IN THE MATTER OF GUZMAN AND OTHERS

SUPREME COURT (Kneller, C.J.): March 19th, 1996

Courts—contempt of court—criminal contempt—court has inherent jurisdiction to ensure due administration of justice by use of contempt powers—power not to be used to prevent genuine, albeit misplaced criticism of court

Courts—contempt of court—criminal contempt—contempt to publish anything calculated to interfere with course of justice, including material detrimental to any proceedings or party to them—may be contempt to publish information held by court for purpose of pending litigation

Courts—contempt of court—criminal contempt—Minister of Crown, Government department or civil servant may be found guilty of contempt of court, but not Crown—finding rare—may not impose sanction against Crown assets, but may, e.g. make declaration

Criminal Procedure—institution of proceedings—contempt of court—only Attorney-General may institute proceedings for contempt of court if public interest at issue—private litigant may institute proceedings if seeking to protect private rights and Attorney-General may not then interfere

The applicants in judicial review proceedings sought leave to commit the Chief Minister, one of the respondents, for contempt of court.

The applicants were Spanish pensioners who had been beneficiaries under a Gibraltar state pensions scheme. The Gibraltar Government decided to wind up the scheme and it was alleged that in doing so, the Government treated the Spanish pensioners unfairly compared with their Gibraltarian counterparts. The applicants accordingly sought judicial review of the Government's decision.

While these proceedings were before the court, the Gibraltar Government issued a number of press releases commenting upon the merits of the case. The applicants alleged that these press releases (a) made use of information contained in affidavits which had been filed but not yet been read in open court; (b) represented that the applicants' solicitors were personally involved in the case and not merely acting on their clients' instructions; (c) represented that the conduct of the case was malicious and deliberately misrepresented the Government's intentions; and (d) attempted to discredit the applicants' claim and to galvanize public hostility against them. It was further alleged that the Government had in this manner attempted to pressurize the applicants' legal practitioners to

modify or drop their arguments in the case. On the basis of those press releases, they therefore sought leave to apply for the committal of the Chief Minister, one of the respondents in the judicial review proceedings, for contempt of court, or for such order as the court saw fit. It appeared that the Attorney-General had declined the applicants' request to pursue the matter of contempt of court on their behalf. The Supreme Court (Harwood, A.J.) granted the application.

The Chief Minister then made the present application to strike out that leave, submitting that it had been improperly given, since (a) the court had no power to commit a Minister of the Crown, acting in his official capacity, for contempt of court; (b) he had not in any case been acting in contempt of court but had been exercising his right of freedom of speech, guaranteed by the Gibraltar Constitution, to keep the public informed of the matters at issue, which were legitimate matters of public concern; and (c) the applicants had no right to pursue the issue of criminal contempt, which was a matter of public interest, and only the Attorney-General had the *locus standi* to pursue such a matter and his refusal to do so in the present case could not be questioned.

The applicants submitted in reply that (a) the Chief Minister was not immune from prosecution for contempt of court, either in his personal or official capacity, since the court had an inherent power to remedy abuses of its procedure, which included the power to punish any person whose acts amounted to an interference with the administration of justice and thus to criminal contempt; (b) the Chief Minister had so acted in that he had deliberately attempted to interfere with the manner in which the applicants' legal practitioners undertook their duties to their clients and to the court and had done so by publishing material which was before the court for the purpose of the pending proceedings, without first obtaining the leave of the court; and (c) it was not true to say that only the Attorney-General had *locus standi* to seek to commit a person for criminal contempt and in the present case the applicants were entitled to apply because they were attempting to assert their private rights and were not therefore usurping the Attorney-General's role of acting in the public interest.

Held, refusing to set aside leave:

(1) The court's power to punish contempt, both civil (*i.e.*, failure by a party to litigation to obey a court order) and criminal (*i.e.*, abuse of or conduct calculated to obstruct the court), was part of its inherent jurisdiction to ensure the due administration of justice. The court's power to punish criminal contempt existed to protect from interference those discharging their duties in the administration of justice, including witnesses, jurors and officers of the court, but did not extend to preventing genuine criticism made in good faith, however misplaced it might be, of acts done in or by the court (page 226, line 17 – page 227, line 17).

(2) It was accordingly criminal contempt to publish anything calculated to interfere with or impede the course of justice. This included

the publication of material which was detrimental to any proceedings or a party to them, and attempts to incite public opinion against such a party or its legal practitioners. It could be criminal contempt to publish material to be found only in documents held by the court for the purposes of pending litigation. Although some such documents were obtainable, without the court's leave, by members of the public on payment of the appropriate fee prescribed by rules of court, and others were obtainable with leave on showing good reason for publication, publication of such material outside these rules could still amount to contempt if it interfered with the administration of justice (page 227, line 18 – page 228, line 8; page 229, lines 7–29).

(3) The Chief Minister, acting in either his personal or official capacity, or indeed a Government department or a civil servant, could be found guilty of criminal contempt if it were shown that he or it intended to interfere with the administration of justice, although such a finding was not possible against the Crown itself. The circumstances in which such a finding was appropriate would by their very nature be rare. Whilst an order against the Crown's assets would not be an appropriate sanction in such a case, there were other possible remedies, including a declaration (page 230, line 10 – page 231, line 28).

(4) Lastly, it could not be said that the applicants had no *locus standi* to initiate proceedings against the Chief Minister for contempt, because they were attempting to assert their private rights and the Attorney-General could not interfere, whereas had they been attempting to raise an issue of public rights, only the Attorney-General would have been able to proceed. For these reasons, leave to apply for committal for contempt of court had properly been given and the Chief Minister's application to set it aside would fail (page 228, lines 9–45; page 231, line 29 – page 232, line 2).

Cases cited:

(1) *Ambard* v. *Att.-Gen. (Trinidad & Tobago)*, [1936] A.C. 322; [1936] 1 All E.R. 704, *dicta* of Lord Atkin applied.
(2) *Att. Gen*. v. *B.B.C*., [1981] A.C. 303; [1980] 3 All E.R. 161, considered.
(3) *Att. Gen*. v. *Newspaper Publ. PLC*, [1988] Ch. 333; [1987] 3 All E.R. 276, considered.
(4) *Att. Gen*. v. *Times Newspapers Ltd*., [1973] Q.B. 710; [1973] 1 All E.R. 815; on appeal, [1974] A.C. 273; [1973] 3 All E.R. 54, considered.
(5) *Att. Gen*. v. *Times Newspapers Ltd.*, [1992] 1 A.C. 191; [1991] 2 All E.R. 398.
(6) *Bonnard* v. *Perryman*, [1891] 2 Ch. 269; [1891–4] All E.R. Rep. 965.
(7) *Bradlaugh* v. *Gossett* (1884), 12 Q.B.D. 271; 50 L.T. 620.
(8) *Cooper* v. *Hawkins*, [1904] 2 K.B. 164; (1903), 89 L.T. 476, considered.

(9) *Dingle* v. *Associated Newspapers Ltd*., [1960] 2 Q.B. 405; [1960] 1 All E.R. 294n.; on appeal, [1961] 2 Q.B. 162; [1961] 1 All E.R. 897; on further appeal, *sub nom. Associated Newspapers Ltd*. v. *Dingle*, [1964] A.C. 371; [1962] 2 All E.R. 737.
(10) *Dixon* v. *Dixon*, [1904] 1 Ch. 161; [1903] W.N. 156.
(11) *Dobson* v. *Hastings*, [1992] Ch. 394; [1992] 2 All E.R. 94, considered.
(12) *Gouriet* v. *Att. Gen.*, [1978] A.C. 435; *sub nom. Gouriet* v. *Union of Post Office Workers*, [1977] 3 All E.R. 70.
(13) *Helmore* v. *Smith (No. 2)* (1886), 35 Ch. D. 449; 56 L.T. 72.
(14) *Jenkins* v. *Att. Gen*. (1971), 115 Sol. Jo. 674.
(15) *Johnson, In re* (1887), 20 Q.B.D. 68; 58 L.T. 160, *dicta* of Bowen, L.J. applied.
(16) *M, In re*, [1994] 1 A.C. 377; [1993] 3 All E.R. 537.
(17) *Merricks* v. *Heathcoat-Amory*, [1955] Ch. 567; [1955] 2 All E.R. 453.
(18) *R*. v. *Home Secy., ex p. Brind*, [1991] 1 A.C. 696; *sub nom. Brind* v. *Home Secy.*, [1991] 1 All E.R. 720.
(19) *R*. v. *Home Secy., ex p. O'Brien*, Queen's Bench Division, July 26th, 1995, unreported, considered.
(20) *R*. v. *Martin* (1848), 5 Cox, C.C. 356.
(21) *R*. v. *Osbourne* (1992), 14 Cr. App. R. 265.
(22) *Stockdale* v. *Hansard* (1839), 9 Ad. & El. 1; 112 E.R. 1112.
(23) *Sunday Times* v. *United Kingdom* (1979), 2 E.H.R.R. 245.
(24) *Vine Prods. Ltd.* v. *Green*, [1966] Ch. 484; *sub nom. Vine Prods. Ltd*. v. *Mackenzie & Co. Ltd*., [1965] 3 All E.R. 58.
(25) *Wilton, Ex p*. (1842), 1 Dowl. N.S. 805; *sub nom. In re Macleod*, 6 Jur. 461.

K.B. Parker, Q.C., H.J.M. Levy and *L.E.C. Baglietto* for the applicants;
J.E. Triay, Q.C., R.M. Vasquez and *J.E. Triay* for the respondents.

KNELLER, C.J.: At this point, in what has become known as "the Spanish pensions case," the court has to decide whether or not the Supreme Court has jurisdiction to grant leave to apply for an order of committal of a Minister of the Crown in Gibraltar acting in his official capacity or such order as the court might think fit to make against him pursuant to the provisions of the Rules of the Supreme Court, O.52.

A brief outline of the background to the issue follows. I repeat, because it is apt, what I set out in a ruling I gave on August 21st last year in the Government of Gibraltar's application for security for costs in the Spanish pensions case.

Many Spanish nationals who were employed here contributed to the Gibraltar Insurance Fund from 1955 when it was set up until they lost their employment in 1964 because Franco closed the border between Gibraltar and Spain. They had contributed 6d. per week, which was the

rate in force for all contributors during those years. After 1969, they could not and did not contribute to or collect their pensions because they were on the wrong side of the frontier. The Spanish Government of the day refused to accept from the Gibraltar Government a share of the Fund for the Spanish contributors and pensioners.

Inflation and higher standards of living between 1969 and 1980 led to pensioners in Gibraltar receiving much larger pensions here than they had in the years 1955 to 1969 when Mr. Aguera Guzman and those he represents ("the Spanish pensioners") were contributing to or enjoying their pensions. The contributors on this side of the border made this possible by paying greater contributions.

When Spain acceded to the EEC, it was decided by the authorities here that the same pension should be paid to the Spanish pensioner across the border as was paid to the Gibraltarian pensioner here if the Spanish pensioner had the same record of contributions before the border was closed. The Spanish pensioner, however, did not pay any back contributions or increased contributions and was not asked to do so.

The Fund could not meet this liability for more than a few months. The EEC would not send the Gibraltar Government any money to meet it. A Gibraltar Government and a UK Government study group worked out that if the Gibraltar Government had to continue to pay the Spanish pensioners the larger pensions, about 7% of Gibraltar's GNP would go to people outside Gibraltar and that would wreck the local economy.

The UK Government provided money that covered the additional liability up to the end of 1993. The two Governments agreed to wind up the Fund and distribute any balance in it to past and present contributors on either side of the border in proportion to the pensions they would have received if the Fund were not wound up. The Social Security (Insurance) Ordinance (Amendment) Regulations 1993 were made pursuant to s.53 of the Social Security (Insurance) Ordinance to carry out that agreement.

The two Governments considered that this had to be done and that it did not transgress the Gibraltar Constitution or EEC Law. The Governments believe that the Gibraltarian and Spanish contributors have been treated equally and fairly and that in fact the Spanish contributors and pensioners across the border have been treated generously.

The Spanish pensioners, the Spanish Government and the Junta de Andalucia took a different view. They briefed Triay & Triay, the Gibraltar firm of barristers and solicitors, and one consequence was that the Spanish pensioners applied on February 22nd, 1994 to move against the Gibraltar Government for judicial review of its decision to wind up the Fund and distribute its balance in the manner already set out in this ruling. Leave to move was granted by this court the next day.

Continuing with the outline of the background to the question posed at the beginning of this ruling, it is right to mention in summary form the Spanish pensioners' grounds for asking for judicial review. They contend

that the Gibraltar Government's decision to wind up the Fund was inequitable. It was neither necessary nor expedient to abolish the payment of its benefits to the Spanish pensioners for the purpose of winding up the Fund and the manner of doing so was unfair to them. Their financial loss amounts to deprivation of their property without justification or legitimacy, which is contrary to s.6 of the Constitution. Other persons, bodies or institutions are also liable directly or indirectly to meet the liabilities of the Gibraltar Government to continue to pay the Spanish pensioners their dues.

The Government of Gibraltar counters all that by reference to s.23 of the Ordinance, which provides for the winding up of the Fund and the disbursement of its assets. The repeal of the Ordinance's provisions for payments out of the Fund is covered by s.53(e).

It submits that once the Governor decided to wind up the Fund, he had to do so fairly. He was given powers to make the necessary provisions to do so. Each contributor either side of the frontier was to receive a dividend related to the benefits he would have enjoyed if the Fund had continued to exist, plus a little extra due to the United Kingdom's *ex gratia* payments to the Fund.

The Government of Gibraltar accepts, in the judicial review action, that for a number of years the Spanish pensioners were entitled by statute to receive their benefits, but asserts that now they have no right to seek them here because the rights no longer exist under the law of Gibraltar. No outside body has any duty to fund Gibraltar's Pensions Scheme, according to the Government of Gibraltar.

So much for the parties' contentions in the judicial review case. It has not been heard and determined yet because, among other things, the Government of Gibraltar applied for an order that the Spanish pensioners should give security for the Gibraltar Government's costs in the judicial review case. Later, Mr. Aguera Guzman and those he represents, the Spanish pensioners, and the barristers and solicitors of the firm of Triay & Triay together asked for leave to move the court to commit the Chief Minister for criminal contempt or for such order as the court might think fit to make against him.

Harwood, A.J. granted leave on October 5th last year, which on October 12th the Chief Minister asked the court to discharge with costs on the ground that Harwood, A.J. lacked jurisdiction to grant such leave, and there is the origin of the conundrum for the court to answer in this ruling.

The alleged acts which are said to amount to contempt of this court lie in the issue and publication of a series of press releases on behalf of the Gibraltar Government between May 22nd, 1994 and September 13th, 1995 in relation to the judicial review proceedings.

The Spanish pensioners and the barristers and solicitors of Triay & Triay complain that the press releases amount to an interference with the

administration of justice. This is because the releases include opinions on the merits of questions which are for the court to determine, and give rise to a real risk that the fair trial of the Spanish pensions case will be prejudiced.

Particulars are given. The press releases declare among other things that the claim by the Spanish pensioners that the payments to them in the past are now the subject of political discrimination in Gibraltar is a "value judgment" and irrelevant to any law upon which the Spanish pensioners are entitled to rely, when in fact according to the Spanish pensioners what they are saying is the abolition of the Fund in the manner in which it was carried out was discriminatory and contrary to law. This issue, they assert, is clearly one that is still pending determination by this court.

The press releases, they add, allege that the financial support given by the Junta de Andalucia as a part of the sovereign Government of Spain to the case of the Spanish pensioners justifies the making of an order for security for costs against the Spanish pensioners, who call themselves and are called by Triay & Triay "the impoverished litigants." That was a matter for the court to determine and it has since been determined in favour of the Government of Gibraltar, but is presently the subject of an appeal to the Court of Appeal.

The Government of Gibraltar has maintained in one or other of the press releases that the Spanish pensioners and Triay & Triay aver that the Government has planned to deprive Spanish pensioners of their pensions while preserving those for the Gibraltarians, which is a malicious distortion of the case of the Spanish pensioners put forward by Triay & Triay. Again, this is an important issue in the Spanish pensions case which awaits the decision of this court.

The Government of Gibraltar has also said in a press release that the arrangements in which Community Care Ltd. participates are irrelevant to the issues that arise in the Spanish pensions case: another matter that arises for decision by this court in the Spanish pensions case.

These press releases make public material which has been set out in affidavits which have not been read in open court and have been used for the purpose of business in chambers. This has been done without the consent of the court. And that is contempt.

There has been a direct attempt by the Government of Gibraltar, in the submission of the Spanish pensioners and Triay & Triay, to subject the Spanish pensioners to public obloquy because they have come to this court to have their legal rights and obligations pronounced upon and enforced by the court. Those responsible for these press releases portray this action by the Spanish pensioners as totally unmeritorious.

The press releases, in the view of Triay & Triay, constitute an interference with their professional duty to the court and to the Spanish pensioners in the conduct of this case. The releases do not always mention the name of Mr. Aguera Guzman and those whom he represents,

but always refer to members of Triay & Triay as if they were personally involved. They are said to be acting on their own initiative and without proper instructions. They are declared to be maliciously, unreasonably and misleadingly persisting in the allegation that Community Care Ltd. plays a part in a plan of the Gibraltar Government to deprive Spanish pensioners of their entitlement while it is paid to Gibraltarian pensioners. They go on to say that as a result of the malicious, misleading conduct of the case for the Spanish pensioners, Triay & Triay is threatening the Government's arrangements for the continued payment of pensions to elderly Gibraltarian citizens.

The Government of Gibraltar promises in one press release that it will protect present and future Gibraltarian pension rights against the actions of Triay & Triay "whatever the final outcome of the court case."

So the barristers and solicitors of Triay & Triay say they are accused of lacking any acceptable standard of professional ethics in the conduct of the Spanish pensions case. They are the subject of irrelevant scandalous allegations that they are motivated by their own "political value judgments." They are even charged with making unreasonable attacks upon the integrity of the Chief Minister in relation to meetings he has had with the Spanish pensioners. They are alleging that the Spanish pensioners are generally persons of "limited intelligence" and failing to act on their professional instructions. Instead they have acted on their own initiative and implicated Community Care Ltd. in an attempted fraud on the Spanish pensioners.

All this, the barristers and solicitors of Triay & Triay maintain, is to be set against the fact that the Spanish pensions case raises a great deal of public hostility and emotion among a large number of the public in Gibraltar. A determination by the court in favour of the Spanish pensioners, according to Triay & Triay, would raise potential liabilities for the Government and the Gibraltarians have no sympathy for any claim advanced on behalf of the Spanish pensioners against Gibraltar's public funds.

What the Chief Minister is trying to do, according to Triay & Triay, is to discredit the arguments advanced so far by Triay & Triay, and to cause the Spanish pensioners to wonder whether they should proceed with the application for judicial review in the light of such hostility, which undermines the confidence of the Spanish pensioners in Triay & Triay. The barristers and solicitors of Triay & Triay feel they are being pressed to drop the case or modify certain arguments irrespective of their merits in law, when all that they have done is to discharge their professional duty. The press releases militate against the efficiency of the administration of justice. There has been no attempt by Triay & Triay to suggest to the Chief Minister that he ought not to meet with the Spanish pensioners, but they wrote to him privately suggesting that the Spanish pensioners should be legally represented and advised by independent advisers at such meetings.

In short, say Triay & Triay, there is "a press war" against them for being involved on behalf of the Spanish pensioners in their move for judicial review. Accepting instructions from the Spanish pensioners was bound to attract hostility and to exploit this unpopularity in a small community like Gibraltar is to interfere with the administration of justice. It should be well known, but it is not, that a local legal practitioner is committed by the Gibraltarian rules of his profession to represent clients whether their claims are popular or unpopular.

One reason for it, they surmise, is that at the time of the Government's press releases, two members of Triay & Triay were elected members of the House of Assembly. One is the Leader of the Opposition and the other is or was a member of the Opposition party with responsibilities to their party and the electorate of Gibraltar which they must honour. The Spanish pensioners and Triay & Triay believe that the press releases have been issued to make out that that political party is somehow tied up with the claims of the Spanish pensioners. The other members of Triay & Triay are not engaged in politics or even in the conduct of this case, yet each member is usually named in full at the end of the press releases.

The Spanish pensioners and Triay & Triay, who wish to have the Chief Minister committed for contempt or some other order made against him, assume that he made these attacks on the Spanish pensioners and their legal advisers here in Gibraltar with the intention of undermining the Spanish pensioners' confidence in Triay & Triay, provoking differences among partners of Triay & Triay, conjuring up public scorn and annoyance at Triay & Triay's efforts and so impairing their professional work.

Earlier in this ruling, I said that the only question this court has to answer at this point is whether or not a Minister of the Crown acting in his official capacity may be committed by the Supreme Court of Gibraltar for criminal contempt or have some other appropriate order made against him. This issue was isolated by counsel for the Government of Gibraltar as being one that should be answered at the outset of the Chief Minister's application to have the leave given by the Additional Judge discharged. The result will then go to the Court of Appeal for Gibraltar. If Harwood, A.J. had no jurisdiction to give leave to move for committal for contempt, then the other issues need not be answered. Counsel for the Spanish pensioners and Triay & Triay agreed to this, but reluctantly, I think.

So much for the background. The researches of counsel have not unearthed any direct authority on this issue, so the answer to it might be found in first principles and decisions on analogous points. The Constitution guarantees everyone in Gibraltar the right to the protection of the law for freedom of expression (ss. 1(*a*) and (*b*) and 10); a fair impartial trial according to law (s.8(8)) and the services of his lawyer (s.8(2)(*d*)): see also art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Supreme Court of Gibraltar is established by s.56 of the Constitution. It is a superior court of record. It possesses and exercises all the jurisdiction, powers and authorities which are from time to time vested in and capable of being exercised by Her Majesty's High Court of Justice in England (see ss. 11 and 12 of the Supreme Court Ordinance). The jurisdiction vested in it is to be exercised (as far as regards practice and procedure) in the manner provided by that Ordinance or any other Ordinance, or by such rules as may be made pursuant to the Ordinance or any other Ordinance and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice (see s.15 of the Ordinance and r.8(4) and Schedule 1 of the Supreme Court Rules). Local Ordinances do not deal specifically with the practice and procedure for applications relating to contempt or other suitable relief, so in default the provisions of O.52 of the Rules of the Supreme Court are applied here.

The power of courts of record to punish contempt is part of their inherent jurisdiction: see *Borrie & Lowe's Law of Contempt*, 2nd ed., at 314 (1983). It is part of the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. It flows from the concept of a court of law, not from statute or common law, and so courts should be slow to find it has been cut down by the legislature unless it is in the clearest of terms. Technicalities should not be allowed to emasculate it: see Jacob, *The Inherent Jurisdiction of the Court*, 23 *Current Legal Problems*, at 28 (1970).

There are two types of contempt: first, civil contempt, which is disobedience to an order of the court committed by a party to the proceedings and, secondly, criminal contempt, committed by any person *in facie curiae* by hurling abuse or an object at the court or outside the courts or by conduct obstructing or calculated to prejudice the due administration of justice.

In *In re Johnson* (15), Bowen, L.J. explained the reason for the offence of criminal contempt thus (20 Q.B.D. at 74):

> "The law has armed the High Court of Justice with the power and imposed on it the duty of preventing brevi manu and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground, and not on any exaggerated ground of the dignity of individuals that insults to judges are not allowed. It is on the same ground that insults to witnesses or to jurymen are not allowed. The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have resort to courts of justice."

See also *Att. Gen.* v. *Times Newspapers Ltd.* (5). In *Ambard* v. *Att.-Gen. (Trinidad & Tobago)* (1), Lord Atkin set the boundaries when he said ([1936] 1 All E.R. at 709):

> "[N]o wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are allowed to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."

The courts have punished for criminal contempt those who have attempted to interfere with officers of the court while engaged in their duties, *e.g.*, a Master (*Ex p. Wilton* (25)), a receiver (*Helmore* v. *Smith (No. 2)* (13), *Dixon* v. *Dixon* (10)), a foreman of a jury (*R.* v. *Martin* (20)), and a party's solicitor or counsel (*R.* v. *Osbourne* (21)).

Can it be a criminal contempt of court to publish in any form material to be found only in documents in the file in the court's registry relating to civil proceedings? The answer is that it depends on the documents in which the information lies. A file in the registry is not open to the public: it is maintained by the court only for the proper conduct of the proceedings. If he pays the fee, someone who is not a party may, without leave, search for, inspect and take a copy of the writ of summons and any judgment or order given or made in court. He may do so for any other documents only when leave of the court is granted on his application made *ex parte*: see O.63, r.4 of the Rules of the Supreme Court. He will have to show good reasons for leave to be given. When any document is used in open court, anyone may publish its contents unless the court orders otherwise. Any material which is used in chambers and not in open court may not be published by anybody without leave of the court. If publication of material filed or raised in the proceedings offends against these rules, it may be criminal contempt if it interferes with the administration of justice: see the judgment of Nicholls, V.-C. in *Dobson* v. *Hastings* (11) ([1992] 2 All E.R. at 99–101). He then gave the example (*ibid*., at 102) of publication to the world of documents containing trade secrets which would nullify a pending trial. A Minister of the Crown, because of his position or duties, would not be exempt from this rule, or so I think.

Questions are raised in this case as to the right to inform the public, the right of the public to be informed, freedom of speech and so forth. Although it may not be part of Gibraltar law, it is useful to refer to the Convention again, of which art. 10, dealing with these rights, subjects them to restrictions necessary in a democratic society including those for maintaining the authority and impartiality of the judiciary, the functioning of the courts and the whole machinery of justice: see *R.* v. *Home Secy., ex*

p. Brind (18), *Sunday Times* v. *United Kingdom* (23) (2 E.H.R.R., para. 55, at 274–275). Lord Reid dealt with that point in *Att. Gen*. v. *Times Newspapers Ltd*. (4) in this way ([1974] A.C. at 294):

> "Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice."

See also s.10(2)(*b*) of the Constitution.

It was submitted that only Her Majesty's Attorney-General has *locus standi* when the contempt of court alleged is not that of breaching or assisting in the breach of a court order. The Attorney-General declined the invitation of the Spanish pensioners and Triay & Triay to apply to the court to move against the respondent for contempt. In *Att. Gen*. v. *Times Newspapers Ltd.* (4), Lord Diplock said ([1974] A.C. at 311):

> "[T]he Attorney-General accepts the responsibility of receiving complaints of alleged contempt of court from parties to litigation and of making an application in his official capacity for committal of the offender if he thinks this course to be justified in the public interest. He is the appropriate public officer to represent the public interest in the administration of justice."

Contrast that, however, with the view of Lord Edmund-Davies in *Att. Gen*. v. *B.B.C*. (2) ([1981] A.C. at 346):

> "My Lords, in so far as the Attorney-General invites the courts to rely on his ipse dixit, in the confidence that all holders of that office will always be both wise and just about instituting proceedings for contempt, acceptance of his invitation would involve a denial of justice to those who on occasion are bold enough to challenge that a particular holder has been either wise or just."

In *Att. Gen*. v. *Newspaper Publ. PLC* (3), Donaldson, M.R. declared ([1988] Ch. at 362) that "in general" this form of contempt was for the Attorney-General to raise. Lord Bridge of Harwich said it was "a difficult point" on which the Attorney-General should be heard in a future application by someone other than the Attorney-General. In *Dobson* v. *Hastings* (11), Nicholls, V.-C. also left it for another day. At present, therefore, the relevant authorities do not all support the submission that only Her Majesty's Attorney-General for Gibraltar has *locus standi* in an application such as was before Harwood, A.J.

It is correct, however, to say that public rights or the criminal law in a civil action can only be asserted by Her Majesty's Attorney-General as an officer of the Crown representing the public. It is a fundamental principle of English law, as Mr. John Prendergast Gouriet learned (in the end) when he was spurred on by his interest in the enforcement of the law: see *Gouriet* v. *Att. Gen*. (12). But as I see it, what the Spanish pensioners and their local lawyers are trying to do here is to assert their private rights and in that the Attorney-General, in my view, may not interfere.

This application will be tried by a professional judge alone so it is generally accepted that by his professional training he will be sufficiently well equipped to be on guard against such matters influencing him in deciding such a case: see the judgment of Buckley, J. in *Vine Prods. Ltd.* v. *Green* (24) ([1966] Ch. at 496), although this was doubted by Viscount Dilhorne in *Att. Gen*. v. *B.B.C.* (2) ([1981] A.C. at 335).

It is a criminal contempt of court to publish, by words spoken or written, material calculated to interfere with the course of justice. Anything that impeded or prejudiced it would be such a contempt. An attempt to retard, slow down, delay or hinder it would be criminal contempt. So would any publication that was detrimental to the proceedings or person bringing them: see *Att. Gen*. v. *B.B.C.* (2). Likewise, any attempt to incite public opinion against a party—and, I would add, his legal representative—so as to affect the conduct of the case or the assertion of the party's rights: see *Att. Gen*. v. *Times Newspapers Ltd*. (4) ([1973] 1 All E.R. at 825, *per* Phillimore, L.J.). The publisher's intention can be inferred from the circumstances: see the speech of Lord Oliver of Aylmerton in *Att. Gen*. v. *Times Newspapers Ltd*. (5) ([1992] A.C. at 217–218).

Then we go back again to the need not to restrict freedom of expression unnecessarily. This covers the freedom of the press and the freedom of the Government of the day to inform the public of the progress or otherwise of Government business. Gagging injunctions, for example, that are severe restrictions on these freedoms are seldom granted (see the judgments of Lord Coleridge, C.J. in *Bonnard* v. *Perryman* (6) ([1891] 2 Ch. at 284–285) and Lord Denning, M.R. in *Att. Gen*. v. *B.B.C.* (2) ([1981] A.C. at 311)). None of this would, I apprehend, protect statements lambasting litigants and or their lawyers for bringing their claims and submissions to the court.

The immunity of the Crown, its Ministers and servants was also prayed in aid. *Cooper* v. *Hawkins* (8) was cited. Cooper, a civilian employed and paid by the Crown as a leading engine driver, was exempted from the provisions of s.4 of the Locomotive Act 1865, which made it an offence to drive a locomotive at more than 2 m.p.h. The statute was not expressed to bind the Crown, and the locomotive he drove was Crown property. He drove it, laden with coal, at 3 m.p.h. along Wellington Avenue in Aldershot to reach a balloon factory before nightfall. I presume it was a factory for producing balloons for the armed services. Wills, J. found Cooper was not doing anything which was unnecessary or without orders. The particulars of the charge alleged that the "speeding" happened at 5.30 p.m. on February 26th, 1903 and Cooper was not, according to the report, drunk. Furthermore, in the performance of military duties, it would be absolutely necessary for such locomotives to be driven at a greater speed than 2 m.p.h. The act of Cooper was, in brief, the act of the Crown: he was the servant of

the Crown on Crown service. Cooper did not, it should be noted, go outside the scope of his service to the Crown.

An injunction will not lie against an officer or representative of the Crown such as a Minister though sued personally for carrying out his official functions because again his actions are those of the Crown. The Crown as monarch can do no wrong and the courts lack jurisdiction in such cases. It is otherwise if the Minister is sued in his personal capacity for acts which were not connected with his official functions: see s.2 of the Crown Proceedings Act 1947 and *Merricks* v. *Heathcoat-Amory* (17).

It follows, then, that a finding of contempt cannot be made against the Crown directly. It can be made, however, against a Government department. And it can be made against a Minister of the Crown or a civil servant both in his official capacity and his personal capacity if it relates to his own default and if it is shown that he had an intention to interfere with or impede the administration of justice. Thus, according to Lord Woolf, it is expected to be rare—indeed, exceptional—that the circumstances will exist in which such a finding will be justified, but, because it vindicates the rule of law, the possibility exists. The court would not fine or sequester the assets of the Crown, a Government department or an officer of the Crown acting in his official capacity because it would be inappropriate, but there are other sanctions, including a declaration, which would suffice: see *In re M* (16).

It has been recognized by the courts in England that the dissemination of information in the exercise of a prerogative power is unsuitable for and immune from judicial review: see *Jenkins* v. *Att. Gen*. (14) and de Smith & Brazier, *Constitutional & Administrative Law*, 7th ed., at 142 (1994).

In *R*. v. *Home Secy., ex p. O'Brien* (19), Stuart-Smith, L.J. and Butterfield, J. adjourned *sine die* two applications by IRA men by motion for leave pursuant to O.52, r.2 to apply to commit the Home Secretary and the Governors of the prisons in which they lay for contempt of court because each had also applied for judicial review of a number of decisions by the Secretary of State and the Governors which had yet to be heard and determined and if they were successful, the applicants might well find it unnecessary to proceed with the applications to commit for contempt of court which for that reason were described as "misconceived." My reading of the judgment does not persuade me that the court said it had no jurisdiction to hear the applications for leave to apply for committal of the Secretary of State simply because he was a Minister of the Crown acting as such. The applications were neither struck out nor dismissed but adjourned, presumably for the applicants to reconsider after their judicial review applications had been resolved.

Barristers and solicitors approved, admitted and enrolled by this court accept that they have to act as fearlessly in and outside the court on their clients' instructions as is consistent with their duty to the court to observe

the proprieties. Their complaint here, however, is that in attacks on them there has been an interference with the administration of justice in the Spanish pensions case. The Chief Minister vehemently denies it. That is an issue which this court is not dealing with now: the material for doing so is not yet all before the court. The authorities cited so far do not support the view that as a class, barristers or solicitors here cannot succeed in an application for leave to apply for committal for contempt. In any case, it should not be overlooked that the first applicant is a Spanish pensioner who by leave represents all the others and is not an officer of this court but a party in litigation before it.

A Minister of the Crown, it was pointed out, could ventilate the same matters in the same phrases in the House of Assembly. This court recognizes that the legislature has the exclusive right to regulate its own proceedings. A court of law cannot enquire into what is said or done within its walls. In the United Kingdom, that is enshrined in art. 9 of the Bill of Rights 1688 and was applied in *Stockdale* v. *Hansard* (22), *Bradlaugh* v. *Gossett* (7) and *Dingle* v. *Associated Newspapers Ltd*. (9). Whether or not allegations are allowed to be made in the House of Assembly about the claims or conduct of a party or his legal representatives in litigation pending before this court is a matter for the Speaker and the members, and it is most unlikely that there would be any move to interfere in any proceedings before the court. If there were, this court would not have to pay any attention to what happened there. Parliamentary privilege does not, however, cover press releases by a Minister issued outside Parliament. The fact that they would be privileged if repeated in it does not, in my judgment, mean that in an appropriate case, leave to apply for committal or another proper order may not be given.

Harwood, A.J. had before him an *ex parte* application by the Spanish pensioners and members of their legal representatives' firm for leave to apply for orders against a Minister of the Crown. By way of remedy, they asked for committal of the Minister or whatever other order the court thought fit. Harwood, A.J. granted leave. The leave, it was said, could not and should not have been given. When the substantive application came on before this court, it was agreed that the court should hear submissions of law on the issue of whether the Supreme Court of Gibraltar had jurisdiction to give such leave to accede to such an application against a Minister of the Crown acting in his official capacity. Personalities were kept out of the arguments as far as possible so the question is a hypothetical one. It was said to be unprecedented for a Minister of the Crown to have been proceeded against for contempt of court or for other orders if he were acting in his official capacity but it is clear from *In re M* (16) that he could be and *R.* v. *Home Secy., ex p. O'Brien* (19) is not authority against that answer. I hold that the preliminary point taken by counsel for the Chief Minister fails.

This is a ruling that should go to appeal if the respondent wishes to appeal; if leave to appeal is required, it is granted.

To date in this Spanish pensions case, the parties have been left to agree an appropriate order for costs and they have been reserved. The same order is made for this stage of this application. There will also be general liberty to apply for each party.

Application to set aside dismissed.