[2001–02 Gib LR 235]

R. (Application of JURADO) v. MANAGER OF KING GEORGE V HOSPITAL

SUPREME COURT (Schofield, C.J.): March 13th, 2002

Constitutional Law—fundamental rights and freedoms—"civil right or obligation"—Mental Health Review Tribunal is "authority" considering "civil right or obligation" under Constitution, s.8(8), as consideration of applicant's medical condition determines right to personal liberty

Mental Health—Mental Health Review Tribunal—independence—Tribunal is independent and impartial "authority" under Constitution, s.8(8) as each application heard by panel of three with different qualifications—two-year period of appointment, members' lack of judicial oath or one member's duty at hospital gives no perception that Tribunal lacks independence—no dependency between members and executive

Mental Health—Mental Health Review Tribunal—legal representation—by Constitution, s.8(8), implied right to legal representation at public expense before Tribunal, if necessary effectively to challenge detention under Mental Heath Ordinance, s.6—insufficient to satisfy s.8(8) that legal representation ultimately available in Supreme Court on appeal or review

The applicant sought judicial review of the respondent's decision to detain him in hospital for treatment.

The applicant had been admitted to hospital for treatment pursuant to powers exercised under the Mental Health Ordinance. The s.6(3) requirements were complied with and two doctors made written recommendations that he was suffering from mental illness. The authority for his admission expired on June 20th, 2001 and on the basis of one doctor's recommendation, the applicant continued to be detained in hospital, purportedly in accordance with s.6 of the Ordinance.

The applicant commenced the present judicial review proceedings submitting that his detention from June 20th, 2001 onwards was unlawful as (a) it was not founded on the recommendation of two medical practitioners; and (b) although a right of appeal to the Mental Health Review Tribunal was available, he could not take advantage of it because of the unavailability of legal aid for such an appeal. He also sought damages for his detention between June 20th and June 27th (when the requirements of s.6 were complied and a second doctor joined the first in recommending

that the applicant should be detained in hospital). The main issues were also contained in an action brought under s.15 of the Constitution.

The applicant submitted that (a) his continued detention from June 20th to June 27th was unlawful as it did not comply with the requirements of s.6 of the Mental Health Ordinance; (b) the Tribunal was not objectively an "independent and impartial" authority, as required by s.8(8) of the Constitution, due to (i) the short two-year term of appointment of its members; (ii) the fact that its lawyer, doctor and lay members were not required to take a judicial oath; (iii) the members' dependency on the executive; and (iv) the perception that one of its members, who worked at the hospital, could favour a colleague's recommendation; and (c) to have the fair hearing guaranteed by s.8(8) of the Constitution and to protect his right to personal liberty under s.3(1), legal aid had to be provided for representation on an application to the Tribunal.

The respondent submitted in reply that (a) the Tribunal was not an authority covered by s.8(8), as it did not rule on the existence of civil rights or obligations; (b) the availability of legal representation in the Supreme Court on subsequent appeal or judicial review protected the applicant's s.8(8) right to a fair trial; and (c) the application for damages was wrongly brought in judicial review proceedings, as the rectification of an error by an inferior court or tribunal was not at issue.

Held, adjourning the application:

(1) The applicant had been unlawfully detained in hospital from June 20th to June 27th, 2001 because the requirements of s.6 of the Mental Health Ordinance for a recommendation from two doctors had not been followed. He would be awarded only nominal damages for his unlawful detention, as he had been correctly detained for his own benefit and the unlawfulness was simply the result of not following the correct formal procedures. It was not in the interests of justice to require the applicant to put this claim for damages for false imprisonment in its correct procedural form (para. 10; para. 45).

(2) The Mental Health Review Tribunal was an "authority" under s.8(8) of the Constitution, as in considering the applicant's medical condition it made a determination on his right to personal liberty. The fact that each application to the Tribunal was heard by a panel of three members with different qualifications, was a sufficient guarantee of its independence and impartiality to satisfy s.8(8). In deciding whether it was independent and impartial, the length of appointment of its members was not the determinative factor. The fact that its members did not take a judicial oath did not reasonably bring about an objective belief that it lacked independence. There was no relationship of dependency between the members and the executive, as there was no evidence that an appointment to the Tribunal was or was seen as part of a career progression dependent on someone in authority. In addition, the fact that one of the members had duties at the hospital would not give an objective

belief that he lacked independence and impartiality (para. 14; paras. 25–27; para. 29).

(3) A person detained against his will had the right to challenge his detention, through the Tribunal, at the earliest possible time. Under s.8(8) of the Constitution, an applicant had the implied right to be legally represented at public expense before the Tribunal, if this were necessary for an effective challenge to an order under s.6 of the Ordinance. It was insufficient to satisfy s.8(8) that on ultimate recourse to the Supreme Court legal representation might be available (para. 40).

(4) A new system would have to be established for the allocation of legal aid on an application to the Mental Health Review Tribunal. It would not be until the requirements for the grant of legal aid had been determined that the question of providing legal aid counsel for the applicant could be addressed. If a means test were appropriate, it should accord with that applied in criminal cases, as the applicant's liberty was at stake. Due to the novelty of the applicant's point, the court was not disposed to award damages at the present time. The application would be adjourned (paras. 42–44; para. 46).

Cases cited:

(1) *Airey* v. *Ireland* (1979), 2 E.H.R.R. 305, followed.
(2) *Bryan* v. *United Kingdom* (1995), 21 E.H.R.R. 342, referred to.
(3) *Campbell* v. *United Kingdom* (1984), 7 E.H.R.R. 165, applied.
(4) *Ciraklar* v. *Turkey* (1998), 32 E.H.R.R 535, distinguished.
(5) *Findlay* v. *United Kingdom* (1997), 24 E.H.R.R. 221, referred to.
(6) *Gautrin* v. *France* (1998), 28 E.H.R.R. 196, referred to.
(7) *R.* v. *Bournewood Community & Mental Health N.H.S. Trust, ex p. L*, [1999] 1 A.C. 458; [1998] 3 All E.R. 289, distinguished.
(8) *R.* v. *Governor of Brockhill Prisons, ex p. Evans (No. 2)*, [2001] 2 A.C. 19; [2000] 4 All E.R. 15, distinguished.
(9) *R. (Alconbury)* v. *Environment Secy.*, [2001] 2 All E.R. 929, distinguished.
(10) *Roberts* v. *Chief Constable, Cheshire Constabulary*, [1999] 1 W.L.R. 662; [1999] 2 All E.R. 326, distinguished.
(11) *S-C (Mental Patient: Habeas Corpus), Re*, [1996] 1 All E.R. 532, referred to.
(12) *Starrs* v. *Procurator Fiscal, The Times*, November 17th, 1999, distinguished.

Legislation construed:

Mental Health Ordinance (1984 Edition), s.6: The relevant terms of this section are set out at para. 6.
s.19: The relevant terms of this section are set out at para. 7.
s.63(2)(d): The relevant terms of this paragraph are set out at para. 33.
s.63(6): The relevant terms of this sub-section are set out at para. 34.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), s.3(1)(h): The relevant terms of this paragraph are set out at para. 12.
s.8(8): The relevant terms of this sub-section are set out at para. 13.

D. Hughes for the applicant;
A.A. Trinidad, *Senior Crown Counsel*, and *C. Pitto*, *Crown Counsel*, for the respondent.

1 **SCHOFIELD, C.J.:** This action started its life as an application for judicial review, but the main issues found their way into an application, subsequently filed, made pursuant to s.15 of the Gibraltar Constitution Order. It concerns the continued detention of Jeremy Anthony Jurado, the applicant, pursuant to powers purportedly exercised under the Mental Health Ordinance.

2 The applicant was first admitted for observation to the King George V Hospital, Gibraltar pursuant to s.5 of the Ordinance. On June 26th, 2000, he was admitted to the hospital for treatment pursuant to s.6 of the Ordinance. His admission was proper and two medical practitioners recommended that it was necessary to admit him for treatment in the interests of his health or safety. One such practitioner certified that he was suffering from mental illness and the other that he was suffering from severe mental illness.

3 The problem which led to this action occurred one year later when, by s.19(1) of the Ordinance, the duration of the authority for his admission to the hospital expired. The doctors considered that the applicant needed, and indeed still needs, to be detained in the hospital, both for his own health or safety and also, it seems, for the protection of other persons. On June 20th, 2001, Dr. Coogan recommended that the applicant should remain in the hospital under "his current s.6 M.H.O. Treatment Order." In pursuance of Dr. Coogan's written recommendation, the applicant continued to be detained in the hospital. The applicant immediately sought relief from this court against his continued detention. His initial challenge was based on two grounds. First, that a detention pursuant to s.6 of the Ordinance must be founded on the recommendation of two medical practitioners, yet his detention was founded on the recommendation of but one such practitioner, Dr. Coogan. Secondly, that he wished to challenge his detention by application to the Mental Health Review Tribunal constituted pursuant to s.60 of the Ordinance, but that this application was not available to him because of the unavailability of legal aid.

4 The first of the applicant's objections was rectified on June 27th, 2001. On that day, Dr. Coogan issued a further recommendation pursuant to s.6 of the Ordinance in the same terms as his recommendation of June 20th, 2001. Dr. Thompson joined Dr. Coogan in making such recommen-

dation. Both declared that it was in the interests of the applicant's health or safety and for the protection of other persons, that the applicant should continue to be detained. Dr. Coogan certified the applicant to be suffering from paranoid psychosis and Dr. Thompson that he is suffering from psychotic mental illness. Despite these recommendations, the applicant says that he was detained from June 20th to June 27th, 2001 unlawfully and that part of his original claim for judicial review, which includes a claim for damages, remains.

5 The second claim, that his inability to challenge his detention by application to the Mental Health Review Tribunal because of the unavailability of legal aid, has found its way into the claim for relief pursuant to s.15 of the Gibraltar Constitution. Added to that claim is a further claim that the Tribunal is not an independent and impartial tribunal for adjudicating upon the applicant's civil rights, as required by s.8(8) of the Constitution.

6 Was the applicant's continued detention from June 20th to June 27th, 2001 unlawful under the terms of the Ordinance? The relevant provisions of s.6 of the Ordinance read:

> "(1) A patient may be admitted to a hospital, and there detained for the period allowed by the following provisions of this Ordinance, in pursuance of an application (in this Ordinance referred to as an application for admission for treatment) made in accordance with the following provisions of this section.
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> (2) An application for admission for treatment may be made in respect of a patient on the grounds—
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> (a) that he is suffering from mental disorder, being—
>
> (i) in the case of a patient of any age, mental illness or severe subnormality;
>
> (ii) in the case of a patient under the age of twenty-one years, psychopathic disorder or subnormality,
>
> and that the said disorder is of a nature or degree which warrants the detention of the patient in a hospital for medical treatment under this section; and
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> (b) that it is necessary in the interests of the patient's health or safety or for the protection of other persons that the patient should be so detained.
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> (3) An application for admission for treatment shall be founded on the written recommendations in the prescribed form of two medical practitioners, including in each case a statement that in the opinion of the practitioner the conditions set out in paragraphs (a)

and (b) of subsection (2) are complied with; and each such recommendation shall include—

(a) such particulars as may be prescribed of the grounds for that opinion so far as it relates to the conditions set out in para. (a); and

(b) a statement of the reasons for that opinion so far as it relates to the conditions set out in para. (b), specifying whether other methods of dealing with the patient are available, and if so why they are not appropriate."

7 It is beyond doubt that if the applicant's admission for treatment on June 20th, 2001 was pursuant to s.6, then it was unlawful as being on the recommendation of but one medical practitioner and not two such practitioners. However, Mr. Pitto argues that such admission was in effect an extension of the original authority to detain pursuant to s.19 of the Ordinance. The relevant portion of s.19 reads:

"(1) Subject to the following provisions of this Part, a patient admitted to hospital in pursuance of an application for admission for treatment, may be detained in a hospital for a period not exceeding one year beginning with the day on which he was so admitted, but shall not be so detained or kept for any longer period unless the authority for his detention is renewed under the following provisions of this section.

(2) Authority for the detention of a patient may, unless the patient has previously been discharged, be renewed under this section—

(a) from the expiration of the period referred to in subsection (1), for a further period of one year;

(b) from the expiration of any period of renewal under paragraph (a), for a further period of two years,

and so on for periods of two years at a time.

(3) Within the period of two months ending on the day on which a patient who is liable to be detained in pursuance of an application for admission for treatment would cease under this section to be so liable in default of the renewal of the authority for his detention, it shall be the duty of the responsible medical officer to examine the patient; and if it appears to him that it is necessary in the interests of the patient's health or safety or for the protection of other persons that the patient should continue to be liable to be detained, he shall furnish to the Superintendent of the hospital where the patient is liable to be detained a report to that effect in the prescribed form.

(4) Where a report is duly furnished under subsection (3), the

authority for the detention of the patient shall be thereby renewed for the period prescribed in that case by subsection (2)."

8 It seems clear from these provisions that if "the responsible medical officer" had made a report in the prescribed form, then there could be no question that the detention of the applicant under this head of challenge would be lawful. In short, a detention pursuant to s.19 would have been lawful whereas a detention pursuant to s.6 was in this case unlawful. Could it be said that the applicant's detention was pursuant to s.19? I have concluded that it was not. In the first place, the form of recommendation signed by Dr. Coogan on June 20th, 2001, clearly states that it is a recommendation under s.6, both in the heading to the form and in the written recommendation of the doctor itself. In the second place, the replacement recommendation of Dr. Coogan signed on June 27th, 2001 contains the same wording, both in the form used and in the form of words used by the doctor. It is the same form which is used by Dr. Thompson. If the detention had been intended to be pursuant to s.19, I would have expected the forms dated June 27th, 2001 to have rectified the recommendation of June 20th, 2001, and there would have been no need for the second recommendation of Dr. Thompson. In the third place, I would have expected to receive some evidence as to such mistake, which evidence has not been tendered. In the fourth place, whilst it may well be that Dr. Coogan is "the responsible medical officer" for the purposes of s.19, I have received no evidence to that effect and I have not been addressed on it.

9 Quite why the respondent has chosen to go the route of s.6 rather than the route of s.19 has not been explained. The answer may be in Dr. Coogan's recommendation, wherein he says that the applicant "has been recalled to hospital following a trial period of leave . . ." and that this was, indeed, a new admission rather than an extension of the duration of the original authority. Whatever the reason, I am satisfied that the applicant was unlawfully detained from June 20th, 2001, because the requirements of s.6 of the Ordinance were not strictly followed.

10 Mr. Pitto has argued that the application should not be in the form of judicial review. In the first place, he argues that by seeking judicial review the applicant denies the respondent the defence of necessity. The answer to this can be succinctly stated. This was not a case of necessity such as was discussed in the House of Lords decision in *R.* v. *Bournewood Community & Mental Health N.H.S. Trust, ex p. L* (7). All the respondent needed to do was follow a strict statutory procedure. In the second place, Mr. Pitto argues that the applicant is not asking the court to rectify an error by an inferior court or tribunal and as such judicial review does not lie. There may be merit in this argument, but even if there is I do not consider that the interests of justice would be served, given the

history of this action, by me demanding that the applicant put what is obviously a claim for damages for false imprisonment in its correct procedural form. I shall, of course, return to the issue of damages when I have decided the other issues.

11 Is the applicant's continued detention after June 27th, 2001 unlawful? The applicant's challenge is based on his contention that he is denied access to the Tribunal by reason of legal aid being unavailable for this application for review of his detention thereby. Furthermore, that the Tribunal is not an independent and impartial authority in the determination of his civil rights as required by s.8(8) of the Constitution. I shall deal with this latter challenge first.

12 Section 3(1)(h) of the Constitution provides:

> "(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say—
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> . . .
>
> (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind or addicted to drugs or alcohol for the purpose of his care or treatment or the protection of the community;"

13 The authority of the law under which the applicant has been deprived of his personal liberty is the Ordinance, by Part V of which the applicant may have his detention reviewed by the Tribunal. The Tribunal may direct that he be discharged on any ground set out in s.62(1) of the Ordinance. However, the applicant claims that the Tribunal is not an independent and impartial authority and as such does not satisfy the requirements of s.8(8) of the Constitution. Section 8(8) reads:

> "Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

14 Mr. Pitto has argued that the Tribunal is not an authority which is covered by s.8(8). He says it does not rule on the existence of civil rights or obligations. His argument goes that the Tribunal's powers under s.62 of the Ordinance all relate to medical issues and that the Tribunal decides whether medically the patient has the ability to enjoy his undisputed rights. I do not find this argument attractive. In my judgment, the Tribunal is making a determination on a person's right to personal liberty. It may do so by reference to his medical condition, but in considering his medical condition it determines the existence or extent of his civil rights.

If the decisions of planning authorities or the Secretary of State for the Environment on planning permission fall within the scope of the determination of civil rights (see *R. (Alconbury)* v. *Environment Secy.* (9)), then how much more are the decisions of a tribunal which determines the propriety of a person's detention in hospital? In this connection, furthermore, my attention has been drawn to the decision of the European Court of Human Rights in *Gautrin* v. *France* (6) in which it was held that professional disciplinary proceedings are proceedings over civil rights.

15 Is the Tribunal an independent and impartial authority? There are six members of the Tribunal, two lawyers, two doctors and two lay members. The Tribunal sits as a quorum of three, one lawyer, as chairman, one doctor and one lay member. The members of the Tribunal are, of course, part-time members and they are each appointed for a period of two years. They are not paid any fees or expenses.

16 The applicant does not allege that the Tribunal is, subjectively, a Tribunal which lacks independence or impartiality. He contends that there could be a perception that it lacks independence and impartiality, that the Tribunal does not meet the objective test. For this contention, he points to three things. First, that the term of appointment of the members, two years, gives the appearance of lack of independence. Secondly, that there is no requirement for the members to take a judicial oath. Thirdly, that one of the medical members of the Tribunal performs duties at the hospital and could be perceived to favour a recommendation of a colleague.

17 I have derived assistance in determining whether the Tribunal is an independent and impartial authority from decisions of the European Court of Human Rights in its consideration of breaches of art. 6 of the European Convention on Human Rights and Fundamental Freedoms. In *Bryan* v. *United Kingdom* (2), it was stated (21 E.H.R.R. 342, at para. 37):

> "In order to establish whether a body can be considered 'independent,' regard must be had, *inter alia*, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence."

18 In *Findlay* v. *United Kingdom* (5), it was stated (24 E.H.R.R. 221, at para. 73):

> "As to the question of 'impartiality,' there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect."

19 As I say, it is the objective element of those aspects of impartiality which is called into question in this case. The applicant does not allege any personal prejudice or bias on the part of any member of the Tribunal.

20 Mr. Hughes, for the applicant, relies heavily upon the decision of the Scottish High Court of Justiciary in *Starrs* v. *Procurator Fiscal* (12) in which it was held that a temporary sheriff who had no security of tenure and whose appointment was subject to annual renewal was not "independent" within the meaning of art. 6 of the Convention and therefore it was unlawful for the Crown in Scotland to prosecute a person before such a judge.

21 The Lord Advocate was responsible for prosecutions before the sheriffs' courts. He also had a crucial role to play in the appointment of temporary sheriffs, although the power of appointment was vested in the Secretary of State for Scotland. A permanent sheriff had security of tenure. All temporary sheriffs held office at pleasure and had no security of tenure. Their appointment was expressed to subsist for 12 months unless previously recalled. Renewal was both possible and expected, but was at the discretion of the executive. The court held that the annually renewable appointment and the absence of security of tenure were both objectionable in the circumstances. Whilst a short term of office was not necessarily objectionable, a term of office expiring at the end of a fixed period of relatively short duration was liable to compromise a judge's independence. In the Scottish system, membership of the pool of temporary sheriffs had increasingly come to be coveted as a step on the road to a permanent appointment and had effectively come to be seen to some extent as a probationary period during which potential candidates for permanent appointment could be assessed. It was held that the system created a situation in which a temporary sheriff was liable to have his hopes and fears in respect of his treatment by the executive when his appointment came up for renewal: in short, a relationship of dependency. That was a factor pointing strongly away from independence.

22 Mr. Hughes has also pointed to the decisions of the European Court of Human Rights which show that a term of office under five years can be held to point towards a lack of independence (see, for example, *Ciraklar* v. *Turkey* (4)). However, these cases appear to be in consideration of the independence of "career judges" and not, as here, of part-time, unpaid members of a tribunal.

23 I should also mention the position with the Mental Health Tribunals in England. There part-time appointments are made for five years. However, the significant difference between appointments in England and in Gibraltar is that in England members, legal, medical and lay, are paid fees and expenses and are subject to terms and conditions of service.

24 Mr. Hughes argues that membership of the Tribunal carries prestige and the perception is that appointment brings a member into "the establishment." In particular, that the lawyer members may see it as a step to acknowledgement such as appointment as Queen's Counsel.

25 I must say I find these arguments unpersuasive. There is no suggestion that a member of the Tribunal benefits financially from his appointment. It is more likely that a member accepts his appointment out of a sense of duty and responsibility to the community. There is no evidence one way or the other, but it is possible to envisage a situation where the Governor might have difficulty in finding professional members of the Tribunal if he were to attempt to tie them to a five-year term. This factor was acknowledged in the case of *Campbell* v. *United Kingdom* (3) before the European Court of Human Rights. The appointments are made by the Governor, who has no interest in the decisions made by the Tribunal, and the appointment system is a far cry from the appointment system in *Starrs* (12). Furthermore, there is no evidence that any member would see his appointment as a step on the ladder to greater things. The example given by Mr. Hughes of the lawyer members seeing membership of the Tribunal as a stepping-stone to silk does not stand scrutiny. Whilst an appointment to the Tribunal may look good on a member's curriculum vitae, the possibility of it being responsible for his advancement within the profession is too remote to create the situation of "dependency" referred to in *Starrs*.

26 The term of appointment is only one factor in deciding whether an authority is independent and impartial. In the case of the Tribunal, I do not think it is the determinative factor. Indeed, I do not think that the applicant has put up a case that the Tribunal is not independent or impartial.

27 Mr. Hughes further argues that the members of the Tribunal do not take a judicial oath and that this could affect an objective view of the Tribunal's independence. There is no evidence, and indeed no suggestion, that the Tribunal carries out its functions otherwise than honestly, conscientiously and independently of outside or improper influence. In my judgment, the fact that its members do not take an oath could not reasonably bring about an objective belief that the Tribunal lacks independence. In this connection, it is worth pointing out that part-time appointees to the similar tribunal in England do not take a judicial oath. I do not accept Mr. Hughes' argument that the fact that the Lord Chancellor makes the appointments in England makes a difference in this connection. In Gibraltar it is the Governor, who by any objective standard can have no interest in the outcome of any proceedings before the Tribunal, who makes the appointments.

28 The third and final point raised by Mr. Hughes in relation to the independence and impartiality of the Tribunal is that one of its medical

members, Dr. Montegriffo, has duties at the hospital and the perception could be that he would follow the recommendations of doctors working at the hospital. There is no suggestion that Dr. Montegriffo does slavishly follow his colleagues' opinions; it is the perception that is complained of.

29 It is a fact, particularly well known by those of us involved in the law, that doctors often disagree in their professional opinions. Whilst it may be that Dr. Montegriffo does work at the hospital, it would be surprising indeed if, in a jurisdiction as small as Gibraltar, it was possible to appoint to the Tribunal doctors with sufficient expertise who did not know and work as colleagues with those who diagnosed and treated the persons who apply to the Tribunal. With the safeguard of an appellant having his application heard by a panel of three, from three different professions, I do not consider that, on an objective view, the Tribunal could be said to lack independence or impartiality.

30 The applicant further argues that the provisions of ss. 3(1) and 8(8) of the Constitution, imply a right, on his part, to be legally represented before the Tribunal. The argument is that the applicant cannot be detained save in accordance with the law and that the Tribunal in adjudicating upon his civil rights must accord him a fair hearing. If the Constitution does not guarantee the applicant the right to be legally represented before the Tribunal, the guarantees of liberty, enunciated by the Constitution, are worthless.

31 I do not think it is in dispute that the applicant could not afford to pay for his own representation before the Tribunal. He could not properly argue matters of law before the Tribunal, both because of his lack of legal expertise and because he is, in the opinion of two doctors, suffering from a mental disorder. The applicant argues that if his right to test the legality of his detention is dependent upon his right to legal representation, the state must, in order to comply with the Constitution, make legal assistance available to him.

32 I have already said that I cannot accept Mr. Pitto's argument that the Tribunal is not a court or authority so as to bring it within the provisions of s.8(8) of the Constitution. I also do not accept his argument that the Tribunal deals only with medical matters. There may be matters of law to be considered by the Tribunal and presumably this is why its chairman is a lawyer. Mr. Pitto's argument in this respect does not accord with the view of the legislature. Section 63 of the Ordinance provides that the Chief Justice may make rules with respect to application to proceedings before and matters incidental to or consequential on the proceedings of the Tribunal. No such rules have been made, but from the under-mentioned provisions it was anticipated by the legislature that matters of law would be dealt with by the Tribunal and that legal representation may be required.

33 Section 63(2)(d) reads:

> "(2) Rules made under this section may in particular make provision—
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> . . .
>
> (d) for regulating the circumstances in which, and the persons by whom, applicants and patients in respect of whom applications are made to the Tribunal may, if not desiring to conduct their own case, be represented for the purposes of those applications;"

34 Section 63(6) reads:

> "The Tribunal may, and if so required by the Supreme Court shall, state in the form of a special case for determination by the Supreme Court any question of law which may arise before them."

35 What I have to consider is whether the requirement of a fair hearing requires the availability of legal representation before the Tribunal, or whether access to legal representation on the matter reaching the Supreme Court, by way of s.63(6) or on an application for judicial review, fulfils the requirements of s.8(8) of the Constitution.

36 The applicant relies on the landmark decision of the European Court of Human Rights of *Airey* v. *Ireland* (1). In that case, Mrs. Airey sought to apply for a decree of judicial separation in the Irish High Court. No legal assistance was provided by the state for such an application. Article 6(1) of the Convention provides for a fair hearing before an independent and impartial tribunal in the determination of civil rights and obligations or of any criminal charge, in terms similar to s.8(8) of our Constitution. It does not specifically refer to the provision of legal assistance, which is specifically required in criminal proceedings by art. 6(3). The court held that, despite the absence of a clause similar to that which requires a party to be provided with legal assistance in criminal proceedings, in civil litigation art. 6(1) may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court, either because legal representation is compulsory or by reason of the complexity of the procedure or of the case. In the *Airey* case, it was held that Mrs. Airey was entitled to free legal assistance and that art. 6(1) had been breached.

37 Mr. Pitto has argued that the availability of legal assistance to an applicant in this court, should the matter reach the court pursuant to s.63(6) of the Ordinance or by way of an application for judicial review, satisfies the requirements of s.8(8). He has cited the *Alconbury* case (9) in support of his argument. Lord Slynn of Hadley had this to say of that decision ([2001] 2 All E.R. at 969):

"The European Court of Human Rights has, however, recognised from the beginning that some administrative law decisions which affect civil rights are taken by ministers answerable to elected bodies. Where there is a two-stage process, i.e. there is such an administrative decision which is subject to review by a court, there is a constant line of authority of the European Court of Human Rights that regard has to be paid to both stages of the process. Thus even where 'jurisdictional organs of professional associations' are set up:

> 'Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1).' See *Albert v. Belgium* (1983) 5 EHRR 533, at 541–542 (para. 29).

See also *Le Compte v. Belgium* (1981) 4 EHRR 1, *Golder v. UK* (1975) 1 EHRR 524.

In *Kaplan v. UK* (1980) 4 EHRR 64, at 86 (para. 150), the Commission noted that—

> 'it is a feature of the administrative law of all the contracting states that in numerous different fields public authorities are empowered by law to take various forms of action impinging on the private rights of citizens.'"

38 *Alconbury* (9) was a case involving a determination made by the Secretary of State for the Environment, Transport and the Regions in connection with an application for planning permission. It was the decision of a minister answerable to the legislature. His decision was not that of an independent and impartial tribunal. Be that as it may, the House of Lords considered that the availability of a review of his decision before the courts provided the necessary protection under art. 6(1). Lord Clyde had this to say ([2001] 2 All E.R. at 1002):

"If one was to take a narrow and literal view of the article, it would be easy to conclude that the respondents are correct and that the actions of the Secretary of State are incompatible with the article. It is accepted that he does not constitute an impartial and independent tribunal. In the context of a judicial proceeding that may well be fatal.

The first point to be noticed here, however, is that the opening phrase in art 6(1), 'in the determination,' refers not only to the particular process of the making of the decision but extends more

widely to the whole process which leads up to the final resolution. In *Zumtobel v. Austria* (1993) 17 EHRR 116, at 125 (para. 64) the commission under reference to *Ettl v. Austria* (1987) 10 EHRR 255, recalled that:

> 'Article 6(1) of the Convention does not require that the procedure which determines civil rights and obligations is conducted at each of its stages before tribunals meeting the requirements of this provision. An administrative procedure may thus precede the determination of civil rights by the tribunal envisaged in Article 6(1) of the Convention.'

It is possible that in some circumstances a breach in one respect can be overcome by the existence of a sufficient opportunity for appeal or review."

39 However, the House of Lords in *Alconbury* (9) was dealing with an administrative decision made by a Secretary of State. It was not dealing with the decision of a court or a judicial or quasi-judicial tribunal, which affected the liberty of the subject. Bingham, M.R. said in *Re S-C (Mental Patient: Habeas Corpus)* (11) ([1996] 1 All E.R. at 534): "As we are well aware, no adult citizen of the United Kingdom is liable to be confined in any institution against his will, save by the authority of the law."

40 It appears to me that a person detained against his will should have a right to challenge that detention at the earliest possible moment. The legislature has set up a tribunal so that he can do so. If an effective challenge requires him to be legally represented, then such legal representation should be available to him. It follows that if a person so detained does not have the means to pay for his legal representation, then for him to have a fair hearing it is required that that legal representation be paid for out of public funds. It is not sufficient that such legal representation may be available to him after recourse to this court.

41 I have enquired about the position on legal representation before the English Mental Health Tribunal and have been informed that the Access to Justice Act 1999 allows for public funding for representation before it. Legal representation is made available to a patient whose case is to be considered by the Tribunal and to the applicant to the Tribunal, who may be the patient's nearest relative. There is a presumption that any patient or applicant to the Tribunal will be legally represented and that such legal representation will be paid for out of public funds. Such representation is not means-tested. The approach in England, therefore, confirms my view as expressed above.

42 Having said that, I am conscious that whilst it may be the case that most applicants to the Tribunal should have an opportunity to be legally represented, at public expense if necessary, there must be in place some

control of those expenses. There must be in place a system of sifting out unmeritorious cases and a control of how much is expended in any particular case. In England, the Lord Chancellor issues franchises to specialist firms of solicitors who operate under strict guidelines. If they were to operate outside the guidelines, their fees would be regulated or denied by the Legal Services Commission and they stand to lose their franchise. This is a statutory system unknown to Gibraltar where, in criminal cases, application is made to the judge or magistrate who determines whether a particular case merits the grant of legal aid, both in terms of the justice of the case and in terms of an applicant's means. There is a statutory fee system and after the trial a barrister's fees are taxed by the Registrar.

43 In deciding, therefore, that if an effective challenge to an order made pursuant to s.6 of the Ordinance requires a patient to be legally represented at public expense, I have to decide whether this applicant has been denied his constitutional right to a fair hearing before the Tribunal because of the unavailability of legal aid. The answer is, I do not know because I have not been informed of the grounds of his challenge to the order made under s.6. It is obvious, given that he has been granted legal assistance for the purposes of this hearing, that he will satisfy any means test, should such a test be appropriate. I should, perhaps, add that if a means test is appropriate, it should accord with that applied in criminal cases because the liberty of the applicant is at stake.

44 In all the circumstances, therefore, I think it proper to adjourn this application to give the applicant and the Attorney-General opportunity to work out how the Government is to entertain and process an application by the applicant for public funding of his appeal to the Tribunal.

45 So far as damages are concerned, I have determined that the applicant was unlawfully detained for one week from June 20th to June 27th, 2000. However, the unlawfulness of his detention was as a result of administrative error which was soon rectified. It was not that he should not have been detained. It was that correct procedures should have been followed, and were not. This is not a case such as *R.* v. *Governor of Brockhill Prisons, ex p. Evans (No. 2)* (8) where a person was detained because of a mistaken understanding of the law relating to the aggregation of periods spent on remand, for in that case even though the law was clarified by the courts subsequent to the unlawful incarceration, his incarceration was in any event unlawful. In this case, the applicant's detention would have been lawful if the correct procedure had been followed. Nor is it a case such as *Roberts* v. *Chief Constable, Cheshire Constabulary* (10) where a person's detention in custody was not reviewed at the time prescribed by statute, but was reviewed and approved two hours beyond that time. In that case, even though the

continued detention was approved, it was held that he was entitled to compensatory damages for the two hours he was held without approval. There must, to my mind, be a difference between detention in custody for an alleged offence and detention in a hospital certified as being for the patient's own benefit. In the event, I award nominal damages of £1 for his detention from June 20th to June 27th, 2001.

46 There is a claim for damages for the applicant's continued detention from June 27th, 2000. I have not yet decided that his continued detention did offend his rights under the Constitution because his right to legal representation has yet to be decided. Be that as it may, I think it right to say that because the point taken by the applicant was a novel one and one which had never required addressing by the Government before this case, even if he is entitled to legal assistance before the Tribunal, I would not be minded to exercise any discretion to award damages up to date. The position may be different if, on the matter being reviewed by me at the adjourned hearing, I find that legal assistance is unreasonably withheld from this point on. However, that is a situation which I do not anticipate will arise.

47 In summary, my findings are as follows:

(1) The applicant was unlawfully detained from June 20th to June 27th, 2001 and I award him nominal damages of £1;

(2) The Tribunal is an independent and impartial tribunal within the meaning of s.8(8) of the Constitution; and

(3) If an effective challenge to his detention under s.6 of the Ordinance to the Tribunal requires him to be legally represented, he must be so represented at public expense.

48 I adjourn the application to review the position under finding (3) to April 18th, 2002 at 9.30 a.m.

Application adjourned.