[2003–04 Gib LR 271]

ROJAS v. BERLLAQUE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Nicholls of Birkenhead, Lord Hobhouse of Woodborough, Lord Millett, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe): November 10th, 2003

Civil Procedure—juries—female jurors—right to fair hearing—substantial exclusion of women from jury lists by Supreme Court Ordinance, s.19 not direct breach of "impartiality" in Constitution, s.8(8)—discriminatory method of compiling jury list under Supreme Court Ordinance, s.19 violates right to fair hearing under Constitution, s.8(8)

Statutes—interpretation—modification—under Constitution, Annex 2, s.2(1), "existing laws" to be interpreted as conforming with Constitution—Supreme Court Ordinance, s.19(1) modified to impose duty to perform jury service equally on women and men—s.19(2) to be disregarded as unconstitutional

The plaintiff brought an action in the Supreme Court for damages for assault and false imprisonment, as well as an injunction against the defendant, her former partner.

The plaintiff, who was female, applied for the action to be tried by jury and sought a jury drawn from a jury list on which men and women were included on an equal basis. By s.19(1) of the Supreme Court Ordinance, subject to some exemptions and disqualifications, all men between 18 and 65 were automatically placed on the jury list. Women within this age

bracket could volunteer for jury service under s.19(2), but in practice few came forward. The result was that there were about 6,000 men on the jury list and between 25 and 30 women. There had not been a jury in the past six years that contained a single woman member and it was almost inevitable that the jury chosen would be all male. The defendant did not object to the plaintiff's application and the Attorney-General intervened in the proceedings. The Supreme Court (Schofield, C.J.) granted her application and ruled that, in order to comply with her right to a fair trial by an impartial court under s.8(8) of the Constitution, s.19(1) of the Ordinance should be read as if it applied equally to men and women, and s.19(2) should be treated as omitted. On the appeal of the Attorney-General, the Court of Appeal by a majority (Neill, P. and Staughton, J.A., Glidewell, J.A. dissenting) reversed the Supreme Court's ruling. The proceedings in the Court of Appeal are reported at 2001–02 Gib LR 252.

On further appeal, the plaintiff submitted that (a) the practical effect of the way in which the jury list was compiled meant that her constitutional right to a fair trial by an independent and impartial trial had been breached; and (b) she was therefore entitled to a trial by a jury drawn at random from a list on which men and women had been included on an equal basis.

The Attorney-General did not attempt to defend the present method of compiling the jury list but submitted that (a) a requirement of "representiveness" was not part of the natural and ordinary meaning of "impartial"; (b) there was no reason for believing that a jury of nine men was incapable of affording a fair trial to the plaintiff; (c) the plaintiff's right to an independent and impartial tribunal was therefore unaffected; and (d) in any case, the court should not make any orders, under s.2(1) of the transitional provisions to the Constitution, as to the interpretation of s. 19(1) and (2), as the Board should not pre-empt the decision of the legislature, and therefore, if it found that the plaintiff's right to a fair trial had been breached, the Board should limit itself to a declaration of unconstitutionality.

Held, allowing the appeal:

(1) The requirement allowing the requirement of an "independent and impartial" court in s.8 of the Constitution was not directly relevant here, as it was primarily directed to the composition of the particular court in the particular case and it could not be assumed that an all-male jury would be not impartial. Nonetheless, s.8 could still assist the plaintiff on the ground that she would not be accorded a fair hearing, since a non-discriminatory method of compiling a jury list was an essential ingredient of a fair trial by jury, and fairness could only be achieved in the composition of a jury by random selection from a list which was itself fairly constituted. By discriminating between men and women regarding their liability for jury service, s.19 of the Supreme Court Ordinance allowed the compilation of a jury list which was the antithesis of a fairly-constituted list and therefore violated the plaintiff's right to a fair hearing

under s.8(8) of the Constitution (para. 8; para. 14; Lord Hobhouse of Woodborough and Lord Rodger of Earlsferry dissenting, para. 44).

(2) Section 19 of the Ordinance should be modified under s.2(1) of the transitional provisions of the Constitution, which provided that existing laws were to be construed with such modifications as might be necessary to bring them into conformity with the Constitution, so as to impose on women as well as men the duty to perform jury service. It was right to modify s.19 in this way because it was the most sensible interpretation which would conform with the Constitution, and it would not be pre-empting any legislative action, as the legislature still retained the power to amend the section as it wished (para. 24).

Cases cited:

(1) *Ballard* v. *United States* (1946), 329 U.S. 187; 91 L.Ed. 181, considered.
(2) *D.P.P.* v. *Hutchinson*, [1990] 2 A.C. 783; [1990] 2 All E.R. 836, distinguished.
(3) *D.P.P. (Jamaica)* v. *Mollison*, [2003] 2 A.C. 411; [2003] A.C.D. 21; (2003), 100(11) L.S.G. 32, considered.
(4) *Ferrantelli & Santangelo* v. *Italy* (1997), 23 E.H.R.R. 288, considered.
(5) *Findlay* v. *United Kingdom*, February 25th, 1997, 30 *Reports of Judgments & Decisions* 263; (1997), 24 E.H.R.R. 221, followed.
(6) *Fox* v. *R.*, [2002] 2 A.C. 284; (2002), 12 BHRC 261, considered.
(7) *Hauschildt* v. *Denmark* (1990), 12 E.H.R.R. 266, considered.
(8) *Jaulim* v. *D.P.P.*, [1976] M.R. 96, considered.
(9) *Peerbocus* v. *R.*, [1991] M.R. 90, considered.
(10) *Police Commr.* v. *Davis*, [1994] 1 A.C. 283; [1993] 4 All E.R. 476, distinguished.
(11) *Poongavanam* v. *R.*, P.C., April 6th, 1992, unreported, distinguished.
(12) *Porter* v. *Magill*, [2002] 2 A.C. 357; [2002] 1 All E.R. 465, followed.
(13) *Pullar* v. *United Kingdom* (1996), 22 E.H.R.R. 391, considered.
(14) *R.* v. *Hughes*, [2002] 2 A.C. 259; (2002), 12 BHRC 243, considered.
(15) *Reyes* v. *R.*, [2002] 2 A.C. 235; (2002), 12 BHRC 219, considered.
(16) *Smith* v. *Texas* (1940), 311 U.S. 128; 85 L.Ed. 84, considered.
(17) *Taylor* v. *Louisiana* (1975), 419 U.S. 522; 42 L.Ed.2d 690, considered.
(18) *Thiel* v. *Southern Pacific Co.* (1946), 328 U.S. 217; 126 F.2d 710, considered.
(19) *United States* v. *Roemig* (1943), 52 F. Supp. 857, considered.

Legislation construed:

Supreme Court Ordinance (1984 Edition), s.19: The relevant terms of this section are set out at para. 29.
s.20: The relevant terms of this section are set out at para. 31.
s.21: The relevant terms of this section are set out at para. 31.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.1: The relevant terms of this section are set out at para. 27.
s.8: The relevant terms of this section are set out at para. 27.
s.15(2): "The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of the preceding subsection, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled."
Annex 2, s.2(1): The relevant terms of this sub-section are set out at para. 20.

Constitution of the United States, Art. III, s.2: The relevant terms of this section are set out at para. 45.
Fifth Amendment: The relevant terms of this Amendment are set out at para. 46.
Sixth Amendment: The relevant terms of this Amendment are set out at para. 46.
Seventh Amendment: The relevant terms of this Amendment are set out at para. 46.
Fourteenth Amendment: The relevant terms of this Amendment are set out at para. 48.

D. Pannick, Q.C., *D. Hughes* and *N.T. Critelli* for the appellant;
M. Kelly, Q.C. for the respondent;
Hon. M.J. Beloff, Q.C., *J. Herberg* and *A.A. Trinidad, Senior Crown Counsel*, for the Attorney-General.

1 **LORD NICHOLLS OF BIRKENHEAD,** delivering the majority judgment of the Board: The Constitution of Gibraltar guarantees citizens of Gibraltar the right to have a fair trial. In determining their civil rights, and when facing a criminal charge, they are to have a "fair hearing" within a reasonable time by an "independent and impartial" court or authority. That is provided by s.8 of the Constitution. The language of this section is similar to art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Its purpose is the same. Section 8 is one of the fundamental human rights protected by Chapter I of the Constitution.

2 The question raised by this appeal is whether this constitutional right is infringed in the case of trial by jury when the jurors are chosen from a jury list compiled on a sex discriminatory basis. In Gibraltar, jury trials take place regularly in more serious criminal cases. They take place infrequently in civil cases. A jury consists of nine persons. Jurors are chosen at random from a jury list. Despite this, in practice the juries are all male. This is because men and women are treated differently in the compilation of the

jury list. Subject to exemptions and disqualifications, all men between the ages of 18 and 65 are liable to jury service. Jury service is compulsory for them. By way of contrast, women within this age bracket may volunteer for jury service. They are eligible, but service is not compulsory: s.19 of the Supreme Court Ordinance. In practice few women come forward and offer their services, so there are about 6,000 men on the jury list and only 25–30 women. The Chief Justice of Gibraltar, Schofield, C.J., cannot recall ever sitting with a jury, either in a criminal or a civil matter, containing even one woman in the last six years.

3 In the present case, the plaintiff is a woman. Pilar Rojas claims damages from Brian Berllaque with whom she used to live. She claims he subjected her to physical violence almost daily over a period of 18 months from May 1999. Additionally, he locked the door to their home so she could not go out. She seeks damages for assault and false imprisonment, as well as an injunction. The defendant denies all the allegations of improper behaviour.

4 By reason of the allegation of false imprisonment, Ms. Rojas is entitled to have her case tried by a jury. But she objects to the jury being all male. She seeks a jury drawn at random from a list on which men and women have been included on an equal basis.

5 Their Lordships can well understand how Ms. Rojas must feel. They can well understand how a man would feel if their roles were reversed. If roles were reversed, Mr. Berllaque might prefer not to be tried by an all-female jury. Mr. Berllaque, indeed, does not object to Ms. Rojas' application. He supports her view that the jury panel should be chosen from both men and women.

6 The Attorney-General intervened in the proceedings. He has not sought to defend the present method of compilation of the jury list. He has not suggested there is any objective reason why men and women should be treated differently so far as liability to jury service is concerned. His argument is focused more narrowly. He submitted that, however undesirable some may consider it, the existing system does not fall foul of s.8 of the Constitution. A requirement of "representativeness" is not part of the natural and ordinary meaning of "impartial." The focus of impartiality is on the actual jury, not its process of selection. There is no basis for believing a jury of nine men is incapable of affording a fair trial to Ms. Rojas. The jury system, involving the random choice of members of the community, is founded on the assumption that, unless the contrary is shown, those selected will not be biased subjectively. Nor, considered objectively, will they present an appearance of bias. The test in the latter regard is whether, in the words of Lord Hope of Craighead, "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility the tribunal was biased":

see *Porter* v. *Magill* (12) ([2002] 2 A.C. at 494). In the present case, a fair-minded and informed observer would not conclude there was a real possibility that an all-male jury was biased against a woman litigant. If the jury list contained an equal number of men and women, it might still happen that random selection would yield an all-male jury. No one could suggest, and Ms. Rojas does not contend, that trial by an all-male jury thus selected would infringe s.8 of the Constitution.

7 In considering this submission, their Lordships start by noting that the outcome of the present application does not depend in any way on the gender of the plaintiff in the present case. Nor does it depend on the nature of the dispute. The issue raised is of general application. If soundly based, the objection raised by Ms. Rojas is applicable to all jury trials, irrespective of the gender of the parties or the witnesses or the nature of the issues. In the compilation of the jury list there is not one law for domestic violence cases and another law for other cases. Conversely, if Ms. Rojas' objection is not soundly based, it is not assisted by the fact that this particular dispute is between a man and a woman and the subject matter is their domestic conduct.

8 Next, their Lordships should mention that they accept the Attorney-General's submissions concerning the rebuttable presumptions made by the law regarding the impartiality of jurors. Their Lordships accept also that the references to an "independent and impartial" court, in s.8 of the Constitution, are primarily directed to the composition of the particular court in the particular case. It is in this context that the human rights jurisprudence on impartiality has developed so far. The wider point now under consideration seems not to have arisen in human rights cases.

9 Where their Lordships part company with the Attorney-General's submissions is that they cannot accept that s.8 is powerless to assist in a case where the method of selection of members of the jury is blatantly, indefensibly discriminatory. Section 8 contains an open-ended constitutional guarantee of a fair trial. This is one of the most important guarantees in the Constitution. Section 8 is to be interpreted so as to ensure citizens of Gibraltar receive the full measure of protection this guarantee is intended to provide.

10 The question of a discriminatory jury list may not have arisen yet in the context of human rights jurisprudence. It has however arisen many times in the United States of America, in the context of the guarantee of the right to trial by an "impartial jury" in the Sixth Amendment to the United States Constitution. In a line of cases stretching back for over half a century, the United States Supreme Court has consistently held that the discriminatory exclusion from jury service of otherwise qualified groups is unacceptable. In *Smith* v. *Texas* (16) the discrimination was on the ground of race. Black, J. said on behalf of a unanimous court that racial

discrimination not only violates the Constitution and the laws enacted under it, such discrimination is "at war with our basic concepts of a democratic society" (311 U.S. at 130). *Taylor* v. *Louisiana* (17) concerned sex discrimination. The case is strikingly similar to the present case. Under the law of Louisiana as it then stood, a woman was excluded from jury service unless she had previously filed a written declaration of her desire to be subject to jury service. In holding this was unconstitutional, White, J. cited with approval an extract from the judgment of Frankfurter, J. in *Thiel* v. *Southern Pacific Co.* (18) (419 U.S. at 530–531):

> "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

11 Trial by jury is not a constitutional right in Gibraltar, but that difference is immaterial for present purposes. The constitutional guarantee of a fair trial in Gibraltar applies to whatever form of trial is adopted in a particular case. If the form is jury trial, the method by which the jury is selected must be a method which will accord citizens a fair trial.

12 The American jurisprudence was considered by the Board in *Poongavanam* v. *R.* (11). This was a criminal appeal from Mauritius. At that time women were excluded from jury service in Mauritius. The question which arose was whether, having regard to the composition of the jury, the appellant's trial violated a provision in the Constitution of Mauritius corresponding to s.8 of the Constitution of Gibraltar. Lord Goff of Chieveley referred to the "fair cross-section" requirement adopted in the American case law. Whether such a broad principle can be derived from the Constitution of Mauritius depends, he said, upon the construction of the word "impartial." The Constitution of Mauritius is concerned with the actual tribunal by which the case is tried and with the impartiality of that tribunal. The American principle is directed, not to impartiality in the ordinary meaning of that word, but to the representative character of the jury list. Lord Goff added:

> "Whether the jurisprudence on article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms is likely to develop in that direction, is very difficult to foresee; but any such development would require a substantial piece of creative interpretation which has the effect of expanding the meaning of the words of article 6(1) beyond their ordinary meaning."

13 In that case, the Board did not find it necessary to decide whether the Constitution of Mauritius can be read sufficiently broadly to import the

American principle. The Board decided that, having regard to social conditions prevailing in Mauritius in 1987, it would be wrong to hold there was no longer any objective justification for the exclusion of women from jury lists in Mauritius.

14 It seems that in the *Poongavanam* case (11), the appellant sought to equate a discriminatory jury list with a lack of impartiality in the selected jury. A similar approach was adopted on behalf of Ms. Rojas in the present case. This approach, concentrating on the requirement of impartiality, all too easily distracts attention from another, fundamental requirement of jury trial. This requirement is an essential feature upon which jury trial depends for its very validity. Since juries are chosen at random from jury lists, a non-discriminatory method of compilation of the jury lists is an essential ingredient of a fair trial by jury. This is inherent in the concept of a fair trial by an impartial jury. Fairness is achieved in the composition of a jury by random selection from a list which is itself fairly constituted. This is the "fair cross-section" principle underlying the American jurisprudence. It is a principle equally applicable to art. 6(1) of the European Convention on Human Rights and to corresponding constitutional guarantees, of which s.8 of the Constitution of Gibraltar is an instance. A jury list compiled on a basis which, without any objective justification, excludes from jury service virtually one-half of the otherwise eligible population is a jury list compiled on a discriminatory basis. A jury list compiled on this basis is the antithesis of a fairly-constituted jury list. Trial by a jury derived from such a list does not satisfy the constitutional requirement of a fair trial by an independent and impartial court.

15 In reaching this conclusion, the Board fully recognizes that exclusion of women from jury service, either as a matter of law or in practice, and either completely or in large measure, is an historical feature of most, if not all, countries where jury trial exists. The United Kingdom is no exception in this regard, but in all countries espousing human rights values, this practice is now universally seen as a relic from the past. In the absence of cogent objective justification, this is an unacceptable discriminatory practice undermining confidence in any system of law which still maintains it. The Board was informed that in Western Europe, jury trial exists in one form or another in France, Spain, Belgium, Luxembourg, Ireland, Sweden, Austria and Liechtenstein, in addition to the United Kingdom. Only in Gibraltar is any distinction drawn in relation to eligibility for jury service by reference to sex. Likewise no distinction on eligibility for jury service based on gender is recognized in Australia, New Zealand, Canada or the United States.

16 For these reasons, their Lordships agree with Schofield, C.J. and Glidewell, J.A. that Ms. Rojas' claim is well founded. Section 19 of the

Supreme Court Ordinance violates s.8 of the Constitution, in so far as it discriminates between men and women regarding liability for jury service. In reaching the contrary view, Neill, P. was sympathetic to Ms. Rojas' claim. He said that today a jury list should be made up of persons representative of the community as a whole and that no group or section should be excluded on grounds of sex or race. But, understandably, both he and Staughton, J.A. felt constrained by the views expressed by Lord Goff of Chieveley in the *Poongavanam* case (11), on the scope of the term "impartial."

Remedy

17 Their Lordships turn to the question of remedy. Section 15(2) of the Constitution empowers the Supreme Court to give such directions as it may consider appropriate for the purpose of enforcing the protective provisions in Chapter I of the Constitution. Pursuant to this provision, the Chief Justice directed that s.19 of the Supreme Court Ordinance should be read as though s.19(1) applied equally to men and women and s.19(2) were omitted. The alternative, of simply declaring that s.19 was unconstitutional, would create an unacceptable situation by bringing jury trials to a halt.

18 In the Court of Appeal, this question did not arise for decision, but Neill, P. considered that, in any event, relief should have been limited to a declaration. On this point, Glidewell, J.A. agreed with Neill, P. Staughton, J.A. expressed no view on the point. Neill, P. based his opinion on the decision of the Board in *Police Commr.* v. *Davis* (10). In that case, the Board held that certain statutory provisions relating to drug offences infringed the Constitution of The Bahamas. A question then arose on the severability of one of the offending statutory provisions, s.22(8) of the Dangerous Drugs Act. This sub-section related both to convictions on information and to summary convictions. The sub-section was unconstitutional in its application to summary convictions, but not in its application to convictions on information. In holding that s.22(8) was void only in so far as it related to summary convictions, the Board applied the "substantial severability" test enunciated by the House of Lords in *D.P.P.* v. *Hutchinson* (2).

19 The *Davis* case resembles the present case, in that the Constitution of The Bahamas contained a remedial provision corresponding to s.15(2) of the Constitution of Gibraltar. In the present case, Neill, P. said the court's power to enforce legislation which has been modified by the permissible principles of severance is the full extent of the power which the court possesses.

20 Before the Board, Mr. Pannick, Q.C. presented Ms. Rojas' case differently. Instead of relying on s.15(2) of the Constitution, counsel

relied primarily on the transitional provisions contained in the Order which brought the Constitution into force. The current Constitution of Gibraltar came into force on August 11th, 1969, pursuant to the Gibraltar Constitution Order 1969. This Order provides that the Constitution shall have effect subject to transitional provisions annexed to the Order. Section 2(1) of the transitional provisions deals with "existing laws." Existing laws are to have effect as if they had been made in pursuance of the (new) Constitution and "shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution." Section 19 of the Supreme Court Ordinance, regulating the eligibility of men and women for jury service, is an existing law for this purpose.

21 Thus, in the present case the court is concerned to give effect to the terms of these transitional provisions. No reliance appears to have been placed upon these provisions in the courts below. Nor was any comparable provision in point either in *D.P.P.* v. *Hutchinson* (2) or in *Police Commr.* v. *Davis* (10). In the *Hutchinson* case, the House of Lords was concerned to clarify the test applicable when seeking to sever the valid from the invalid where part of subordinate legislation, there the R.A.F. Greenham Common Byelaws, was held to be *ultra vires* the enabling statute. In the *Davis* case, the Bahamas Independence Order 1973, bringing the Independence Constitution into effect, did contain a transitional provision regarding existing laws comparable with s.2 of Annex 2 of the Gibraltar Constitution Order 1969. However, in that case the offending law was not an existing law. The Dangerous Drugs (Amendment) Act 1988, which inserted the offending s.22(8) in the Dangerous Drugs Act, was enacted long after the Constitution came into force.

22 The present case therefore stands apart from both *Hutchinson* and *Davis*. In the present case, unlike in the *Davis* case, the offending law is an "existing law." Accordingly, in compliance with the Constitution's transitional provisions, courts are required to interpret existing laws in a manner conformable with the Constitution: "the existing laws . . . shall be construed with such modifications [*etc*.] as may be necessary to bring them into conformity with the Constitution." On several occasions recently, the Board has given effect to similar provisions in other "Westminster model" constitutions. These include the Constitution of Belize in *Reyes* v. *R.* (15), the Constitution of Saint Lucia in *R.* v. *Hughes* (14), and the Constitution of Saint Christopher and Nevis in *Fox* v. *R.* (6).

23 The Attorney-General submitted there is more than one way s.19 of the Supreme Court Ordinance may be made consistent with the Constitution. The legislature might choose to provide for complete equality between men and women in the compilation of the jury lists; or it

might decide to provide for less than complete equality, as by exempting women with young children; or it might decide to abolish jury trials altogether. When granting relief, the Board should permit the legislature an opportunity to consider how to respond to the Board's decision. The Board should not pre-empt the decision of the legislature. Relief should be confined to a declaration of unconstitutionality.

24 Their Lordships are unable to accept these submissions. Section 2 of the transitional provisions imposes a far-reaching obligation on courts. As noted in *D.P.P. (Jamaica)* v. *Mollison* (3), this type of obligation goes beyond the limits of construction of statutes as usually understood. In the usual course, the process of construction involves interpreting a provision in a manner which will give effect to the intention the court reasonably imputes to the legislature in respect of the language used. The exercise required by these transitional provisions is different. The court is enjoined, without any qualification, to construe the offending legislation with whatever modifications are necessary to bring it into conformity with the Constitution. There may of course be cases where an offending law does not lend itself to a sensible interpretation which would conform to the relevant Constitution. That is not this case. The offending provision here is the provision according women a different liability to jury service from men. The modifications to s.19 most naturally to be made, when construing this section in a constitutionally consistent manner, are those identified by the Chief Justice: s.19(1) is to apply to women as well as men, and s.19(2) is to be omitted. Section 19 should be read accordingly. Far from this being an unworkable result, in reaching this conclusion, the Chief Justice had in mind the practical inconveniences which would flow from adopting the alternative course of merely granting a declaration of unconstitutionality. That is a matter on which the Chief Justice is much better placed than the Board.

25 Adopting this interpretation of the legislation will not pre-empt any subsequent decision of the legislature. It will not trespass upon the authority or the function of the legislature. It will give effect to the court's obligation under the constitutional transitional provisions. The legislature will retain the power to amend s.19 as interpreted in accordance with those provisions.

26 For these reasons, their Lordships will humbly advise Her Majesty that this appeal should be allowed. Section 19 of the Supreme Court Ordinance infringes the Constitution of Gibraltar, in so far as it provides for liability for jury service being different for women and men. In accordance with s.2 of the transitional provisions annexed to the Gibraltar Constitution Order 1969, s.19 should be construed in the manner stated above. The Attorney-General must pay the parties' costs in the Court of Appeal and before their Lordships' Board.

27 **LORD HOBHOUSE OF WOODBOROUGH** and **LORD RODGER OF EARLSFERRY**, dissenting: This appeal raises a question of the construction and application of an article of the Constitution of Gibraltar as contained in the Gibraltar Constitution Order 1969. Section 1 declares the existence, "without discrimination by reason of . . . sex," of the human right of the individual to "the protection of the law." This wording cross-refers to s.8 which is entitled "Provisions to secure protection of law". Section 8(8), which is not dissimilar to art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, provides:

> "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."

28 The appellant contends that her rights under art. 8(8), in particular, will be infringed if her case is tried by an all-male jury constituted in accordance with s.19 of the Supreme Court Ordinance ("the Ordinance"). The majority have concluded that her rights under art. 8(8) will indeed be infringed, though not on the basis for which the appellant contended. We respectfully dissent from that conclusion.

29 In these proceedings the appellant seeks damages, *inter alia*, on the ground that the respondent, with whom she lived at one time, unlawfully imprisoned her. In terms of s.15 of the Ordinance, such a claim is to be tried with a jury. The composition of the jury is regulated by the Ordinance. In particular, s.19(1) provides that, subject to the exemptions and disqualifications contained in the Ordinance, every male person between 18 and 65 who is resident in Gibraltar and has a competent knowledge of English "shall be liable to serve as a juror at any trial held by the Supreme Court in Gibraltar." Section 19(2) provides that:

> "Any woman between the ages of eighteen and sixty-five may volunteer for service as a juror, and may apply to the Registrar to be included among persons liable for jury service, and the Registrar if satisfied that she has the necessary qualifications for a juror, shall include her name in his jury lists accordingly."

30 All males meeting the specified requirements are therefore not only eligible, but under a duty to serve as a juror. Females, on the other hand, are eligible to serve as jurors, but they are not under the same obligation to do so. Rather, provided they meet the requirements, women can volunteer for service as jurors. For the men, the performance of the civic service is compulsory, for women it is voluntary. By making jury service

voluntary for women but compulsory for men, whether justifiably or not, the Ordinance in effect treats women more favourably than men. In practice, the result is that there are about 6,000 men on the jury list but only 25–30 women. Neither the Chief Justice nor the puisne judge could recall sitting with a jury with a single woman member in the previous six years. The Chief Justice was therefore stating the obvious when he concluded that the chances of the appellant's claim being tried by a jury containing even a single woman "are remote, to say the least."

31 Section 19 should not be viewed in isolation. Section 20 lists those who are to be ineligible to serve as jurors. They include those, such as "ministers of religion," lawyers and doctors and dentists, whom one might expect to see on the list, having regard to the position in the United Kingdom. But in addition, the list includes, for example, "school teachers," nurses, firemen, newspaper editors and those engaged in the (maritime) "light or pilotage services." Those disqualified from serving include "aliens who have been resident in Gibraltar for less than ten years": s.21. The provisions of these sections no doubt reflect the particular situation of Gibraltar. It is not unreasonable to suppose that, at least originally, s.19 was also thought to respond to social conditions there.

32 The appellant's challenge, as presented by her counsel, was based entirely on the requirement in s.8(8), that the court which determines her case should be "impartial." She did not contend, either in the courts below or before the Board, that an all-male jury would necessarily be subjectively partial. Subjective bias would, after all, depend on the actual characteristics of the men who happened to be selected to serve on the jury in her case. The appellant's contention was, rather, that an all-male jury selected from a list drawn up under s.19 of the Ordinance would not be seen to be impartial, in particular in a case involving a claim of false imprisonment brought by a woman against her former male lover. A fair-minded and informed observer would conclude that there would be a real danger of bias. So the court trying the case could not be regarded as being objectively impartial.

33 It was common ground that tribunals are not to be assumed to be partial or incapable of reaching fair decisions in accordance with the law. If a party alleges that such unfairness or partiality has occurred, he must demonstrate this. If the allegation is that there is reason to fear that a particular tribunal lacks impartiality, what is decisive is whether this fear is justified on an objective appraisal: *Hauschildt* v. *Denmark* (7).

34 We understand the majority to accept that in this case the appellant cannot show that, on an objective appraisal, an all-male jury selected in terms of the Ordinance would lack impartiality. The difficulty of any such submission was underlined by Mr. Pannick, Q.C.'s acceptance that, if an

all-male jury were drawn from a list containing roughly equal numbers of men and women, he could not contend that it would lack impartiality. Even more importantly, at first instance the Chief Justice acknowledged that there was "no evidence that a jury comprised of nine Gibraltarian men would not exercise their functions as jurors properly simply because of the gender of the [appellant herself] in this case." He added: "indeed the jury system in Gibraltar has operated well for many years and juries have come to impartial decisions." The appellant did not challenge this. Nor do we find what the Chief Justice says surprising. For instance, the experience of both counsel and judges in criminal trials in the United Kingdom suggests that, since mixed juries are often more critical than all-male juries of the evidence of women, a defendant in a rape case would have nothing to gain from being tried by an all-male jury. Similarly, in the present case, the defendant has supported, rather than opposed, the appellant's attempt to obtain a mixed jury of men and women. That serves as a reminder that the make-up of the jury would be the same irrespective of the sex of the parties. So the appellant cannot contend, in terms of s.1, that she is being subjected to any discrimination on grounds of her sex or indeed on any other ground.

35 Despite having expressly stated that there was no evidence that Gibraltarian juries had been, or are, partial or unfair, the Chief Justice concluded that the appellant's rights under s.8(8) had been infringed. He cited *Findlay* v. *United Kingdom* (5), where the European Court of Human Rights affirmed that there should not only be an absence of subjective personal prejudice or bias, but also the tribunal must "be impartial from an objective viewpoint" and "offer sufficient guarantees to exclude any legitimate doubt in this respect." The Chief Justice went on to say that "an objective observer could reasonably conclude that it is unfair to try a case between a man and a woman before a jury from which women are systematically excluded." The difficulty with this statement is that it proceeds on different factual premises from, and indeed contradicts, those already accepted by the appellant and the Chief Justice. In the first place, women are not "systematically excluded." The make-up of juries in Gibraltar is not the result of any exclusion; it is in the relevant respect merely the result of the social (and perhaps cultural) decision to make the performance of the civic service compulsory for men but voluntary for women. Moreover, this is not an example of rigging the jury system in order to pervert jury verdicts or to discriminate against any class of litigant or for any other improper purpose.

36 What then, according to the Chief Justice, is the reasonable basis for an objective observer to conclude that it would be unfair to try the case before an all-male jury? He does not say. The evidence does not justify that view. There is no evidence or other indication whatsoever that the citizens of Gibraltar have anything but complete confidence in the

impartiality of the juries empanelled in their courts. The fact that juries in the United Kingdom and elsewhere are now drawn from differently constituted lists, reflecting a different view of the civic duty to serve, is neither here nor there. It is not a requirement of s.8 (or s.1) of the Constitution that the law of Gibraltar should follow the laws and procedures of other countries. What is in issue in the present appeal is whether an objective Gibraltarian observer would have a reasonable basis for saying that in Gibraltar juries are not impartial and do not deliver fair verdicts. The answer is that he would have none. The Chief Justice's statement therefore remains a bare subjective assertion, contrary to the evidence of how the jury system works in Gibraltar: his statement must be rejected. (See also *Ferrantelli & Santangelo* v. *Italy* (4), (23 E.H.R.R. 288, at paras. 56–58), and *Pullar* v. *United Kingdom* (13), (22 E.H.R.R. 391, at paras. 38–41).) By parity of reasoning, there is no basis for saying that the appellant, or any other class of litigant, is being discriminated against by the jury system in Gibraltar.

37 The Chief Justice gave a second reason, however, for upholding the appellant's constitutional claim. He accepted her submissions that "for a jury to be impartial it must be representative of the community, and that a jury from which women are systematically excluded is self-evidently not so representative." As before, the use of the apparently pejorative expression "systematically excluded" cannot be condoned. But this is not the substance of the submission: the substance is that the jury will not be impartial unless it is representative of the community. The Chief Justice thus applied a notion of impartiality that is broadened so as to include a requirement that a jury should be representative of the community. He pointed to nothing in English law or in the jurisprudence of the Strasbourg court to support that interpretation. Rather, he claimed to find support for it in a line of decisions of the Supreme Court of the United States. Unfortunately, the Chief Justice was not referred to the decision of this Board in *Poongavanam* v. *R.* (11), where Lord Goff of Chieveley pointed out the difficulties inherent in his approach.

38 In *Poongavanam*, the appellant was a male who had been convicted of murder on the verdict of an all-male jury. He argued that the all-male jury was unconstitutional under the Constitution of Mauritius, arts. 3 and 10 of which were, for present purposes, indistinguishable from arts. 1 and 8 of the Gibraltar Constitution. Under the Mauritian Constitution there was no constitutional right to trial by jury. At the time of the trial, only males meeting property, wealth and income requirements were eligible for jury service. In 1990, between the time of the trial (1987) and the time of the hearing of the appeal by the Board (1992), the relevant Mauritian statute had been amended so as to remove the financial requirements and make women also eligible, though not compellable, to serve as jurors. The "American" argument was advanced that the jury must be "drawn

from a list which provides the accused with a fair possibility of obtaining a jury which constitutes a representative cross-section of the community." The Board rejected that argument. Lord Goff of Chieveley emphasized that the requirement of the Mauritian Constitution was impartiality. He continued:

> "The American principle however transcends such requirements. It is directed not to impartiality in the ordinary meaning of that word, but to the representative character of the list from which the jury are drawn. The effect is therefore that, however impartial the actual jury may in fact have been, the principle may nevertheless be offended against if those from whom the jury are selected are not representative of society. Furthermore the principle is not directed towards the constitution of the particular jury in question. It is recognised that it is impossible to achieve, by a process of random selection, a representative jury . . . This makes it all the more difficult to derive the principle from a provision such as s.10(1) of the Constitution of Mauritius, which is concerned rather with the actual tribunal by which the case is tried, and the impartiality of that tribunal . . . any such development would require a substantial piece of creative interpretation which has the effect of expanding the meaning of the words of art. 6(1) beyond their ordinary meaning."

39 Lord Goff then turned to the question whether, if it were assumed that the American principle were to apply, the exclusion of women from juries could be objectively justified at the material time by the social circumstances then prevailing in Mauritius. On this there were clear statements by judges of the Supreme Court. In *Jaulim* v. *D.P.P.* (8), Sir Maurice Latour-Adrien, C.J., giving the judgment of the court, said ([1976] M.R. at 101–102):

> "The framers of those laws [the Jury Acts] may have thought and may still think that the Mauritian woman's status, her place and role in the home and family, and social conditions prevailing in this country are incompatible with a service which, as our law has stood and still stands, may require that they be kept away from home for sometimes long periods, sleeping in hotels, and unable to move about except under the vigilant eyes of court ushers. It seems unquestionable to us that such an obligation would cause much distress to many Mauritian women, and arouse a deep resentment among many of their male relatives. Those circumstances would provide, in our judgment, an objective and reasonable justification, if any was needed, for the distinction made by the impugned legislation."

The majority of the Court of Criminal Appeal had followed the same approach in *Peerbocus* v. *R.* (9). On this basis, the Board held that, even if

the American principle were applicable, it would be quite wrong to hold that by 1987 the time had come when it could properly be held that there was no longer any objective justification for the exclusion of women from jury lists in Mauritius, having regard to the social conditions prevailing in that country. The appeal therefore failed, even if the appellant's legal argument based on the American decisions were to be accepted.

40 We accept, of course, that the comments of the Board on the concept of impartiality were, strictly speaking, *obiter*, but they were carefully considered and we see no reason not to apply them when interpreting s.8(8) of the Constitution in this case. On matters such as what amounts to "cruel and inhuman punishment," it is recognized that standards have risen, and it is the current standard to which effect should be given. See, for instance, *Reyes* v. *R.* (15). There is however no dispute as to what is meant by the term "impartial": it means the absence of both actual and reasonably perceived partiality. For the reasons given by Lord Goff of Chieveley, there is no basis for embarking today on the substantial process of creative interpretation which would be involved in expanding the notion of impartiality beyond its normal meaning so as to include a requirement that any jury be drawn from a panel that is representative of a cross-section of the community.

41 Two further points are worth making before parting with *Poongavanam* (11). The first is that provisions such as those in s.19 of the Ordinance, should not be too readily dismissed as unacceptable. Cultural and practical factors may provide perfectly adequate justification for what the legislature has done. This is, however, the less important point in the present case, since counsel for the intervenor, the Attorney-General, did not seek to adduce any evidence or to raise any argument on this point, preferring to take his stand on the terms of s.8 of the Constitution. The important point is the second: the whole of this discussion of justification demonstrates how far the debate has strayed from applying the requirement of the Constitution that there should be an impartial tribunal. If there is an impartial tribunal and a fair trial, there has been no breach of s.8. If, on the other hand, the tribunal is not impartial, that too is the end of the matter since there has been a breach of s.8. It will be nothing to the point that the state seeks to excuse what it has done by pleading expediency or some social policy. The obligation of the state is to ensure that the appellant's case is given a fair hearing before an independent and impartial tribunal.

42 In these circumstances, we share the view of the majority that the appellant has not shown any objective basis for fearing that the all-male jury trying her case would not be "impartial" in terms of s.8(8). She has therefore failed to establish the only infringement of s.8(8) which she alleged, and the only infringement indeed for which her counsel contended before the Board.

43 The majority consider, however, that, by concentrating on the requirement of impartiality in s.8(8), the appellant and her counsel missed a trick. Focusing, by contrast, on the requirement of a fair hearing, the majority hold that it is inherent in the concept of a fair hearing by an impartial jury for the purposes of s.8(8) that the jury should be chosen from a list compiled by a non-discriminatory method. Hence the appellant's s.8(8) rights are infringed, because trial by a jury derived from the kind of list used at present does not amount to a fair hearing by an independent and impartial court.

44 We are unable to accept that conclusion. We accept, of course, that the constitutional guarantee of a fair trial applies to whatever form of trial is adopted in a particular case. We also accept that the method by which the jury is selected must accord citizens a fair trial. But, for the reasons already given, we reject the characterisation of s.19 as "discriminatory" against the women of Gibraltar—and, of course, the appellant makes no such complaint in these proceedings where she appears as a party and not as a potential juror. Moreover, again as we have already emphasised, the experience of the Chief Justice over a period of years is that trials by juries selected in accordance with s.19 of the Ordinance are fair. Why, then, do the majority conclude that there is a breach of the appellant's s.8 rights? They reach that conclusion only by importing into the interpretation of the requirement of a fair hearing in s.8(8) precisely that American jurisprudence which the Board was reluctant to squeeze into the notion of an "impartial" tribunal in *Poongavanam* (11). In other words, they extend the notion of a "fair" hearing so as to hold that a hearing is not fair unless the jury is representative of a cross-section of Gibraltar society. In our view, however, the reasoning in the American cases does not support that approach.

45 The first thing is to note that, by contrast with the position in Gibraltar, in the United States there is a constitutional right to a trial by jury. In relation to crimes, this right is enshrined in the Constitution of the United States, Article III, s.2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . ."

46 The Fifth Amendment added a requirement that trials for a "capital or otherwise infamous crime" should be "on a presentment or indictment of a Grand Jury." The Sixth Amendment further provided, *inter alia*, that: "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

47 The Seventh Amendment extended the constitutional right to a jury to civil actions:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

48 Finally, the Fourteenth Amendment, s.1, provided:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

49 These are the constitutional provisions applied in the decisions of the United States Supreme Court. The individual states have their own similar constitutional provisions, variously expressed, but they must comply with the constitutional provisions of the United States, as the Fourteenth Amendment makes clear. The core right from the beginning is, and has been, the right to a trial by jury. The word "impartial" is used only in relation to one of the additional rights which the Sixth Amendment introduced for criminal defendants. In making this observation, we are not suggesting that the Constitution falls to be construed in some unduly strict manner that would be wholly alien to its history and origin. Rather, we have sought to identify the terms of the Constitution that must be borne in mind when considering the language used in the leading judgments of the courts.

50 A number of key factors have helped shape the decisions and language of the courts. The first and most important is the democratic imperative which underlies the whole of the Constitution and the political ethic of the society of the United States—the full involvement of the people in all aspects of government. Thus, in many states, the state judiciary is open to election and re-election, usually on a party slate of candidates which includes a wide range of other public officials. Another feature of American society is the diversity of ethnic cultures and origins that it accommodates. Originally, the largest minority group was persons of West African origin, but the existence of significant ethnic minorities in various parts of the Union has continued to be an important aspect of American society. In these circumstances, the risk of partiality of juries in some cases had to be carefully guarded against, as had any pre-selection of juries along racial or ethnic lines.

51 Thus, when the Supreme Court came to consider what the right to trial by jury involved, it was guided principally by these considerations. In some states it has been held that the right necessitated a unanimous verdict of the whole jury. More importantly, for present purposes, it has

also been adopted as a basic principle that the jury must be empanelled by random selection from a list of eligible jurors.

52 The case of *Smith* v. *Texas* (16) concerned the committal by a grand jury of a black defendant for trial on an indictment for rape. He claimed that he was being denied his right under the Fourteenth Amendment to the "equal protection of the law." In Harris County, Texas, 20% of the population and 10% of the tax-payers were black, but the jury system was run so that normally the list of 16 jurors summoned would include only one black juror and he would be put at or near the bottom of the list. As the juries were empanelled by calling the jurors forward in numerical order, the black juror would rarely, if ever, be called. No black juror had been called in the relevant year. All this occurred as the result of the deliberate policies of the officers involved. The Supreme Court held that there was a breach of the equal protection requirement. Delivering the opinion of the court, Black, J. said (311 U.S. at 130):

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles."

53 *Thiel* v. *Southern Pacific Co.* (18) concerned a civil personal injury action brought by a passenger against a railway company. It was tried in the federal district court. The claimant objected to the jury panel, which had been purposively selected so as to consist of "mostly business executives or those having the employer's view-point" and excluded particularly "employees and those in the poorer classes who constitute, by far, the great majority of citizens eligible for jury service." The undisputed evidence was that the officers, deliberately and intentionally, excluded from the jury lists all persons who worked for a daily wage. The trial went ahead and the jury found for the defendant company. The claimant appealed, but the Court of Appeal refused to set aside the verdict. Exercising its power of supervision over the administration of justice in the federal courts, and without citing any specific provision of the Constitution, the Supreme Court reversed the decision of the Court of Appeal on the ground that there had been a failure to abide by the proper rules of jury selection. Murphy, J., delivering the majority opinion of the Supreme Court, summarized the relevant principles thus (328 U.S. at 220):

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates

> an impartial jury drawn from a cross-section of the community. [*Smith* v. *Texas* cited] This does not mean, of course, that every jury must include representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that the prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found at every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

Though he dissented on the application of the relevant principles to the facts of this case, Frankfurter, J.'s formulation of the underlying idea is worth noting (*ibid.*, at 227): "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case."

54 In *Ballard* v. *United States* (1), the Supreme Court applied these principles to single-sex juries. The appeal was brought by the defendants in a criminal trial which had taken place in a Federal court sitting in California. The offence charged was using the mails to defraud in connection with an alleged fraudulent religious organisation. Although the law of California (like that of most, but not all, states) made women eligible for jury service, it appeared that the practice in California at that time was, nevertheless, intentionally and systematically to exclude women from the panels for *grand* and *petit* juries. Douglas, J. delivered the majority opinion of the Supreme Court. He said that the contemplation of Congress, in legislating that Federal courts sitting in a state should follow the local law as regards eligibility for jury service, was that juries in Federal courts sitting in states where women were eligible "would be representative of both sexes." He followed the *Thiel* decision (18) and held that the purposeful and systematic exclusion of women from the panel was a departure from the scheme of jury selection which Congress had adopted. He rejected the argument that "an all male panel drawn from the various groups within a community will be as truly representative as if women were included." Douglas, J. held (329 U.S. at 193–194):

> "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality

> is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

He summarized his conclusion (*ibid.*, at 195), by adopting two quotations from an earlier case: "such [administrative] action is operative to destroy the basic democracy and classlessness of jury personnel" and it "does not accord to the defendant the type of jury to which the law entitles him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him" (*United States* v. *Roemig* (19)). He concluded by referring again to "the democratic ideal reflected in the processes of our courts."

55 A similar decision, similarly reasoned, was reached under the Sixth and Fourteenth Amendments in *Taylor* v. *Louisiana* (17). Under the relevant Louisiana law, women were excluded from jury service unless they had previously filed a written declaration of their desire to serve. As a result very few women were called for jury service and, in the case in question, no women were on the *venire* from which the *petit* jury was drawn. The jury convicted Taylor, a male, of aggravated kidnapping. He was sentenced to death. He appealed on the ground that he had been deprived of his Federal constitutional right to "a fair trial by jury of a representative segment of the community . . ." The Supreme Court allowed his appeal, White, J. observing (419 U.S. at 527) that—"the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community."

56 There are many other cases which could be cited to the same effect, but these are the leading authorities from the Supreme Court. As revealed by the passages we have cited, the key principle is that "the American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community" (in *Thiel* (18) (328 U.S. at 220 *per* Murphy, J.)). The jury must be "drawn from a pool broadly representative of the community as well as impartial in a specific case" (in *Thiel* (*ibid.*, at 227 *per* Frankfurter, J.). See also *Taylor* (17) (419 U.S. at 530 *per* White, J.)). There are thus two distinct requirements: first, that the jury be representative of the community; secondly, that it be impartial. The former is derived from the "democratic ideal" fundamental to the political ethic embodied in the United States Constitution and the right to trial by jury which it includes.

57 We pause to point out that the American cases, with their emphasis on the distinction between the two requirements, are strongly against the actual submission advanced by the appellant to the effect that the jury should not be regarded as "impartial" unless it was representative of the community. Moreover, the representative principle to be found in the

Constitution of the United States is to be contrasted with, and not subsumed under, the right to a "fair" hearing in the Constitution of Gibraltar and the European Convention. In terms of s.8(8) of the Gibraltar constitution, the appellant's right is that her case should be given a fair hearing by an independent and impartial court. There is no further requirement or constitutional right. In particular, there is no right to a trial by jury. Nor is there any requirement that the court trying the case should be representative of a cross-section of the community. The view of the majority that such a requirement can be spelled out of the right to a fair hearing in s.8(8) cannot easily be confined to courts which comprise a jury. Nor is it readily explicable why trial by an all-male jury is to be regarded as fair if the jury is selected from a list comprising roughly the same number of men and women, but unfair if the jury is selected from a list compiled in accordance with s.19.

58 There is a strong argument for amending the Ordinance so as to make jury service compulsory for women as well as men. Neill, P. acknowledged as much and the Attorney-General did not seek to argue to the contrary. Judged by modern standards, a jury drawn from a panel made up of roughly equal numbers of men and women may well be regarded as preferable or "better." The Board, however, does not sit to decide what would be a better system of jury trial for Gibraltar or to bring its law on the matter up to date. The only question for the Board is whether the appellant's case will be given a fair hearing by an independent and impartial court in terms of s.8(8) if it is tried by an all-male jury chosen from a panel constituted in accordance with s.19 of the Ordinance. Experience of jury trials in Gibraltar shows that it will. Since there is accordingly no infringement of the Constitution, the courts' jurisdiction and duty is to apply the law as it is enacted in s.19 of the Ordinance. It is up to the Gibraltar House of Assembly to decide whether to change s.19.

59 For these reasons, we would have humbly advised Her Majesty that the appeal should be refused, and that the judgment of the Court of Appeal should be affirmed. If, by contrast, we had been in favour of allowing the appeal, we might have considered that a declaration in suitable terms would have been the appropriate remedy.

Appeal allowed.