persuaded that Mr Fitzgerald's approach to the application of the law to the present case was correct. It is reasonably clear that "inability" and "misbehaviour" have no fixed meaning. In particular the content of "misbehaviour" is to be determined by reference to the effect of the conduct on the capacity of the person to

continue to hold the office, including what is perceived *(Clark v Vanstone,* Gray J, paragraph 85, approved by the Privy Council in *Lawrence v Att Gen of Grenada*). In *Vanstone* Weinberg J said at paragraph 164, with reference to the meaning of "misbehaviour" that "the conduct in question must have the potential to undermine the standing of the courts, or destroy public confidence in the judge's ability to continue to perform his or her functions".

22. Mr Otty was, in our opinion, correct when he submitted that the concepts of "inability" and "misbehaviour" were closely related, and that the interpretation of one may assist in the interpretation of the other (*Vanstone,* Black CJ at paragraph 20*)*. We also accepted his submission that there was no reason in principle why "misbehaviour" justifying removal may not be based on the cumulative effect of a number of incidents, at least where some of them can themselves be properly characterised as "misbehaviour". That is consistent with the approach taken by the Privy Council in *Lawrence v Att Gen of Grenada.* While the facts of that case and the office with which it was concerned were plainly different from the present we found no good reason to distinguish the principles on which the judgments were based. Mr Fitzgerald was right to emphasise the high test that had to be satisfied before the removal of a judge was warranted. However, it also has to be borne in mind that the performance of a judicial function calls for virtually irreproachable conduct (*Therrien v Canada (Minister of Justice)* [2001] 2 RCS 3, paragraph 111).

23. In the present case it is clear that from the outset the task of the Tribunal was to consider the allegation of a systemic problem affecting the Chief Justice, arising out of a number of allegations relating to incidents over a period of years. We considered that in general it is not feasible at this stage, before the full hearing when the whole of the evidence is before us, to pick out which of those allegations, if any, are of no materiality or relevance. We might add that there was force in the observation of Mr White for the Signatories that paragraph 2.21 of the written submissions for the Chief Justice appeared to accept that at least some of the allegations did meet the test for "misbehaviour".

24. As regards the allegations about Mrs Schofield, we noted that in the Supplementary Memorandum the Signatories assert that the Chief Justice not disassociate himself from certain of her statements and actions, and in their representations they say that the only proper inference to draw is that her statements and actions were part of a coordinated joint approach adopted by her and the Chief Justice; and that in any event any fair-minded observer would have believed that he shared and endorsed the views that she expressed. We were not persuaded that we should exclude any of the allegations relating to the conduct of Mrs Schofield, or any other allegations, on the ground that they are irrelevant. However, we considered that it would be going too far and too fast to affirm their relevance at this stage on the basis of what has been asserted about them. We reserved our judgment as to their relevance until we have the whole evidence at the full hearing. In the meantime we noted that the conduct of a relative may be relevant, for example, to a real danger or suspicion of bias (*R v Bow Street Metropolitan Magistrate ex parte Pinochet (No 2)* [2000] 1 AC 119, Lord Browne-Wilkinson at page 135).

25. We next refer again to the Schedule for the Chief Justice. Having regard to considerations of fairness and proportionality and the fact that they relate to the conduct of the Chief Justice when he was serving in another jurisdiction we were satisfied that it is appropriate to exclude the allegations to which paragraphs 13 and 14 of the Draft Statement of Issues relate. For the Signatories Mr White argued that the allegations about the behaviour of the Chief Justice in court to which paragraphs 15-19, 31-32, 46-48 and 63-64 relate should be regarded as falling into a pattern. While there are a number of similarities between these allegations, they are not likely to make any material difference when considered in conjunction with the other allegations. Accordingly we excluded these paragraphs. We did not take the same course with paragraph 49 as it raises different issues. We also agreed that in the interests of the efficiency of the inquiry it was right to exclude paragraph 45 which relates to the conduct of the Chief Justice at the land frontier with Spain. Lastly, paragraph 37(d) raises an issue as to whether the Chief Justice acted improperly when prosecuted under the Traffic Act in arguing that particular account should be taken of

his position as Chief Justice in the exercise of discretion to stay the proceedings. In the light of the evidence which has now been filed we accepted the suggestion of Mr Otty that that paragraph should be excluded.

26. As regards Mr Fitzgerald's submission that the Tribunal should find that there was no case to answer as a matter of fact, we considered, subject to what we say in the next paragraph, that it was premature to reach any view as to sufficiency of evidence. As Mr Otty pointed out, evidential inquiries on behalf of the Tribunal have only recently begun, and the Government have indicated that they intend to offer further evidence. In the meantime we should not be understood as accepting the proposition, in reliance on the Mustill Report, that the allegations against the Chief Justice will require to be proved beyond reasonable doubt. In view of the nature of the conduct with which that tribunal was concerned, its use of that standard is understandable. In the present case the more flexible approach to which it referred at paragraph 81 may be more appropriate.

27. We excepted from the above the allegations concerning Hassans (Statement of Isssues paragraphs 41 and 53-54) since it was plain from the response of that firm that these allegations should be excluded.

Disposal

28. In the result, save in respect of the issues raised in paragraphs 13-14, 15-19, 31-32, 37 (d), 41, 45 -48, 53-54 and 63-64, of the draft Statement of Issues, the applications of the Chief Justice were dismissed.

Third Schedule

The headings of the revised Statement of Issues

General issues (general criticisms of the conduct of the Chief Justice)

Factual issues in chronological order:

1. The comments made by the Chief Justice in respect of the funding of the judiciary at the opening of the legal year 1999-2000.

2. The comments made by the Chief Justice in November 1999 in respect of judicial appointments.

3. The failure of the Chief Justice in 1999 to make punctual PAYE and social security payments in respect of domestic staff.

4. Instructions from the Chief Justice relating to the attendance by the Chief Minister at the Registry of the Supreme Court in December 1999.

5. Instructions to the Registrar of the Supreme Court in respect of expenditure in May 2000.

6. The alleged statement by the Chief Justice in October 2000 to the then Chairman of the Bar, Mr Robert Vasquez, that he should not "rape the constitution".

7. The allegation of interception of the Chief Justice's telephone communications in 1999 and 2000.

8. The alleged nature of defence arguments advanced on behalf of the Chief Justice on his prosecution in 2001 for an offence under the Traffic Act.

9. The comments made by the Chief Justice in open court in February 2002 following, and relating to, his re-appointment as Chief Justice for 1 year.

10. The conduct of the Chief Justice in respect of certain proceedings in November 2004.

11. The conduct of the Chief Justice on the departure of the former Governor Sir Francis Richards in July 2006.

12. The involvement of the Chief Justice in debate over the 2006 Constitution.

13. The conduct of the Chief Justice in relation to the Judicial Service Bill 2007.

14. The nature and course of a hearing before the Chief Justice on the morning of 16 April 2007.

15. The nature and course of a hearing in chambers before the Chief Justice in the afternoon of 16 April 2007.

16. The nature of the Chief Justice's reply when asked for information in respect of the hearing in chambers on 16 April 2007 referred to above.

17. The conduct of Mrs Schofield's libel proceedings against Mr James Neish QC from April 2007 onwards.

18. The nature and course of a hearing on 24 April 2007.

19. The recusal applications of May 2007.

20. The complaint by Mrs Schofield against Mr Freddie Vasquez QC dated 21 August 2007.

21. The pursuit of judicial review proceedings in relation to the Judicial Service Act 2007 between August and December 2007.

22. The purported cancellation of the Ceremonial Opening of the Legal Year in October 2007

23. Alleged inappropriate criticism of Registry staff in October 2007.

Other undated instances of alleged misconduct on the part of the Chief Justice raised by the Deputy Registrar of the Supreme Court

Fourth Schedule

First Part

Rulings on applications by Mrs Schofield at the directions hearing on 8 April 2008

1. On behalf of Mrs Schofield Mr Stanley invited us to recognise that she should be accorded representation by counsel at the Inquiry, in accordance with section 11 of the Commissions of Inquiry Act, albeit, as he accepted, on a limited basis. He argued that she was "implicated... in the matter under inquiry", failing which we should exercise our discretion in favour of her being so represented. He also sought a recommendation that the legal expenses of her representation should be paid in accordance with section 13 of the Act. These applications were supported by written submissions by Mr Michael J Beloff QC.

2. Mr Stanley pointed to two respects in which her interests were at stake, as meriting her separate representation. First, the Tribunal was being asked to endorse criticisms of her conduct, perhaps regardless of whether it came to the view that her conduct should be attributed to the Chief Justice. Her personal and professional reputation might be affected by the conduct and reporting of the proceedings. Secondly, if there were a rule that the Chief Justice was obliged to control his wife or to distance himself publicly from anything that she said, she would be affected in a different way from him, being always in the position of seeing cold water poured over her views by a person who enjoyed a position of some responsibility in the community.

3. Turning to the issue of funding, Mr Stanley emphasised the inquisitorial nature of the inquiry. Whatever the outcome, the Tribunal would be required to determine the facts and give advice to the Governor. It was in the public interest that confidence in the judicial system was maintained. The representation of persons who had an interest in the subject matter of an inquiry served the public interest as well as private interests. He referred to passages in the Report of the Royal Commission on Tribunals of Inquiry under the Chairmanship of Lord Justice Salmon in 1966 (Cmnd 3121) in which it considered the circumstances in which a witness should be given opportunity to prepare his case, be assisted by legal advisers and have his legal expenses met out of public funds.

4. Mr Stanley submitted while Mrs Schofield should be entitled to separate representation, it needed to be limited and confined to those matters where she had an interest which was or might be different from that of the Chief Justice. Funding for representation might cover advice about the preparation of the witness statements, written submissions perhaps briefly amplified orally and possibly participation when witnesses who had something to say specifically about her were being cross-examined.

5. We consider in the first place whether there is a basis for Mrs Schofield being accorded representation by counsel. In his written submissions Mr Beloff maintained that allegations made by the Signatories raised important issues. These included, he said, whether, because of her status as a judge's wife, Mrs Schofield's freedom of expression was curtailed, and whether the wife of a serving judge was obliged to maintain any particular standards of behaviour in her capacity as such. We note that Mrs Schofield put forward a similar argument in support of her application for representation dated 15 February 2008. In the light of the discussion at the directions hearing on 8 April we are by no means satisfied that these are live issues, let alone issues which are appropriate for resolution by this Tribunal. As Mr Otty pointed out, whatever the outcome, the Tribunal process will not involve any determination of any of Mrs Schofield's own civil rights. Counsel for the Signatories and the Gibraltar Government accepted that there was no challenge to her right of

free speech. Mr Beloff also maintained that that there were issues as to whether a judge was obliged to disassociate himself from any behaviour (including statements) of his wife, and, more fundamentally, whether there was any basis for not treating wife and husband as separate persons with separate rights and obligations. However, as was pointed out by Mr Otty, these issues were addressed by the Chief

6. Justice in his Preliminary Response to the Supplementary Memorandum and Messrs Bindman's letter to the Governor dated 26 July 2007 enclosing it. If it be the case that the resolution of the first of these issues would have different implications for the Chief Justice and Mrs Schofield, this does not, in our view, support her being separately represented, since their respective interests would not be in conflict but in alignment. Both the Chief Justice and Mrs Schofield are at one in asserting that he was under no duty to disassociate himself from her activities.

7. When we reach our conclusions at the end of this inquiry we will be concerned with statements and actions of Mrs Schofield only in so far as they bear on the question of inability or misbehaviour of the Chief Justice for the purposes of section 64. Thus we will not be concerned with criticisms of Mrs Schofield in so far as they affect her only. Whether statements or actions of Mrs Schofield bear on that question will depend, in the first place, on whether the Chief Justice was associated, or would reasonably have been perceived to be associated, with them, arising from his having taken a joint approach with her or from having failed to disassociate himself, as is alleged. In the second place it will depend on whether, if he was so associated, the nature of such statements or actions point to his inability or misbehaviour. The Chief Justice has an interest to maintain that neither of these requirements will be satisfied. At present he clearly disputes the first of them. Mr Fitzgerald stated that the Chief Justice would certainly seek to justify what his wife had said in some cases. Where her expressed views coincided with the views expressed by him, he would obviously want to defend them. However, he might not agree with everything his wife had done, and there were some things in which he had no interest.

8. It thus appears that, to a significant but not clearly defined extent, it is likely that the Chief Justice will seek to defend what Mrs Schofield said and did in the exercise of her right of free speech. In these circumstances we are persuaded that it is appropriate that Mrs Schofield should be represented by counsel. We emphasise that it is on the limited basis that such representation is for countering criticisms of her statements and actions which are not covered by the representatives of the Chief Justice despite the claim by the Signatories and the Gibraltar Government that they affect him. We are content to accept that Mrs Schofield should be regarded as "implicated or concerned in the matter under inquiry" for the purpose of section 11.

9. As regards the separate question of funding, this plainly depends on the circumstances. We see no good reason why Mrs Schofield's witness statement should not be taken by her husband's solicitors, as was suggested by Mr Otty. There is no conflict of interest which would make this inappropriate, and it is not inconsistent with his position that he did not have to disassociate himself from what she said or did. We have already pointed out the limited basis for the representation of Mrs Schofield. We note the extent of her representation in the proceedings which was envisaged by Mr Stanley. For the Gibraltar Government Mr Pannick QC, who opposed funding, pointed out that Mrs Schofield would not be eligible for civil legal aid. In all the circumstances we are not persuaded that it is appropriate for us to recommend that the representation of Mrs Schofield should be publicly funded.

10. Mr Stanley indicated at the hearing that he left it to us to deal with the substantive applications by Mrs Schofield dated 25 March 2008. It is abundantly plain that we have no jurisdiction to make the rulings or directions sought in paragraphs 1, 4, 6, 7 8, and 9 of the application notice. We agree with Mr Otty that paragraphs 2 and 5 add nothing to similar applications by the Chief Justice and fall to be rejected for the same reasons. As regards paragraph 3, since the proceedings are inquisitorial in nature there is no question of the Signatories bearing a burden of proof. Statements of truth are not required at this stage. We are content to grant

Mrs Schofield permission, as sought in paragraph 11, to disclose the statements of Mr Neish, Mr Vasquez, Mr Mendez and the Attorney General in her libel action.

Second Part

<u>The circumstances in which Mrs Schofield did not give evidence before the Tribunal</u>

1. Mrs Schofield was from the outset listed as an intended witness. She was named on the provisional list of witnesses which was circulated on 3 March 2008 along with the draft Statement of Issues.

2. On the first day of the full hearing (7 July) we refused a written application by her for permission to cross-examine particular witnesses in regard to certain matters. We did so for the reasons advanced by Counsel to the Tribunal, namely that there was no reason to believe that counsel for the Chief Justice could not pursue such lines of questioning as were relevant to the issues before the Tribunal. Counsel to the Tribunal also pointed out that there were real practical difficulties with her proposal that Mr Charles Gomez should take responsibility for cross-examination, in that he would be appearing as a witness, and had made a number of criticisms of the Signatories in his witness statement. On day 6 (14 July) we dismissed as lacking any justification an application by Mrs Schofield for a direction that Counsel to the Tribunal and the Solicitors to the Tribunal should disclose information relating to their appointment and the negotiation of their fees, and the briefing of Counsel to the Tribunal; and that there should be disclosure as to an alleged briefing of Mr James Neish QC by the Secretary to the Tribunal.

3. On day 3 (9 July) Mr Charles Gomez, who had acted for Mrs Schofield in 2007, gave evidence about Mrs Schofield consulting him in regard to a possible challenge to the Judicial Service Bill (see paragraphs 5.14 – 5.15). In the course of his evidence the Chairman of the Tribunal asked him whether, for the purpose of its having an accurate and clear account of the

sequence of events, it would be possible for him to come with his file of papers on the following day when he was due to continue giving evidence. Mr Gomez said that it would. Thereafter the Solicitors to the Tribunal wrote to Mr Gomez asking him to confirm with Mrs Schofield that she had no objection to his providing such papers. Mrs Schofield responded to them that at that stage she did not consent, and that she wished to consider the papers herself and take legal advice, in particular on the question of legal professional privilege. She asked that the reasonable costs of her obtaining such advice be the subject of a recommendation by the Tribunal. On day 4 (10 July) Counsel to the Tribunal stated that this investigation could be important both for the purpose of achieving an accurate chronology and for consideration of the allegation that Mrs Schofield and the Chief Justice had acted in concert. As then proposed by Counsel to the Tribunal, we made a formal recommendation that the reasonable expenses of Mrs Schofield in obtaining legal advice on certain matters should be included in the expenses of the Tribunal and paid to her. These matters were the extent of professional privilege over any documentation in the possession of Mr Gomez relevant to certain specified issues; whether any such documentation could be redacted so as to allow disclosure without infringing such legal professional privilege; and whether such privilege should be waived in respect of any such documentation so as to allow production before the Tribunal.

4. On day 7 (15 July) we considered an application by Mrs Schofield, made by e-mail to the Solicitors to the Tribunal on that date, in which she claimed that her right to privilege had been breached during the examination of Mr Gomez by Counsel to the Tribunal. She sought a recommendation by us that she should be funded for the expense of obtaining the advice of counsel "as to the impact of the breach of privilege on my further participation in the Tribunal". She went on to state that "I shall be unable to appear on the 21st (being the day on which she was then due to give evidence) unless I have received independent advice on the impact of the breach of privilege on my participation in the Tribunal". Mrs Schofield also sought a recommendation of funding to cover the

expense of her solicitor travelling to London for the purpose of her obtaining advice from counsel about the alleged breach of privilege, on the ground that "I have no confidence in the privacy of phones and e-mails in Gibraltar". We ruled that, whether or not the advice fell strictly within our previous recommendation, we were satisfied that our recommendation should include the cost of taking such advice, but declined to recommend the expense of her solicitor travelling to London in that it was not justified by the reason stated for it.

5. By e-mail to the Solicitors to the Tribunal on 18 July Mrs Schofield sought confirmation from us that, for the purpose of obtaining such advice, fees of counsel estimated at £6,400 (16 hours at £400 per hour) and solicitors at £1,900 (10 hours at £190) would be met. We authorised the Solicitors to the Tribunal to respond, as they did by e-mail on 20 July, that we did not consider it appropriate to comment on these specific figures; that our recommendation had made it clear that her expenses must be reasonable; and we did not consider that we were in a position to go beyond that recommendation.

6. On day 9 (22 July) Counsel to the Tribunal stated that the Government had indicated through its counsel that it was content to authorise whatever fees we considered were reasonable for the purpose of Mrs Schofield obtaining legal advice in respect of the subject of the recommendation made by the Tribunal. Counsel for the Government recorded its concern as to the fee levels which were being sought, commenting that they seemed extremely large for the amount of work and given the nature of the issues. We reiterated that expenditure on obtaining legal advice about the matter of confidentiality required to be reasonable and it was not appropriate for us to state a specific level of fees for counsel and solicitors. That was for the reason it was not practical for us to express a view on figures or indeed a range of figures. However, we felt bound to say that, at least on the face of it, the number of hours for counsel and solicitors which had been stated struck us as excessive for the limited purpose of getting advice on the matters mentioned in our recommendation and in accordance with our rulings. We also

emphasised that, for the proper running of the proceedings before the Tribunal within the period which had been arranged for them, it was essential that Mrs Schofield attend as a witness to give evidence on Friday 25 July and no later, observing that we were not aware of any good reason why she should not so attend.

7. Mrs Schofield responded by e-mail to the Solicitors to Tribunal later on 22 July, stating:

> "In the light of the ruling, I am unable to seek legal advice.
>
> In the absence of funding for my participation, I am unable to proceed in any form before the Tribunal before receiving advice on different aspects of my participation and legal issues.
>
> I shall therefore not be appearing before the Tribunal on Friday. I reserve my rights before the Privy Council".

8. On Day 10 (23 July), when this message was referred to before us, we observed that there was no question of Mrs Schofield being unable to obtain legal advice. It remained the position that we had recommended that she was entitled to the reasonable costs of taking legal advice in relation to privilege, including the question of an alleged breach and what the consequences might or might not be. We reiterated that it was not appropriate or practicable for us to sanction a particular number of hours or a particular figure or range of figures. We also observed that the absence of legal advice provided no justification for Mrs Schofield not appearing as a witness as we expected on Friday. We regarded the absence of legal advice as nothing more than a pretext for her non-appearance. We accepted the proposal of Counsel to the Tribunal that we should not summon Mrs Schofield under section 8 of the 1888 Act, applied by section 64 (5) of the Constitution, since:

   (i) the Tribunal had made its expectation and requirements for the efficient running of the inquiry abundantly clear;

   (ii) it was not clear that the issue of a summons would achieve any greater effect than that clear statement;

(iii) it was not clear whether Mrs Schofield was in the United Kingdom or Gibraltar, and so difficulties arising out of service or its effectiveness might arise; and

(iv) the expectation that Mrs Schofield should give evidence had been clear from the outset, and it would not be in the interests of either the Chief Justice or the people of Gibraltar that there be any delay to the further conduct of this inquiry.

9. On Day 11 (24 July) we were referred to a further e-mail from Mrs Schofield to the Solicitors to the Tribunal of that date, in which she requested that Tribunal to respond to the figures which had been quoted. We stated that we had nothing to add to what we had previously stated.

10. Following the conclusion of the hearing Mrs Schofield made an application on 1 August that a Foreign Affairs Committee Report on Overseas Territories should be placed before us, as bearing on the conversation between Lord Luce and the Chief Justice referred to in chapter 2 of this Report. Having considered the application we declined it as being of insufficient relevance.

11. Copies of the relevant written and e-mail communications between Mrs Schofield and the Solicitors to the Tribunal were included in the papers of the Tribunal.

Fifth Schedule

The standard of proof

Counsel for the Chief Justice submitted that we should apply the criminal standard of proof beyond reasonable doubt "given the gravity of the allegations and the magnitude of what is at stake". He referred in particular to allegations that the Chief Justice had committed criminal offences, and, in his words, had "colluded with his wife in a dishonourable and dishonest way", and "made complaints about the Government which he either knew or ought to have known were false". He submitted that, in the alternative, we should apply a standard, intermediate between the criminal and the civil, requiring "clear and convincing evidence", as in certain other jurisdictions. Finally, he said, we should at least apply the "flexible approach", described in *In Re H* [1996] AC 563 by Lord Nicholls of Birkenhead at page 586 where he said: "The more improbable the event, the stronger must be the evidence that it did occur".

It is clear that, apart from certain exceptions, the general standard of proof in civil proceedings is proof on the balance of probabilities (*In Re D* [2008] 1 WLR 1499, Lord Carswell at paragraph 23). As he pointed out, the exceptions include disciplinary proceedings brought against members of a profession, where proof beyond reasonable doubt is required (cf *Campbell v Hamlet*, Privy Council, 25 April 2005). However, we do not consider that the proceedings before us are analogous to disciplinary proceedings. Although they arise out of complaints about the conduct of the Chief Justice, he is not being 'prosecuted' by an accuser. The proceedings before us are inquisitorial in nature. The Chief Justice is entitled to be represented before us since his conduct is the subject of inquiry. The proceedings as a whole are concerned with the public interest - on the one hand,

to protect a judge against unfounded or illegitimate interference with his tenure of office, and on the other, to remove from office a judge who is unfit to hold office. That unfitness does not need to be based on misbehaviour. It may be based on his inability.

As Lord Hoffmann said in *In re B* [2008] 3 WLR 1 at paragraph 13: "…there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not". Accordingly we reject the idea of an intermediate standard. It is also inappropriate, in our view, to modify the civil standard because of the gravity of the allegations or the magnitude of the consequences for the Chief Justice (see *In Re D*, Lord Brown of Eaton-under-Heywood at paragraph 47; *In Re B*, Baroness Hale of Richmond at paragraph 70).

In these circumstances we apply the civil standard of proof on the balance of probabilities. In doing so we adopt the flexible approach that "the more improbable the event, the stronger must be the evidence that it did occur" (see *In Re D).* There are no matters in dispute which call for the application of the criminal standard of proof beyond reasonable doubt.