[2001–02 Gib LR 281]

ZAMMITT and FIVE OTHERS v. TRANSPORT COMMISSION

SUPREME COURT (Schofield, C.J.): August 23rd, 2002

Transport—Transport Commission—independence—Transport Commission is independent and impartial authority under Constitution, s.8(8) even though chaired by Minister—not affected by principal secretary's duties in enforcement of Ordinance after Commission's decision, his responsibility to Minister, or by members' appointment "from time to time"—availability of appeal to court ensures independence and impartiality of Commission

Transport—Transport Commission—impartiality—bias—apparent bias if fair-minded, informed observer concludes real possibility (not real danger) of bias—no evidence that Transport Commission actually or apparently biased in considering application for additional coach licences over objection of Gibraltar Taxi Association

The appellants appealed from a decision of the Transport Commission granting operator licences for 10 coaches.

The applicant, Calypso Tours Ltd., provided transport for visitors at the cruise liner terminal and applied for licences for additional coaches to cope with an increase in passenger arrivals. The appellants, who were the Gibraltar Taxi Association ("G.T.A.") and other businesses in competition with the applicant, objected to the grant of the licences. They submitted that (a) the applicant's operation left insufficient work for existing taxi drivers; and (b) vehicle congestion would increase if the licences were granted.

The Commission had granted the licences in the exercise of its discretion under s.28(1) of the Transport Ordinance. The Commission consisted of the Minister for Tourism & Transport as chairman, the principal secretary to the Minister (who was also a transport inspector and responsible for enforcing the provisions of the Transport Ordinance) and

other members appointed "from time to time." One such member was a director of a security company, which during the course of the proceedings was given a contract to provide security guards to alleviate the traffic congestion. The Commission held that (a) the needs of the area were not being met, as the number of cruise liner visitors had increased since 1986, but no new licences had been granted since then; and (b) many of the traffic congestion concerns had been eradicated or alleviated. The appellants appealed against this decision.

They submitted *inter alia* that the Transport Commission was not an "independent and impartial" authority, as required by s.8(8) of the Constitution, due to (i) the perception that political criteria might affect the Minister's decisions; (ii) the principal secretary's duties in the enforcement of the Ordinance and responsibility to the Minister; (iii) the other members' dependency on the executive; (iv) the Minister's and principal secretary's previous criticism of the G.T.A.; (v) the Minister's discussion of the issues with both parties, indication that applications for new licences would not be entertained, influence by the Chief Minister's support of the grant and the Minister's professional interest in the tourist arrival figures; (vi) the principal secretary's predetermination of the decision; (vii) the inference that counsel for the applicant had access to confidential information, due to its previous work for the Government; and (viii) one member was a judge in his own cause, as his firm had provided security guards to alleviate traffic congestion and the firm's performance would be at issue.

Held, dismissing the appeal:

(1) The Transport Commission chaired by the Minister, who would take knowledge of Government policy into the deliberations, could be considered an independent and impartial authority under s.8(8) of the Constitution, as an appeal to the courts was available. The Commission's impartiality was not affected by the principal secretary's duties in the enforcement of the Ordinance after the Commission's decision. Likewise, its independence was not compromised by the principal secretary's responsibility to the Minister, as an independent body was responsible for his discipline and removal, or by the members' appointment "from time to time." Whilst there was no statutory bar to the members' peremptory dismissal, the fact that each had been appointed for two years and the Minister was answerable to the public gave them sufficient security against dismissal (paras. 17–19; paras. 22–23; para. 28).

(2) The Commission was not actually or apparently biased. The test for apparent bias was whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility (not a real danger) that the tribunal was biased. There was no evidence that the Minister held a critical view about the previous actions of one of the appellant companies. However, even if he had formed such a view, a fair-minded and informed observer would not conclude that he would find the matter relevant when applying the Ordinance. The principal secretary's

criticism of the appellants' previous action was irrelevant for the grant of the licences and his indication that the applications would be considered on their merits showed that he was not biased (para. 46; para. 49; para. 63).

(3) Moreover, no actual or apparent bias was demonstrated by (a) the predisposition on the part of the Minister and principal secretary to grant the licences if the market capacity demonstrated a need, which was not an unlawful predetermination of the outcome; (b) the discussions by the Minister and principal secretary of the issues with the parties, as it was difficult to avoid reacting to their requests and the discussions did not take place during the currency of the proceedings; (c) the Minister's indication of his view that applications for new licences would not be entertained by the Commission; (d) the Minister's knowledge of the Chief Minister's views about the grant of the licences; (e) the reliance on the official tourist arrival figures and not taking into account the unofficial 2001 figures which showed a slight drop in arrivals, notwithstanding the Minister's political interest in the figures, as the Commission came to an unimpeachable decision regarding the position since 1986; and (f) the Minister's continued chairmanship after an unfounded allegation was made against him (paras. 37–41; para. 43; para. 53; para. 57; para. 72).

(4) Furthermore, the member of the Commission whose firm provided security guards for traffic duty was not a judge in his own cause, as their performance was not at issue. There was no danger that as a result of the proceedings the provision of guards would be withdrawn or increased (para. 81).

Cases cited:

(1) *Albert* v. *Belgium* (1983), 5 E.H.R.R. 533, followed.
(2) *Bovis Homes Ltd.* v. *New Forest District Council*, [2002] EWHC Admin. 483, *dicta* of Ouseley, J. followed.
(3) *Bryan* v. *United Kingdom* (1995), 21 E.H.R.R. 342, followed.
(4) *Ciraklar* v. *Turkey* (1998), 32 E.H.R.R. 535, referred to.
(5) *Findlay* v. *United Kingdom* (1997), 24 E.H.R.R. 221, followed.
(6) *Medicaments & Related Classes of Goods (No. 2), In re*, [2001] 1 W.L.R. 700; [2001] I.C.R. 564, followed.
(7) *Porter* v. *Magill*, [2002] 2 A.C. 357; [2002] 1 All E.R. 465, *dicta* of Lord Hope of Craighead followed.
(8) *R.* v. *Amber Valley District Council, ex p. Jackson*, [1985] 1 W.L.R. 298; [1984] 3 All E.R. 501, *dicta* of Woolf, J. followed.
(9) *R. (Alconbury)* v. *Environment Secy.*, [2001] 2 All E.R. 929, followed.
(10) *R. (Jurado)* v. *King George V Hosp. Manager*, 2001–02 Gib LR 235, followed.
(11) *Starrs* v. *Procurator Fiscal, The Times*, November 17th, 1999, referred to.
(12) *Traffic Commn.* v. *Gillingwater*, C.A., Civil App. No. 2 of 1990, unreported, *dicta* of Fieldsend, J.A. applied.

Legislation construed:
Trade Licensing Ordinance (1984 Edition), s.16(1)(f): The relevant terms of this paragraph are set out at para. 84.

Transport Ordinance 1998 (No. 44 of 1998), long title: The relevant terms of the long title are set out at para. 1.
s.3(1): The relevant terms of this sub-section are set out at para. 2.
s.7(1): The relevant terms of this sub-section are set out at para. 21.
s.28(1): The relevant terms of this sub-section are set out at para. 7.

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

F. Picardo and *I. Felice* for the appellants;
A.A. Vasquez and *Miss M. Borge* for the respondent;
A. Isola and *C. Rocca* for Calypso Tours Ltd., an interested party.

1 **SCHOFIELD, C.J.:** On September 7th, 2000, the Transport Ordinance, enacted on September 3rd, 1998, came into effect. The purpose of the Ordinance is—

> "to amend and consolidate the law relating to public transport and road haulage: to make provision for the establishment of the Transport Commission: to make further provision for the regulation and licensing of services supplied to the tourism sector of the economy: and for matters connected thereto."

2 The Transport Commission is established by s.3(1) in the following terms:

> "There is hereby established a Transport Commission which shall consist of the Minister, who shall exercise the functions of chairman, a Secretary and such other members, not being less than four, as may be appointed by the Minister, from time to time, by Notice in the Gazette."

3 The Commission took over some of the functions of the former Traffic Commission which was appointed under the Traffic Ordinance. One of the functions of the Commission is to consider applications for operator licences for public service vehicles made pursuant to s.27 of the Ordinance. Just over a month after it came into effect, on October 16th, 2000, Calypso Tours Ltd. ("C.T.L.") made the first application under the Ordinance for such licences. C.T.L. applied for licences in respect of 10 coaches which it had ordered on February 14th, 2000, the day after the general election in Gibraltar, and which had been imported into Gibraltar in May of that year. Objections to the grant of the licences were lodged by the appellants on behalf of themselves and the Gibraltar Taxi Association and it was determined that the Commission should deal with the applications in a public hearing, C.T.L. and the appellants being represented by

counsel. The hearings took 31 full or part days and were spread over a period of 15 months. On April 17th, 2001, the Commission handed down a unanimous ruling of 64 pages granting the licences subject to conditions excluding C.T.L. from servicing clients from the coach park terminus or who arrive in Gibraltar overland and prohibiting the fixture of jump seats. It is against the decision to grant the licences that the appellants appeal to this court.

4 Section 67 of the Ordinance gives the right of appeal to this court, on a point of law, to any person aggrieved by any decision of the Commission concerning which no specific right of appeal is provided for "in this Ordinance." The Transport Regulations 2000 were made by the relevant minister pursuant to s.69 of the Ordinance. Regulation 124A allows for an appeal to this court, on matters of law or fact, *inter alia*, to any person aggrieved by a decision of the Commission to grant a licence, subject to leave being granted by the court. No point was taken on whether this is an appeal under s.67 or reg. 124A, the question of leave being conceded by the respondent and the grounds of appeal including both issues of fact and law.

5 C.T.L. is a private limited company whose shareholders are George and John Gaggero. It is an independent company, but was described to the Commission by George Gaggero as part of the family of companies known locally as M.H. Bland. The family of companies acts as port and shore excursion agents for the cruise liners, has a travel agency, operates the cable car and, through its subsidiary, M.H. Bland Stevedores, operates as stevedores and cargo handlers, and operates a tug. C.T.L. operates a fleet of 12 licensed coaches. It was initially formed to provide movement of passengers from the frontier with Spain to the cable car and to provide rock and cable car tours, after Mr. Gaggero had made unsuccessful attempts to convince private operators to provide the service. Mr. Gaggero chronicled for the Commission his problems with the Gibraltar Taxi Association ("the G.T.A.") when the business moved to the coach park and C.T.L. decided to transfer its business to the cruise liner terminal. There was an expansion in the cruise market and a corresponding increase in C.T.L.'s business. C.T.L. purchased the 10 coaches and accordingly applied for licences to operate those coaches, to cope with what it satisfied the Commission was an increase in passenger arrivals.

6 The G.T.A. has been in constant conflict with C.T.L. over the years, claiming that C.T.L. presented the taxi drivers with unfair competition and that its operation left insufficient work for the existing number of taxis. This has led to various actions being taken by members of the G.T.A., including blocking C.T.L.'s operations at the cruise terminal. The G.T.A., together with the other appellants, represent C.T.L.'s competition

in Gibraltar. I do not think it is in dispute that the objections to the grant of the licences are largely as a result of commercial considerations, as, indeed, are C.T.L.'s applications for the 10 licences. However, the appellants also raised before the Commission the question of vehicle congestion on the Upper Rock, which question fell to be considered and was considered by the Commission.

7 I should, perhaps, detail here the criteria for the grant of a licence which are set out in s.28(1) of the Ordinance as follows:

> "In exercising its discretion to grant or refuse an operator licence and its discretion to attach any condition to such licence, the Commission shall have regard to the following matters—
>
> (a) the extent to which the needs of the area of the proposed service are already met;
>
> (b) the desirability of encouraging the provision of adequate and efficient services and eliminating unnecessary or unremunerative services;
>
> (c) the need to establish that the applicant for the licence—
>
> (i) is of good repute;
>
> (ii) satisfies the requirements as to appropriate financial standing;
>
> (iii) satisfies the requirements as to professional competence;
>
> (d) the number, type, design and description of the vehicles which the applicant proposes to use under the licence and the facilities at the disposal of the applicant for carrying out the proposed service;
>
> (e) any representations made by the Licensing Authority, the Commissioner of Police, transport inspectors or any other public body."

8 It is clear from its ruling that the Commission considered these criteria. There were no representations made to it by the Licensing Authority, the Commissioner of Police, transport inspectors or any other public body. No question was raised regarding para. (d) of s.28(1), and, ultimately, the applicants had to concede that C.T.L. is of good repute and satisfies the requirements as to appropriate standing and professional competence. Nor was any issue raised regarding the elimination of unnecessary or unremunerative services. In very brief summary, the Commission found that no new operator licence had been granted since 1986, whereas the number of visitors arriving at the coach park and on cruise liners has grown considerably since then. It held that the needs of

the area of the proposed service were not met in respect of cruise liner visitors, most especially at peak times, and that the situation was detrimental to Gibraltar's tourist industry. Furthermore, the Commission considered the environmental concerns with regard to increased traffic in the Upper Rock and found that many of the concerns in relation to traffic congestion had, as a result of recent arrangements introduced into the area, been either eradicated or alleviated. In short, the Commission, applying the relevant criteria in s.28, exercised its discretion to grant the 10 licences applied for.

9 The appellants' grounds of appeal cover three main areas of the proceedings before and the decision of the Commission and contain allegations that—

(a) the appellants were not afforded a fair hearing before an independent and impartial tribunal, as required by s.8(8) of the Gibraltar Constitution Order;

(b) the Commission was guilty of actual or apparent bias; and

(c) in certain matters unrelated to partiality or bias, the Commission erred in its procedures or decisions.

Independent and impartial tribunal

10 As a preface to considerations of impartiality, independence and actual or apparent bias, perhaps I ought to make the point that the Commission was under a duty to act judicially. As was stated by Fieldsend, J.A. in *Traffic Commn.* v. *Gillingwater* (12), in respect of the Traffic Commission which preceded the Commission:

> "In my view, these provisions of the Ordinance point quite clearly to the Traffic Commission being, in the exercise of decision-making powers in regard to road service licences, at the very least a quasi-judicial body. Section 55 presupposes that in the discharge of these duties it is obliged to act judicially and this is being enforced by the provisions in s.55(a)(iv), provided without limitation and in any proceedings before the Commission, any person may appear. There can be no doubt that in considering an application under s.71, the Commission is conducting 'proceedings.' If any further indication is required of the obligation to act judicially, it is to be found in the provisions of an appeal, even in the case of a refusal to grant an application made under s.71. Said provision presupposes that the Commission must give reason so its decisions can be tested on appeal."

11 Before I deal with the arguments of the appellants regarding actual or apparent bias on the part of members of the Commission, I shall

consider the arguments that the Commission as constituted is not an independent and impartial authority.

12 Section 8(8) of the Constitution 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."

13 Counsel for the respondent indicated that he had considered arguing that this matter did not involve the determination of the appellants' civil rights, in that they were the objectors to a third party's application for a licence to operate coaches and that an objector has no civil right other than to be heard. He felt that it could be argued that the matter may involve the civil rights of C.T.L., but not the civil rights of an objector. However, he chose not to take that argument, choosing rather to face the contention that the Commission is not an independent and impartial authority.

14 The first question to address is whether it is appropriate for the Minister for Tourism & Transport to be chairman of the Commission, given that he is the policy maker in respect of the areas of competence of the Commission and that his considerations in the determination of licence applications may be directly or indirectly tainted by political criteria. It is argued for the appellants that the Minister's chairmanship of the Commission gives it the appearance of lack of impartiality.

15 Decisions of the European Court of Human Rights in its consideration of breaches of art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are of assistance to this court because s.8(8) of the Constitution is in similar terms to art. 6(1) of the Convention.

16 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."

17 I shall deal with the question of the subjective allegations of bias against the particular Minister later, but for the time being I concern myself with the question of whether a Government Minister can, objectively, be seen to be impartial in considerations of whether to grant

or refuse such licences. The Minister is not, as a member of the Government (unless subjectively proved to be), interested in the grant or refusal of any particular licence. He is appointed to the Commission to apply the policy of the Ordinance and the criteria for the grant of licences set forth therein. I can think of no one better than the democratically elected and appointed Minister charged with responsibility for matters of tourism and transport to make, with the help of the other members of the Commission, decisions relating to those criteria. Furthermore, I do not think it can be perceived to hamper the Minister in the performance of his duties under the Ordinance, of giving effect to its policy and of applying the criteria set out in s.28(1), that he is a party to Government policy and is politically aware. Besides (and I think this consideration is the most compelling), it was the intention of the legislature that the responsible Minister be the Commission's chairman, a clear indication that he will take into its deliberations his knowledge of Government policy.

18 I cannot leave this point without reference to the House of Lords decision in *R. (Alconbury)* v. *Environment Secy.* (9), in which their Lordships applied the jurisprudence of the European Court of Human Rights in upholding the decision of the Secretary of State in a planning matter. It was held that whilst the Secretary of State, as the decision-making authority, could not be said to be acting as an independent tribunal, the fact that there was an appeal available by way of judicial review imparted into the system compatibility with art. 6(1). The following passage from the European Court of Human Rights decision in *Albert* v. *Belgium* (1) was cited (5 E.H.R.R. 533, at para. 29):

> "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)."

19 It seems to me that the very fact that this appeal is available to the appellants satisfies the requirements for impartiality under s.8(8). Mr. Picardo argues that the determination of the case involves determining which version of the facts is to be preferred and that a review of the papers which is not a re-hearing would not be a sufficient review of the proceedings in the Commission. But I have before me a full transcript, all seven volumes of it, of proceedings before the Commission. I am empowered to review questions of fact and law and I do not consider that a re-hearing is necessary to fulfil that duty of review.

20 The second argument of the appellants on impartiality relates to the fact that the principal secretary to the Minister is also a member of the Commission. The argument in this regard was two-pronged. First, that the

principal secretary is a transport inspector entrusted with the enforcement provisions of the Ordinance and secondly that he is a civil servant answerable to the Minister.

21 Transport inspectors are appointed pursuant to s.7(1) of the Ordinance, which reads:

> "The Minister may, from time to time, appoint as transport inspectors such persons as he considers necessary on such terms as he considers appropriate for the purposes of securing compliance with the provisions of—
>
> (a) this Ordinance or of any subsidiary legislation made hereunder;
>
> (b) licences granted under this Ordinance,
>
> and the discharge of such other duties as the Minister considers can conveniently be discharged by persons acting as such inspectors."

22 It seems to me that, so far as licences are concerned, the functions of a transport inspector come into play once a licence is granted. I cannot see how it can be perceived that the fact of appointment as a transport inspector could affect the principal secretary's impartiality in the consideration of whether to grant new licences. Mr. Picardo argues that the principal secretary cannot be "enforcer" and "judge." But the "enforcement" comes after the "judgment." It is not a case where a prosecuting authority is also the judging authority. This is a case where a decision-maker is also charged with the subsequent duty of ensuring the statutory and licensing provisions are complied with. This is not, and cannot be perceived to be, incompatible with impartiality in determining whether or not to grant a licence.

23 The second argument against the principal secretary's appointment to the Commission is that, as the civil servant responsible to the Minister, he is not independent and cannot act impartially. In my judgment, a fair-minded and informed observer would realize that the Government, whose servant the principal secretary is, would have no direct interest in the outcome of an application for a licence save to ensure that the principles of the Ordinance are followed. Furthermore, such an observer would know that the principal secretary is appointed, and subject to discipline and removal, by or on the advice of an independent Public Service Commission and it can hardly be the case that his position is under threat if he disagrees with his Minister. As with the Minister, his professional knowledge can only assist him in the exercise of his functions as a member of the Commission and his presence on it cannot be perceived to conflict with its independence or impartiality.

24 The final argument under the head of independence and impartiality is that the members of the Commission, other than the chairman, are

appointed by the Minister "from time to time" and that, as they do not have security of tenure, they cannot be regarded, on any objective standard, as independent.

25 The European Court of Human Rights has said, in *Bryan* v. *United Kingdom* (3) (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."

26 I had to consider this very point in *R. (Jurado)* v. *King George V Hosp. Manager* (10), in which it was argued that members of the Mental Health Tribunal appointed for a period of two years did not constitute an independent authority to consider the detention of a patient under the Mental Health Ordinance. I was there referred to the decision of the Scottish High Court of Justiciary in *Starrs* v. *Procurator Fiscal* (11) 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. I was also referred to decisions of the European Court of Human Rights which showed that a term of office under five years can be held to point towards lack of independence (see, for example, *Ciraklar* v. *Turkey* (4)).

27 The members of the Mental Health Tribunal do not benefit financially by their appointment; they are paid neither fees nor expenses. I found that it is more likely that they accept appointment out of a sense of duty and responsibility to the community and that it is possible to envisage a situation where the Governor, who is responsible for their appointment, might have difficulty in recruiting members if he were to seek to tie them to a five-year term. I held that the term of appointment is only one factor to be taken into consideration when determining whether an authority is independent and held that in the case of the Mental Health Tribunal no case had been made out to impeach its independence.

28 Members of the Commission, other than the Minister and principal secretary, are not paid for their duties. They do not even receive expenses. Although the Ordinance provides that the Minister appoints the other members "from time to time," he has in fact, in the *Gazette* Notices making the appointments, appointed each member for two years. To my mind, this gives the members sufficient security against peremptory dismissal to satisfy the requirement of independence, when one considers the nature and functions of the Commission itself and the fact that its lay

members are unpaid and are performing a public duty. Whilst there would be no statutory bar to their peremptory dismissal by the Minister, he is answerable to the public and in practice it is less than likely that he would exercise that power simply because one of the members of the Commission disagreed with him or otherwise demonstrated his independent spirit.

29 In all the circumstances, I find that the Commission is an independent and impartial authority so as to satisfy the requirements of s.8(8) of the Constitution.

Actual and apparent bias

30 The appellants have made various allegations of bias against the Minister, the principal secretary and one member of the Commission, a Mr. Maginnis, and I shall consider these in turn. Before I do, I ought to say a word about the law in this regard.

31 The following principles are elicited from the English Court of Appeal decision in *In re Medicaments & Related Classes of Goods (No. 2)* (6). If the Commission is shown to be influenced by actual bias, the decision must be set aside. Where actual bias has not been established then the personal impartiality of a member of the Commission is to be presumed. The court then has to consider whether there is apparent bias, and if on the material facts it finds there is then, again, the decision must be set aside. And it would seem from the decided cases that the actual or apparent bias of one member of the Commission would vitiate the decision (see the decision of Ouseley, J. in *Bovis Homes Ltd.* v. *New Forest District Council* (2)).

32 The test for apparent bias has been discussed in a number of recent cases, but was recently settled in the House of Lords decision of *Porter* v. *Magill* (7). Lord Hope of Craighead, with whom the other members of the House agreed, had this to say ([2002] 2 A.C. at 494):

> "In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 W.L.R. 700 to reconsider the whole question. Lord Phillips of Worth Matravers M.R., giving the judgment of the court, observed, at p. 711A–B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R. v. Gough* had not commanded universal approval. At 711B–C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now

be taken to review *R. v. Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp. 726–727:

> 'When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R. v. Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'

I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R. v. Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to 'a real danger.' Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

33 I shall now consider the individual allegations of bias, bearing in mind that if an allegation of actual bias is not proved, I must still apply to it the test for apparent bias.

34 There is a series of allegations made by the appellants against the Minister which, they say, show bias on his part.

35 The first is that he was in meetings in which the matters at issue in the grant of the licences were discussed with both the appellants and with C.T.L., that the appellants knew what was discussed with them but would not know what was discussed with C.T.L. Proof of the discussions came in the form of a file note dated January 13th, 2000 of a telephone discussion which Mr. Picardo, acting for the G.T.A., had with the principal secretary, Mr. Garcia, two days before the date of the note. The whole content of that file note is worthy of repetition, particularly as it appears in the representations regarding bias on the part of the principal secretary.

"F.P. [Fabian Picardo] received a telephone call from Richard Garcia [the principal secretary] at approximately midday on January 11th, 2000. R.G. said that he was calling me from his mobile, as he was away from the office on holiday, but felt it was important that we speak as soon as possible.

R.G. said that he had spoken to Stanley Muscat [the president of the G.T.A.] but did not feel that he had managed to get his point across. R.G. said that he was calling about the purchase by the G.T.A. of the road service licences of Exchange Travel. R.G. said that if the G.T.A. were to apply to the Transport Commission, the Transport Commission would grant nine licences at the cost of £50.00, not £350,000 as is presently the envisaged transaction between the G.T.A. and Exchange Travel.

F.P. said that S.M. had already told me that R.G. had conveyed this message and that was why we had raised the points directly with the Minister at the last meeting. I reiterated that the message that we had got from the Minister was not that they were prepared to give licences, but that they would consider granting licences if capacity in the sector as a whole (we had discussed whether it should be a capacity of the sector as a whole or a particular operator in the sector, and the Minister had finally agreed it should be the sector as a whole) was full and there was a need to grant such licences. For that reason, I said to R.G. that it had been made clear to us at that meeting that the granting of new licences was not presently envisaged. I asked R.G. whether he was telling me in fact that new licences were going to be granted to the Gaggeros and R.G. said that, in fact, that appeared to be the case. I said that I would have to speak to my clients very urgently, as it appeared that the position had changed from that which had been made, we thought, clear to us at the last meeting.

R.G. said that he felt it was important that he should put his message across as soon as possible and as clearly as possible to me, as well as to my clients before we bought. I said that I would speak to my clients, who would no doubt wish to take the matter up with the politicians involved. F.P. then telephoned S.M. and asked him that afternoon.

At the subsequent meeting, at about approximately 3.30 p.m. in my chambers, I discussed the matter with S.M. and P.V. The instructions consequent on my information and despite my advice were to proceed with the purchase of Exchange Travel, as the issue of the grant of new licences would be taken up initially at a political level."

36 I should say that the contents of the file note were discussed before the Commission and that the principal secretary disputes the exact

content of the telephone conversation. Be that as it may, let us for the time being take the file note at face value and look at it through the eyes of a fair-minded and informed observer. It was written at a time when the G.T.A. was considering purchasing, for £350,000, the public service vehicle licences from a tour company called Exchange Travel. In the event, the G.T.A. did purchase the licences, despite Mr. Picardo's advice which is evident from the file note, and despite the clear indication being given by the principal secretary that the G.T.A. could themselves apply for new licences rather than expend £350,000 for the existing licences of Exchange Travel. There is a clear indication in the conversation that capacity and need would be considered in any application for a new licence. It is true that the Minister and principal secretary were discussing Commission matters, but this was eight months before the statute creating the Commission came into operation. All parties, including the G.T.A., were seeking indications of how the land lay and it is significant that the G.T.A. were themselves actively engaged in discussing the issues with "the politicians involved." However, when one reads that file note in its entirety one gains the clear impression that the principal secretary and his Minister have in mind, from C.T.L.'s perspective and from the perspective of the G.T.A., the criteria set out in s.28 of the Ordinance, *i.e.* in layman's terms, capacity and need.

37 It is also true that there is an indication that those factors appear to be operating in favour of the grant of C.T.L.'s licences. That seems to me to be a legitimate reaction to the type of question a politician such as the Minister will be asked to react to. The Minister may have been pressed (in this case no doubt by both sides) for an indication, but a well-informed observer would know that he was intended to be just one member of a six-man Commission, albeit the chairman. In *R.* v. *Amber Valley District Council, ex p. Jackson* (8), Woolf, J. had this to say ([1985] 1 W.L.R. at 307):

> "The rules of fairness or natural justice cannot be regarded as being rigid. They must alter in accordance with the context. Thus in the case of highways, the department can be both the promoting authority and the determining authority. When this happens, of course any reasonable man would regard the department as being pre-disposed towards the outcome of the inquiry. The department is under an obligation to be fair and carefully to consider the evidence given before the inquiry but the fact that it has a policy in the matter does not entitle a court to intervene. So in this case I do not consider the fact that there is a declaration of policy by the majority group can disqualify a district council from adjudicating on a planning application. It may mean that the outcome of the planning application is likely to be favourable to an applicant and therefore unfavourable to objectors. However Parliament has seen fit to lay

down that it is the local authority which have the power to make the decision . . ."

38 Had the discussions taken place during the currency of the Commission hearings, there may have been some merit in the appellants' arguments. However, given the reality of the then existing circumstances, it is difficult to see how the Minister could avoid reacting to the overtures of the parties. Gibraltar is a small constituency and for the parties much was at stake. It would be difficult for the Minister to avoid them.

39 I do not think a fair-minded and well-informed observer would find from the evidence before me any more than evidence of a predisposition on the part of the Minister to grant licences to C.T.L., and for that matter to the G.T.A., should the capacity of the market demonstrate a need for them. This allegation of actual or apparent bias is not made out.

40 The same applies to another allegation of the appellants, to the effect that the Minister had given an indication to Mr. Muscat, president of the G.T.A., that any application for new licences from C.T.L., or anyone else for that matter, would not be entertained by the Commission. Mr. Muscat and another member of the G.T.A. met the Minister at the Gibraltar stand of an overseas travel exhibition. It was before the Ordinance had been brought into effect, but at a time when the G.T.A. was considering purchasing Exchange Travel's licences. When asked whether the new Commission would entertain the issue of new licences, the Minister allegedly non-verbally, but clearly, communicated that it would not.

41 Even if the allegation is accurately represented (and it is open to doubt that I could find that I am convinced enough of that) it is no more than an indication of the Minister's views at the time the question was asked. He was being put on the spot by a constituent and was clearly unprepared to even put his views into words. From the evidence before the Commission, it is impossible to make a finding of actual or apparent bias from the exchanges between Mr. Muscat and the Minister.

42 Mr. Muscat swore an affidavit in which he stated that the G.T.A. representatives had held a number of meetings with Government, more particularly with the Minister and the Chief Minister. Initially, the Government made clear to the G.T.A. that issues relating to the grant of new licences would be a matter for the Commission. When it came to the attention of the G.T.A. that C.T.L. had purchased the 10 coaches, it followed the matter up with the Minister because he had always held out to the G.T.A. that it should not go to the expense of importing coaches, as he could not guarantee the grant of licences for them. In a meeting with the Chief Minister, attended by the Minister on June 1st, 2000, the Chief Minister, said Mr. Muscat, told him that the 10 licences would be granted to C.T.L. by the Minister as chairman of the Commission, because the

Minister "would do as he was told." This indication that the Chief Minister had guaranteed or promised the grant of the licences was not reacted to by the Minister. Mr. Muscat said that at a subsequent meeting the Chief Minister recanted and stated that he would grant the licences if it were up to him, but that it was a matter for the Commission. At a later meeting, the Chief Minister again recanted his earlier statement and insisted that he did not say in the meeting of June 1st, 2000 that the licences would be granted.

43 Assuming the contents of this affidavit are true and accurate, and there appears no evidence to contradict it, the most that a fair-minded observer could say is that at the meeting of June 1st, 2000, the Chief Minister was assuming the assertion of a power which was not his, but that subsequently he realized that he had spoken in error by asserting that it was really a matter for the Commission. The chairman-to-be, the Minister, remained silent when the Chief Minister spoke out of turn, but that does not mean he was doing other than maintaining a discreet and polite silence. Most certainly, the Chief Minister did not repeat his assertion. It is true that the Chief Minister's views about the grant of the licences must have become known to the Minister, but for the reasons stated above, I do not consider this to be an indication that the application before the Commission would receive other than fair and impartial consideration.

44 The next complaint about the Minister's participation in the Commission's hearings is that he had demonstrated a hostile view against the G.T.A. in various disputes which it had had with C.T.L., and had thus shown actual bias or given the appearance of such bias. In particular, reference is made to comments which the Minister made before he entered office and whilst he was president of the Chamber of Commerce in late 1995, which, say the appellants, show that he was blaming the G.T.A. for a disruption in the cruise liner arrivals. Reference is made to two articles in the *Gibraltar Chronicle*. The first was published on December 28th, 1995, and reads:

> "The news that the Cunard shipping line, which includes the Q.E. II, will stop its cruise liners calling at Gibraltar has shocked the business community. The reason given is taxi services at our port. The *Chronicle* asked Sol Seruya, former Tourism Minister and Chamber of Commerce president, for his comments. The news is a terrible blow to trade, said Mr. Seruya. Reliable sources have also informed me that other shipping lines have intimated their intention to withdraw from Gibraltar and this could mean 60 less cruises out of 130 calling annually at our port by 1997. Time is running out, there is no time for recrimination. It is time for the Government to call on the Chamber of Commerce and the Taxi Association in order

to ensure that shipping lines are given a written guarantee that cruise lines will get the services they are entitled. In the past, the British Government advised British shipping lines to call at Gibraltar. I am sure this co-operation will be again forthcoming."

45 The second, published the following day, reads:

"Joe Holliday, president of the Chamber of Commerce, yesterday confirmed that the Chamber is pressing all parties concerned including the Government to resolve the issues including the taxi service dispute affecting the choice of Gibraltar as a cruise liner destination. Mr. Holliday confirmed yesterday that several cruise liners in addition to the Q.E. II have taken Gibraltar off their ports of call and that the reason has been the complaints over arrival and taxi service. The Chamber and shipping agents are to hold an urgent meeting on January 4th to try to resolve the dispute in which there is a disagreement between shipping agents and taxi drivers represented by the Gibraltar Taxi Association."

46 In the first place, I can see nothing in these articles which demonstrates that the Minister was holding the G.T.A. responsible for the difficulties referred to. But even if he were, the past disputes between the G.T.A. and C.T.L. were not relevant to the considerations for the grant of the 10 licences and were not apparently a factor taken into account by the Commission. Even if the Minister had taken a view that the G.T.A. was to blame for the disruption of services to cruise passengers in 1995, a fair-minded observer could not find, on any of the material before the Commission or on an objective view of the nature of applications and proceedings, that the Minister would find that matter relevant when applying s.28 of the Ordinance to the applications.

47 When the 10 coaches were imported, the G.T.A. considered that their importation might have been illegal and openly asked the Attorney-General and the police to investigate the legality of the importation. The appellants point to a press release issued by the Government as a result of the G.T.A.'s request for such investigation. After there had been a decision made that no illegality had taken place, the Government issued a release as follows:

"On August 23rd, 2000, Mr. Fabian Picardo of Hassans, solicitors for the Gibraltar Taxi Association wrote to the Attorney General asking that he should investigate 'whether there had been any impropriety at any level of Government or by any member or prospective member of either the Traffic or Transport Commission' in relation to the importation of 10 buses by M.H. Bland Ltd. or Calypso Travel. Similar insinuations have been made publicly by the G.T.A. in their public statements.

> The G.T.A. now claim that they made no allegation of corruption in public office. This is, however, the natural and implicit meaning of their allegation.
>
> The Government has not made any public statement on this matter so as not to interfere with the proper discharge by the R.G.P. of their duty in this matter. The Government welcomes the enquiry by the R.G.P. It is right that the R.G.P. should investigate such allegations. The R.G.P. have now confirmed that they have investigated the information provided by the G.T.A. and that it discloses no corruption or other offence.
>
> The Government condemns the G.T.A. for formally making grave allegations of this nature purely on the basis of speculation and supposition on their part and with absolutely no supporting facts. The importation of buses by M.H. Bland Group has been completely lawful.
>
> The accusation of impropriety in public office is absolutely without foundation and represents just one more manifestation of the irresponsibility with which the G.T.A. has conducted itself in the recent disruptive action.
>
> Even if the Government had agreed to support an application for further licences, that would not constitute impropriety. The Government is perfectly entitled to do so. The Government's support for or opposition to, an application for a licence does not bind the Commission as the licensing authority. For example, it has been the practice for many years, and of many governments, to agree with property developers or other inward investors to support a planning application to the Development and Planning Commission.
>
> The bad faith that has motivated the G.T.A. in this matter is exposed by the fact that even now they are distorting and misrepresenting the statements of both the R.G.P. and the Attorney General.
>
> It seems to the Government that it is the G.T.A. that is seeking to put improper pressure on the Transport Commission, by creating the impression that any future decision to grant licences (which the G.T.A. opposes for reasons of financial self-interest) is necessarily the result of impropriety."

48 The appellants' argument is that the Minister is a member of the Government and as such must take his share of responsibility for this release and share the views expressed therein. In those circumstances, it would be impossible for the Minister fairly and impartially to judge the issues involved in the application for licences and certainly a fair-minded observer would consider it possible that the Minister could not give the

issues a fair and impartial hearing. The applicants say that because the Minister has formed a view that the G.T.A. acted irresponsibly in reporting the matter to the Attorney-General and a view that the G.T.A. has opposed the issue of the licences for reasons of financial self-interest, the Minister cannot, or cannot be perceived to be, able to give fair and impartial consideration to the licence applications.

49 There is nothing on record to show that the Minister was partial against the G.T.A. or that the Commission gave other than fair and careful consideration to the objections. Even if the Minister had reached the conclusion that the G.T.A. had acted irresponsibly in reporting certain matters to the police and Attorney-General, those were not matters for consideration before the Commission and a well-informed and fair-minded observer would not conclude that there was a possibility of partiality on the part of the Minister, when considering the issues involved in the G.T.A.'s objections. So far as the suggestion that the G.T.A. is making its objection for reasons of financial self-interest is concerned, this is a matter not in dispute. The whole issue of the licences concerns the financial self-interest of the parties and is not a matter which appeared to affect the Commission adversely.

50 I should add that there had been earlier disagreement between the Minister and the G.T.A. as to whether "under-capacity" should affect the grant of licences and if so what that word involved. Again, there is nothing on record to show that this disagreement, which according to the record had in any event been determined in accordance with the G.T.A.'s understanding, adversely affected the consideration of the objections or could be perceived to do so.

51 In short, I do not consider that any previous disputes or disagreements between the G.T.A. and the Minister demonstrated actual or apparent bias so as to debar the Minister from sitting on the Commission.

52 One factor, indeed one of the main factors, which influenced the Commission in deciding to grant the licences was the increase in tourist arrival figures since the previous grant of new licences. The appellants contend that the Minister could not determine this issue fairly and impartially and indeed that in determining this issue had a personal or professional interest in the outcome of the proceedings. The argument is that the Minister is responsible for tourism and, as such, his political fortunes are linked to the number of tourist arrivals and that therefore, whatever the evidence showed, he could not concede that the number of arrivals was down. The appellants say that weight is added to the argument by the fact that when C.T.L. made its application for the licences, Mr. Gaggero stated that the improvement in arrival figures was a direct result of the policies of the Government of which the Minister is

a member and in evidence he said that C.T.L. would not have invested in the new coaches if that Government had not been re-elected. Further fuel is added to the argument by the fact that, on the appellants' arguments, the tourist arrival figures for 2000 and 2001 show a downturn, a matter which seems to have been ignored by the Commission.

53 I must say I find no merit in this argument. The Commission went by the official tourist arrival figures and used as its base the year 1986, which was the last year in which new licences had been granted. Since 1986 there has been a substantial rise in the figures and even if there had been a slight drop in the figures in the years 2000 and 2001, the overall picture was, in the Commission's opinion, of a substantial increase which needed to be catered for in terms of transportation. It is difficult to know what figures other than the official figures the Commission was to accept. The Commission was aware of the evidence of a drop in the figures for 2000 and seemed to ignore figures given for 2001 because they were not the official figures. Even if they were wrong in their assessment of the evidence regarding the years 2000 and 2001 (and I cannot see that they were), the members of the Commission came to an unimpeachable decision with regard to the position since 1986. No fair-minded person could fault the Commission's finding in this regard or fault its handling of the issue. It is true that the Minister has a political interest in the tourist arrival figures, but that does not mean that he could be perceived as being partial by taking the official figures into account in his consideration of the issues before the Commission.

54 The appellants point to the telephone conversation of January 11th, 2000 between the principal secretary and Mr. Picardo (set out in Mr. Picardo's file note at para. 35 above) and argue that the principal secretary had pre-determined the decision whether or not to grant the 10 licences applied for.

55 In *Bovis Homes Ltd.* v. *New Forest District Council* (2), Ouseley, J. had to consider allegations of predisposition on the part of members of a District Council in relation to a planning matter. He said:

> "In my judgment, a Council acts unlawfully where its decision-making body has predetermined the outcome of the consideration which it is obliged to give to a matter, whether by the delegation of its decision to another body, or by the adoption of an inflexible policy, or as in effect is alleged here, by the closing of its mind to the consideration and weighing of the relevant factors because of a decision already reached or because of a determination to reach a particular decision. It is seen in a corporate determination to adhere to a particular view, regardless of the relevant factors or how they could be weighed. It is to be distinguished from a legitimate predisposition towards a particular point of view. I derive those principles

from the *Kirkstall Valley Campaign Ltd.* case, to which I have already referred, particularly at 321.

There is obviously an overlap between this requirement and the commonplace requirement to have rational regard to relevant considerations. But, in my judgment, the requirement to avoid predetermination goes further. The further vice of predetermination is that the very process of democratic decision making, weighing and balancing relevant facts and taking account of any other viewpoints, which may justify a different balance, is evaded. Even if all the considerations have passed through the predetermined mind, the weighing and balancing of them will not have been undertaken in the manner required. Additionally, where a view has been predetermined, the reasons given may support that view without actually being the true reasons. The decision-making process will not then have proceeded from reasoning to decision, but in the reverse order. In those circumstances, the reasons given would not be true reasons but a sham."

56 What does one read from the principal secretary's conversation with Mr. Picardo? That an atmosphere in which the grant of new licences was not envisaged had changed and that it appeared that C.T.L.'s application would be granted. But the whole point of the principal secretary's call was to forewarn the G.T.A. that it may be unnecessary for it to spend £350,000 on purchasing the licences from Exchange Travel when the atmosphere had changed and the Commission may be predisposed to consider applications for new licences. The purpose of the call was for the G.T.A.'s benefit. Whilst one may understand why the G.T.A. is upset at having spent £350,000 for licences which C.T.L. obtained for £50, the principal secretary warned it that the atmosphere had changed and, from his file note, Mr. Picardo advised the G.T.A. not to proceed with the purchase from Exchange Travel.

57 The principal secretary did not demonstrate that he (and by implication the Minister) had closed his mind and had predetermined C.T.L.'s application. The evidence shows no more than that there was a change in atmosphere towards a legitimate predisposition to grant new licences. There was no actual or apparent bias demonstrated by the principal secretary (or the Minister) on this complaint by the appellants.

58 The next allegation of bias against the principal secretary concerns an exchange of correspondence between him and Mr. Zammitt, the current president of the G.T.A. It is necessary to recite the contents of the three letters, the first of which is dated November 15th, 2000.

"I refer to the letter from Mr. Vella, in his capacity as secretary of the Gibraltar Taxi Association (G.T.A.), which appeared in the

Gibraltar Chronicle on November 10th, 2000. I intended to reply to the *Chronicle*, but decided it would be preferable not to do so and instead to refer the matter to you.

The contents of the letter clearly shows the lack of understanding by the G.T.A. of the cruise industry, which may account for recent events. The assertion that the G.T.A. should not be blamed for a drop in cruise calls next year sounds like self justification.

The Gibraltar Tourist Board (G.T.B.) is optimistic that cruise calls for 2001 will continue to increase, as has happened since 1997. The reality of the present situation is that a number of cruise operators have been following the recent disruptive events very closely before making final decisions with regard to calls at Gibraltar for 2001. The G.T.B. will now have to undertake a major damage limitation exercise to reverse the damage caused by the G.T.A., as Gibraltar's interests in the cruise industry have been seriously damaged as a direct result of their ill-advised action.

With regard to the innuendo regarding the granting or otherwise of additional tour bus licences to Calypso Tours Ltd. (and not M.H. Bland), the Transport Commission will have to consider the application on its merits. The G.T.A., and indeed others, have had the opportunity to make written submissions to the Commission opposing the application. These will be considered by the Commission before a decision is made. It is improper to prejudge the outcome of the Commission's decisions before this had even been made."

59 Mr. Zammitt's reply is dated November 20th, 2000. It reads:

"The G.T.A. will take up only one issue in relation to your letter at this stage, and not make any comment (whilst disagreeing) in relation to the rest.

The G.T.A. do not accept that it has in any way caused any damage to Gibraltar's industry, in relation to cruising or otherwise. We do not accept that the cruise industry has been seriously damaged by any actions taken by the G.T.A. or that any such action was ill-advised."

60 The principal secretary sent a further letter on November 30th, 2000, as follows:

"Your assertion that the Gibraltar Taxi Association has in no way caused any damage to Gibraltar's tourism industry, in relation to cruising or otherwise, belies the evidence of the facts in this matter. It is my considered view that the cruise industry has been seriously damaged as a result of the recent action taken by the G.T.A. and that the only party that can be held to be responsible for this is the

G.T.A. It is for this reason that I consider that the action that was taken by the G.T.A. was ill-advised."

61 The hearing before the Commission commenced the following day, December 1st, 2000. The appellants argue that the principal secretary, in his letter of November 15th, 2000, comments on the following four matters which were in issue before the Commission:

(a) He alleges that the G.T.A. does not understand the cruise industry;

(b) he takes issue with the question of whether or not industrial action taken by the G.T.A. was justified;

(c) he considers the effect of that industrial action on the cruise market; and

(d) he states that the Gibraltar Tourist Board is optimistic that cruise calls would continue to increase in 2001.

62 The first three of those issues relate to industrial action taken by the G.T.A. against M.H. Bland at the cruise liner terminal. That action clearly generated some debate in the local press and was a matter which would obviously concern the principal secretary is his official capacity. Equally clear is the fact that the principal secretary took a view on the effect that such action had on the cruise market in Gibraltar. In my judgment, the question of whether the G.T.A. was right in the action it took is not strictly relevant to the issues facing the Commission and the criteria set out in s.28(1) of the Ordinance. However, the appropriateness of the G.T.A.'s action was drawn into the proceedings before the Commission and it has been argued that because the principal secretary took a stance in the matter which was critical of the G.T.A., it could be considered by a fair-minded person that there was a possibility that he was biased against the G.T.A.

63 If a judge or tribunal admonishes a party for its conduct in or out of court, is that judge or tribunal necessarily precluded from trying or determining the issues involving that party? Certainly not. A fair-minded observer would look at the final paragraph of the principal secretary's letter of November 15th, 2000 and be satisfied that he was approaching the Commission proceedings in a balanced manner. In that paragraph, the principal secretary was indicating that C.T.L.'s applications would be considered on their merits and, by implication, that he was not prejudging the applications.

64 So far as the fourth matter is concerned, the principal secretary's declaration that the Gibraltar Tourist Board was confident of a continued increase in cruise calls in 2001, I must confess that I cannot see how that assertion can be taken by anyone to mean that the principal secretary did not approach the Commission's proceedings with an open mind.

65 It may have been prudent for the principal secretary not to engage in this correspondence which tangentially touched upon the issues before the Commission so close to the Commission's proceedings, but a fair-minded review of the correspondence does not reveal that he could be perceived thereby to have set his face against the G.T.A.'s objections to the grant of the licences.

66 A further allegation of bias against the Minister concerns an allegation that he interfered with the provision of information of passenger movement and transport use at the cruise liner terminal. Mr. Hammond is the office manager of the G.T.A. He had been cross-examined by Mr. Isola, who acts for C.T.L., at one session of the Commission hearings about arrival figures for 1998, 1999 and 2000 and had ascertained that C.T.L. obtained the figures from Mr. Bossino, who is the cruise liner terminal manager. Mr. Hammond's evidence was that subsequent to that session, on March 8th, 2001, he had telephoned Mr. Bossino and asked him to provide him, Mr. Hammond, with the figures. Mr. Bossino said they would take some time to prepare. Having heard nothing further by March 14th, 2001, Mr. Hammond again called Mr. Bossino. Mr. Hammond's evidence was that Mr. Bossino told him that the Minister had given him what he described as a "bollocking" for providing the figures to Mr. Gaggero of C.T.L., because the figures had not been released by Government and contradicted his figures. Mr. Bossino subsequently told him that he could not provide the figures and he would have to approach the principal secretary.

67 The Commission proceedings were then interrupted so that Mr. Bossino could be called to testify to Mr. Hammond's evidence. It was agreed between counsel, led, I think it is fair to say, by Mr. Picardo, that the Minister should stand down as chairman of the Commission for this part of the proceedings, relating as it did to the conduct of the Minister himself. In the event, the Minister took himself off to a room from where it would be impossible for him to interfere with the witness, Mr. Lombard took over as chairman, and Mr. Bossino was called from the dentist's chair.

68 Mr. Bossino's testimony was that he or his assistant prepare the figures of passenger arrivals at the cruise liner terminal. He had provided C.T.L. with information on the statistics. He had had a number of conversations with Mr. Hammond about the statistics, contacted the Gibraltar Tourist Board on the matter and received the instruction that in future the figures had to be provided by their Chief Executive. Mr. Bossino denied having been spoken to by the Minister about the statistics but agreed that he might have told Mr. Hammond something to the effect that he received a "bollocking" from the Minister for providing the figures, but that if he did so he said it to stop Mr. Hammond bothering him about the figures. He said he had not realized that the figures he provided to C.T.L. would

be used in the Commission proceedings and he became concerned that he was getting into a serious situation.

69 After hearing the evidence, the Commission, with Mr. Lombard still as chairman, delivered a unanimous ruling to the effect that whilst Mr. Bossino may have told Mr. Hammond that he was under pressure as a way of getting Mr. Hammond "off his back" the members believed Mr. Bossino when he said he had not been interfered with by the Minister. The Minister then resumed his role as chairman.

70 Let me deal with the factual aspects first. Mr. Picardo argues that the appellants stand by Mr. Hammond's evidence and that Mr. Bossino may very well have testified as he did for fear of losing his job or have hoped for some advantage from the Minister by slanting his evidence. He also suggests that it is impossible for this court to determine what weight to give to Mr. Bossino's evidence without seeing him. In my judgment, that is to suggest that this court is imbued with an ability to determine credibility which is not possessed by Mr. Lombard, an experienced and well-respected lawyer in this city, and his fellow Commission members. They had the opportunity of seeing and hearing Mr. Bossino and unanimously accepted his evidence. From the written word, I cannot fault that finding and I can see no advantage in my independently assessing Mr. Bossino's credibility.

71 Mr. Picardo argues that, the allegation having been made against the Minister, the only safe course for the Commission to take was for the Minister to stand down and the Commission hearing to start afresh. He argues that after what had transpired in the Commission, a fair-minded, well-informed observer would consider that there was a real possibility that the Commission, with the Minister as chairman, could not come to a fair and impartial decision.

72 In my judgment, the Commission came to the correct decision to continue with the hearings at a time which was over one year into the Commission proceedings. It would have been unjust, particularly to C.T.L., for the proceedings to be abandoned and to have to commence afresh. An allegation had been made against a member of the Commission. That allegation had been tested in the fairest way possible and was determined to be unfounded. That then was an end to the matter and the proceedings cannot have been tainted by the member against whom the unfounded allegation was made continuing to sit.

73 The final concern of the appellants in relation to actual or apparent bias relates to the fact that Mr. Isola of the firm Isola & Isola acts for C.T.L. when, in other proceedings before this court, the Government had objected to Isola & Isola acting for M.H. Bland Ltd., C.T.L.'s parent company.

74 M.H. Bland Ltd. is locked in litigation with the Government over a levy which the Government imposes on all tourists entering the Upper Rock Nature Reserve. Isola & Isola acts for M.H. Bland Ltd. in that action. Some years ago, Isola & Isola advised a previous Government on the dispute in question and an application was made in the current proceedings for Isola & Isola to be prevented from acting for M.H. Bland Ltd., on the ground that the firm may have had access to Government papers when it gave its earlier advice to Government. In the event, Pizzarello, A.J. ruled that no conflict arose and that Isola & Isola were free to act in the current proceedings.

75 The point taken by the appellants was that if the Minister (as the relevant member of the Government) considered that Isola & Isola had confidential information about the Upper Rock, which was the main area of consideration in the proceedings before the Commission, then Isola & Isola could be privy to information to which the appellants do not have access.

76 Again, I find no merit in this argument. The proceedings between M.H. Bland Ltd. and the Government are entirely different proceedings, raising entirely different issues to those before the Commission. And in any event, if Pizzarello, A.J. held that there was no conflict in the case before him, it is difficult to see how the appellants could be in any way prejudiced in the proceedings before the Commission.

77 The last of the appellants' complaints of lack of impartiality on the part of the Commission relates to the presence of Mr. Maginnis as one of its members. Mr. Maginnis is the director of a security company which, during the course of the Commission's proceedings, was given a contract by the Government to provide three security guards in the vicinity of St. Michael's Cave in the Upper Rock area. Their employment was for the purpose of improving the traffic flow and easing congestion. The appellants argue that as the question of traffic congestion in the Upper Rock was an issue before the Commission, it was clear that whether Mr. Maginnis's company was doing a good job was an issue and therefore, to that extent, Mr. Maginnis was being a judge in his own cause.

78 The evidence before the Commission regarding traffic congestion came from two witnesses. First, Richard Labrador, presumably an expert in this discipline, produced a risk assessment report on the road leading to St. Michael's Cave. In his view, there were obvious cracks in the road and the retaining wall which ought to be surveyed by a structural engineer. Further, he said there would be difficulties because of congestion in evacuating casualties or in emergency services having access to the area. Further still, that the congestion itself, particularly when vehicles are reversing, creates a danger to pedestrians as there is lack of segregation between pedestrians and vehicles. He said that the problem is being

addressed, in some degree, by the provision of security guards who are trying to control the situation, but that there is still a problem. His opinion was that the addition of 10 more coaches would add to the problems and that if he were making the decision, he would not allow additional vehicles in the area until attempts had been made to improve the situation.

79 The second witness in regard to traffic congestion in the Upper Rock was Mrs. Olivero-Azopardi, who is the Upper Rock manager for the Gibraltar Tourist Board. She accepted that there was traffic congestion in the Upper Rock area, as there was in the rest of Gibraltar. She also accepted that an element of congestion would always exist because there was a lack of space. However, she attributed much of the problem to lack of co-operation on the part of some taxi and coach drivers. She thought that the situation had improved since the summer of 2001.

80 The Commission considered the question of traffic congestion in the Upper Rock and its findings were as follows:

> "The Commission has also considered the environmental concern highlighted in respect of the Upper Rock and in particular, the area adjacent to St. Michael's Cave. However, the Commission is satisfied that many of those concerns have been addressed and either eradicated or alleviated, as a result of recent arrangements introduced into the area, in particular, in relation to traffic congestion. To the furtherance of those ends, it would urge all industry practitioners to co-operate with the authorities so that further improvements may follow."

81 Had Mr. Maginnis a vested interest in the deliberations which led to these findings? I think not. The matter at issue was the space available in the Upper Rock area and the conditions and use of the road and safety facilities. The performance of the security guards provided by Mr. Maginnis's firm was not an issue. There was no danger that as a result of the Commission proceedings the provision of such guards could be withdrawn, thus taking away business from Mr. Maginnis's firm and no question that such provision would be increased, thus producing further profit for the firm. A fair-minded, well-informed observer could not reasonably come to the conclusion that there was a real possibility that Mr. Maginnis was biased, thus investing the Commission's proceedings with an element of partiality.

82 My conclusion, having considered all the allegations of actual and apparent bias individually and collectively, is that the appellants received a fair hearing before an independent and impartial Commission, which was not, and could not reasonably be perceived to be, biased.

Other grounds of appeal

83 There were 10 other grounds of appeal argued which were not related to the independence and impartiality of the Commission or bias of its members.

1. The Commission erred in law in its construction of s.28 of the Ordinance and in finding that the authorities on the interpretation of s.16(1)(f) of the Trade Licensing Ordinance were only of limited assistance to it, if at all.

84 Section 16(1)(f) of the Trade Licensing Ordinance reads:

> "Subject to the provisions of subsection (2) and of section 17, the licensing authority may in its discretion refuse to issue a licence, if it is satisfied—
>
> . . .
>
> (f) that the needs of the community either generally in Gibraltar or in the area thereof where the trade or business is to be carried on are adequately provided for . . ."

85 Mr. Picardo argued before the Commission that when considering the "needs of the area" pursuant to s.28(1) of the Ordinance, the Commission should consider authorities from our courts on the interpretation of s.16(1)(f). In its ruling, the Commission pointed to certain differences between s.16(1)(f) and s.28(1) and found the authorities cited of only limited assistance. In particular, the Commission pointed out that s.16 of the Trade Licensing Ordinance only gives the Trade Licensing Authority a discretion to refuse a licence, whereas s.28 of the Ordinance gives the Commission a discretion to grant or refuse a licence. The effect of this wording, as pointed out by the Commission, is that the Trade Licensing Authority can only refuse a licence after it has found that the needs of the community are adequately catered for. The Commission, on the other hand, can refuse a licence even if it finds that the needs of the area are adequately catered for, provided it considers the needs of the area among the other criteria set out in s.28(1) of the Ordinance.

86 Mr. Picardo was drawing on the authorities on the Trade Licensing Ordinance in an attempt to show that the level of competition which would be produced by the grant of 10 new operator licences would greatly prejudice the applicants. Even if the Commission were wrong in deriving limited assistance from the authorities he cited, and in my judgment it was not, the evidence showed an overwhelming case for an increase in the number of seats available to tourists to cater for the "needs of the area" in the sense accepted by both parties, *i.e.* the needs of Gibraltar, its population and its tourist arrivals.

2. The Commission erred in law in finding that because it found no evidence that C.T.L. was involved in undercutting prices, the level of competition in the market is not a relevant consideration for this application.

87 In my view, this ground of appeal is misconceived. The Commission had this to say in its ruling:

> "Equally, in respect of the level of competition and prices principle, the Commission has considered the arguments over undercutting and price differentials for Rock tours. However, since the Commission found no evidence the applicant was involved in such practices, the Commission does not believe it is a relevant consideration for this application."

88 The appellants have taken this to mean that the Commission did not consider that the level of competition in the market was a relevant consideration, whereas in its context the Commission was there only making a finding on allegations made by the appellants of price undercutting by C.T.L.

89 The passage of the ruling quoted above must be read in the context of the whole ruling and in the context of the proceedings, from which it is clear that the Commission considered levels of competition when determining the "needs of the area." In particular, the following passage of the ruling which precedes the passage quoted above, is relevant:

> "The Commission has, therefore, considered the evidence of competitors; the level of competition and prices; the number of licences extant; the manner of operation of extant licences and issues related to [C.T.L.'s] convenience and the development of its own business."

3. The Commission erred in finding that it would be contrary to the principles of natural justice not to allow (C.T.L.) to amend its application, as it was not strictly in keeping with the provisions of para. 3(1)(c) of Schedule 1 of the Ordinance.

90 Mr. Picardo has graciously acknowledged that this and the immediately following grounds are not his strongest. Paragraph 3(1)(c) of the Ordinance requires that every application for an operator licence must specify whether the licence is to cover national and international transportation or national transportation only. The specimen form appearing in the schedule erroneously omits reference to this requirement and C.T.L. followed that form in making its applications. The application proceeded on the basis that C.T.L. required both an international and a national licence, but on the penultimate day of the proceedings the error in the forms was detected. C.T.L. sought leave to amend and the application was opposed. The Commission ruled that it would be contrary

to "natural justice" to refuse C.T.L. leave to amend to avoid having to set aside proceedings which spanned 15 months.

91 What the Commission meant, of course, was that it was not in the interests of justice to refuse leave and in this it cannot be faulted. There is no merit in this ground of appeal.

4. The Commission erred in law in finding that the appellants would not be prejudiced should an amendment of the format of the application be approved.

92 Again, Mr. Picardo has not pressed this ground. His argument that the appellants have suffered prejudice by the grant of leave to amend the application forms, in that the Commission did not strike out the applications and leave the appellants to their business without the competition from C.T.L.'s 10 extra coaches, does not meet the justice of the case. The appellants were not prejudiced in terms of the proceedings before the Commission and were not denied an opportunity to put their case before the Commission so, in that sense, they were not prejudiced by the amendment. It would have been unjust, and I do not think I use too strong a word if I say absurd, for proceedings to have been abandoned after 15 months for the sake of such a technical flaw in the application forms.

5. The Commission erred in law in approving an amended application before the same had been submitted to it.

93 Again, there is no merit in this ground of appeal. The amendment sought was technical and clearly identified. There was no need for the Commission to receive a draft of the proposed amendment.

6. The Commission erred in law in including a reference in its judgment to the views of the non-governmental members of the Commission in respect of the behaviour of the Minister and the principal secretary.

94 The ruling of the Commission contained the following passage:

> "[I]n the light of the persistent submissions about bias, the individual non-governmental members of the Commission have requested that it be placed on record that they have never been subjected to any pressure, advice, suggestion, guidance, interference or other influence from either the chairman, or the principal secretary, either individually or collectively, or from any other person or body, as to the manner in which the members of the Commission should exercise their or its discretion in considering the application. In that respect, the individual non-governmental members should wish to add that the chairman and principal

secretary have been examples of integrity and rectitude and enjoy their full confidence and support."

95 In this regard, the appellants made the following three submissions:

(a) They have not suggested that the Minister or principal secretary have sought to influence the other members of the Commission. There is no evidence available of the Commission's deliberations and the assurances given by the Commission do not relate to the actual and apparent instances of alleged bias;

(b) the views of the non-governmental members demonstrate that the Commission was painfully aware that the appellants did not believe they were having a fair hearing and do not assist in the determination of the issue of bias; and

(c) in any event, interference need not be spoken or obvious.

96 For my part, I cannot see that the passage complained of is an error in law. It does not, of course, go any way to answering the complaints of actual or apparent bias alleged in this appeal on the part of the Minister or the principal secretary, but, in the face of the many allegations of bias, it is an assurance which did no harm in attempting to demonstrate the integrity of the Commission's proceedings.

7. The Commission erred in law in the manner of the conduct of its proceedings, in not allowing the appellants time to appeal its interlocutory ruling on bias to the Supreme Court.

97 When Mr. Picardo made his first submission on behalf of the appellants on bias, the Commission delivered a ruling. Mr. Picardo told the Commission that he wished to appeal the ruling. The Commission gave him until the start of the afternoon session, about two hours, in which to obtain an injunction from the Supreme Court. In the event, the parties appeared before me without papers and I was unable to give the matter immediate consideration, but made time available on the Tuesday following. As it was, the appellants determined not to pursue the application before me because they could not afford to run two sets of proceedings at the same time.

98 If the Commission had held up its proceedings pending determination of an injunction application in my court, the proceedings before it would have been more protracted than they ultimately were and C.T.L. would have been held out of its applications for a longer period than it was. There was no duty on the Commission to allow the appellants extra time to pursue proceedings in my court and the appellants chose not to take further an application which, in any event, would have failed. In my judgment, the Commission did not err in failing to adjourn the

proceedings to enable the appellants to make what was in effect an interlocutory appeal to the Supreme Court.

8. The Commission erred in law in not allowing the appellants to rely on minutes of the Traffic Commission which were relevant to the issues and provided important evidence necessary to determine the application properly.

99 In examining Mr. Muscat, Mr. Picardo sought to put to him certain minutes of the Traffic Commission. Mr. Lombard, one of the members of the Commission, who is also chairman of the Traffic Commission, took exception to what he regarded as confidential minutes being aired at the Commission's public proceedings without the permission of the other members of the Traffic Commission. The upshot was that the examination of Mr. Muscat in this regard was placed on hold, Mr. Picardo wrote to Mr. Lombard in his capacity as chairman of the Traffic Commission for permission to use the minutes and, after the members of the Traffic Commission were consulted, permission was given to Mr. Picardo to use the minutes. In the event, Mr. Picardo did not raise the matter again with Mr. Muscat.

100 The appellants were not in any way deprived of an opportunity to put their case; they may have been delayed in making a point, but no prejudice whatsoever was suffered by them as a result of the Commission's actions in this matter.

9. The Commission made a material error as to the facts in not calculating the number of visitors in its determination of the market as at 2002 or the end of 2001, being the dates of the figures available and instead relying on the figures for the year 2000.

101 The appellants provided the Commission with the tourist arrival figures for the year 2001 when Mr. Picardo made his closing address. They now complain that these figures, which show a drop in the statistics, following a drop in the year 2000, were not taken into account by the Commission, particularly as one of the main planks of its decision was the increase in the market which C.T.L. sought to satisfy. The Commission's ruling in this regard reads as follows:

> "[T]he number of visitors to Gibraltar on board coaches arriving at the coach park and on cruise ships has grown considerably since the last grant of new operator licences in 1986 and, as a result, the same number of licences serve the market now as 16 years ago, notwithstanding the increases in question. In particular, the growth in coach arrivals at the coach terminal has increased by 77% between 1994 and 2000, although, in fact, it almost doubled between 1993 and 2000. Similarly, the number of cruise vessels arriving at Gibraltar between 1991 and 2000 increased by 300%.

> All of which, has resulted in a marked increase in Upper Rock visitor admissions.
>
> Accordingly, pro rata, there is less transport on the road to satisfy the requirements of visitors compared with 16 years previously; in 2001, 28% of passengers on cruise ships took organized tours and an unspecified number took a tour independently. Previously, in 2000 over 400 cruise passengers were booked on organized tours on 26 occasions, between 300 and 399 cruise passengers took tours on 49 occasions and fewer than 300 passengers took organized tours on 48 occasions . . ."

102 The reason why the 2001 figures were not referred to in the ruling seems to be that they were unaudited and, at that stage, unofficial figures. Be that as it may, one would have expected the Commission to have referred to the statistics, as it seems that the figures for 2000 and 2001 were going against an upward trend.

103 I have reviewed the figures in the light of the evidence as a whole. It is true that there was a marginal drop in visitors to the Upper Rock in 2000 and the unofficial figures for 2001 reduce that figure by a little less than 6%. But when one sets that against the substantial increase of over 300% in cruise ship arrivals and the marked increase in Upper Rock visitor admissions from 1986, when the last operator licences were granted, then the overall findings of the Commission regarding the market for tours cannot be in question.

10. ***The Commission made a material error as to the facts in considering the "aggregate" number of taxis hired by C.T.L. under the Taxis (City Service and Cruise Terminal) Regulations 1999.***

104 The Taxis (City Service and Cruise Terminal) Regulations provide a system whereby on any day there is a group of taxis available for normal city duty. The regulations also lay down a system that applies in respect of cruise liner calls, where the cruise liner offers its passengers the facility of pre-booked tours and excursions. The shore excursion agent, appointed by the cruise ship principal to offer pre-booked tours and excursions, is obliged, by the regulations, to use a certain minimum number of taxis according to a table set out in the regulations and depending on the number of passengers on the ship. The regulations also set out the fees payable for the service, which include a fee where a taxi is not required by the shore excursion agent.

105 In its ruling, the Commission considered C.T.L.'s requirement for additional transport in the following way:

> "The applicant's needs for transport to satisfy its business requirements at the cruise liner terminal have increased, no doubt as a result of its relation to M.H.B. which accounts for 85% of the

shore excursion agency work at the cruise liner terminal. In addition, the applicant has a small proportion of work at the coach terminal.

As a result, the applicant is forced to subcontract work to other transport operators, so as to satisfy its clients' needs. For example, in 2000, the applicant subcontracted S.G.L. tour buses on 53 occasions. In addition, other tour buses from other operators were also subcontracted when required. Furthermore, an increasing number of taxis were subcontracted by the applicant between 1996 and 2000, in compliance with its obligations under the provisions of the Cruise Terminal Regulations 1999, which resulted in a larger number of taxis hired by the applicant in aggregate than the minimum number stipulated therein.

At least on 12 occasions the applicant has encountered difficulties of a varying nature and magnitude in the servicing of its clients through subcontracting, which has resulted in adverse comments or actions from the cruise liner companies or their personnel."

106 The appellants complain that the regulations themselves set quotas in respect of each ship arriving in Gibraltar and do not refer to "aggregate" calculations. Accordingly, they argue, the Commission erred in its interpretation of the regulations and took into account irrelevant considerations.

107 On this point, I must say I agree with Mr. Isola, for C.T.L. In the passage quoted above, the Commission merely stated, as a finding of fact, that an increasing number of taxis was subcontracted by C.T.L. or M.H. Bland Ltd. between 1996 and 2000 and that the number of taxis hired by C.T.L. or M.H. Bland Ltd. under the provisions of the regulations exceeded the minimum number stipulated therein. He points out that these findings were based on evidence produced by C.T.L. and there was accordingly no error made in this connection by the Commission. The findings on C.T.L.'s requirement for additional transport were properly made on the evidence tendered.

Conclusion

108 In conclusion, therefore, I dismiss the appeal. The parties received a fair hearing before an independent and impartial authority which gave the evidence and submissions placed before it careful consideration. For my part, having independently reviewed the evidence, particularly the evidence of the substantial increase in tourist arrival figures since 1986, the date when there was last an issue of operator licences, it is difficult to see how the Commission could have justified holding C.T.L. out of the 10 licences applied for.

Appeal dismissed.