[2007–09 Gib LR 376]

IN THE MATTER OF THE CHIEF JUSTICE OF GIBRALTAR

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Phillips of Worth Matravers, Lord Hope of Craighead, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Brown of Eaton-under-Heywood, Lord Judge and Lord Clarke of Stone-cum-Ebony): November 12th, 2009

Constitutional Law—judiciary—removal from office—in determining whether Chief Justice's behaviour constitutes "misbehaviour" justifying removal under Constitution, s.64(2), to consider whether conduct (i) affects ability to carry out duties of office; (ii) adversely affects perception of others as to his abilities; (iii) inimical to due administration of justice if to continue; and (iv) brought office into disrepute

Constitutional Law—judiciary—removal from office—"inability" to discharge functions of office, under Constitution, s.64(2), includes defects of character and effects on conduct—course of conduct to be cumulatively capable of justifying removal—removal of Chief Justice advised on ground of inability since course of conduct, including (a) failure to dissociate himself from wife's allegations against Chief Minister and members of the Bar; and (b) misjudging public attacks on Government, bringing office into disrepute and rendering position untenable

The Governor of Gibraltar referred to the Privy Council the question of whether the Chief Justice of Gibraltar should be removed from office by reason of inability to discharge the functions of his office or for misbehaviour.

The Queen's Counsel in Gibraltar, with the exception of the Speaker in the House of Assembly, had written a memorandum to the Governor, on behalf of themselves and their firms, stating that they had lost confidence in the ability of the Chief Justice to discharge the functions of his office. A further memorandum detailing the reasons for their dissatisfaction was sent and in response the Governor, on the advice of the Judicial Service Commission, appointed a tribunal under s.64(4) of the Constitution to inquire into the matter and advise whether the question of removal of the Chief Justice should be referred to the Privy Council.

The tribunal heard evidence relating to various episodes where the conduct of the Chief Justice had been criticized, including: (i) his implicit

support for the conduct of his wife in failing to publicly distance himself from her actions which included her making public allegations against the Government and members of the Bar Council, including that the Chief Minister sought to have her husband removed from office, and commencing a libel action against the Chairman of the Bar Council; (ii) his own public attacks on the Government—particularly in relation to the provisions of the draft Constitution and Judicial Services Bill (including the commencement of judicial review proceedings containing unfounded allegations against the Attorney-General and the Chief Minister)—for infringing the independence of the judiciary and the Chief Minister's challenge to his security of tenure as Chief Justice; and (iii) breaches of the law in relation to tax and social security contributions for his employees and by failing to have a valid MOT certificate for his car.

The tribunal reported that on a number of instances his conduct had amounted to impropriety but that there was no single instance of misbehaviour that showed he was unfit to hold office. It concluded, however, that there were a number of characteristics of his personality and attitude—*inter alia*, a pre-occupation with protecting judicial independence from the perceived threats of the executive, a repeated lack of judgment and restraint and his inability to dissociate himself from supporting his wife's conduct—that were damaging to the reputation of his office and antagonized local practitioners, rendering him unable to discharge the functions of his office. The tribunal advised that he be removed from office and that the question of removal be referred to the Privy Council.

Before the Judicial Committee, counsel for the Chief Justice submitted as preliminary issues that (a) the tribunal had erred in its approach to fact-finding by applying the civil standard of proof because the hearing was to be equated with disciplinary proceedings for which the criminal standard was applicable; and (b) the procedure before the tribunal had been unfair in that the case against the Chief Justice had not been comprehensively set out at the start of the proceedings and consequently adverse findings were made against him which had not been contained in the initial statement of issues. It was challenged on behalf of the Chief Justice whether his conduct had justified the conclusions of the tribunal and if, when taken as a whole, it amounted to an inability to discharge the functions of his office or misbehaviour under s.64(2) of the Constitution. In particular, it was submitted that he should not have been associated with the actions of his wife and was under no obligation to dissociate himself from her conduct.

Held, advising the removal of the Chief Justice from office (*per* Lord Phillips of Worth Matravers and three others; Lord Hope of Craighead and two others dissenting):

(1) The removal of the Chief Justice from office would be recommended to the Governor as his conduct had resulted in his being unable to discharge the functions of his office. The independence of the judiciary

required that a judge should never be removed from office without good cause and that the question of removal be determined by an appropriate, independent and impartial tribunal. While the highest standards were expected of a judge, failure to meet those standards would not, of itself, be enough to justify removal from office, which would only be appropriate when his shortcomings were so serious as to destroy confidence in his ability to perform the judicial function. When considering whether the Chief Justice's behaviour constituted "misbehaviour" for the purposes of removal from office under the provisions of s.64(2) of the Constitution, the Judicial Committee would consider whether his conduct (i) affected directly his ability to carry out his duties and discharge the functions of his office; (ii) adversely affected the perception of others as to his abilities to do so; (iii) meant that it would be perceived to be inimical to the due administration of justice in Gibraltar if he were to remain in office; and (iv) had brought into disrepute the office of Chief Justice. Further, an "inability" to discharge the functions of his office would be accorded a wide meaning—defects of character and effects of conduct reflecting that defect would therefore be cumulatively capable of satisfying removal under s.64(2)—given that it would be desirable in the public interest to remove such a judge, provided that the decision was taken by an appropriate and impartial tribunal (para. 1; para. 31; paras. 201–206; para. 229).

(2) Since the Chief Justice had failed to dissociate himself adequately from his wife's unfounded allegations against the Government—which had given rise to the inference that he supported her conduct—it would be difficult for him to sit on cases involving the Government, given the risk of perceived bias. There would also be a risk of applications to recuse himself in hearings involving the Attorney-General, and this would therefore substantially disable him from performing his judicial functions. Further, his conduct (a) in publicly criticizing the Government, especially in relation to the draft Constitution and the Judicial Services Bill; (b) in breaching the law with respect to the taxation of his employees and his behaviour in response to the MOT prosecution; (c) in filing judicial review proceedings and the allegations made against the Chief Justice in support of them; and (d) in implicitly supporting his wife's repeated accusations against the Chief Minister and members of the Bar Council, infringed two guides to judicial conduct—the Bangalore Principles of Judicial Conduct and the Judges' Council of England and Wales *Guide to Judicial Conduct*—and had brought him and his office into disrepute. These incidents constituted a course of conduct which had cumulatively rendered his position untenable and his removal would therefore be advised on the ground of inability to discharge the functions of his office (paras. 214–229).

(3) Since the present proceedings were not concerned with disciplining the Chief Justice for misconduct but instead deciding whether he was fit for office, the tribunal had been correct to decide that the civil standard of proof would apply to the fact-finding process (para. 16).

Cases cited:

(1) *Clark* v. *Vanstone* (2004), 81 ALD 21; [2004] FCA 1105, referred to.
(2) *D*, *In re*, [2008] 1 W.L.R. 1499; [2008] 4 All E.R. 992; [2008] N.I. 292; [2009] 1 F.L.R. 700; [2009] Fam. Law 192; [2008] UKHL 33, referred to.
(3) *H.M. Advocate* v. *McKay*, 1996 J.C. 110; 1996 SLT 697, considered.
(4) *Lawrence* v. *Att. Gen. (Grenada)*, [2007] 1 W.L.R. 1474; [2007] 5 LRC 255; [2007] UKPC 18, *dicta* of Lord Scott of Foscote applied.
(5) *Starrs* v. *Ruxton*, 2000 J.C. 208; 2000 SLT 42; 1999 S.C.C.R. 1052; [2000] H.R.L.R. 191; [2000] UKHRR 78; (1999), 8 BHRC 1, referred to.
(6) *Stewart* v. *Scotland (Secy. of State)*, 1996 S.C. 271; 1996 SLT 1203; on appeal, 1998 S.C. (H.L.) 81; 1998 SLT 385; 1998 S.C.L.R. 332, applied.
(7) *Therrien* v. *Canada (Minister of Justice)*, [2001] 2 S.C.R. 3; [2001] SCC 35, considered.

Legislation construed:

Gibraltar Constitution Order 2006, Annex 1, s.64: The relevant terms of this section are set out at para. 2.

M.J. Beloff, *Q.C.* and *P. Stanley* for the Chief Justice of Gibraltar;
J. Eadie, *Q.C.* for the Government of Gibraltar;
T. Otty, *Q.C.* for the Governor of Gibraltar.

1 **LORD PHILLIPS OF WORTH MATRAVERS,** on behalf of himself, **LORD BROWN OF EATON-UNDER-HEYWOOD, LORD JUDGE,** and **LORD CLARKE OF STONE-CUM-EBONY:** The task of the Committee is to advise Her Majesty whether Mr. Schofield, Chief Justice of Gibraltar, should be removed from office by reason of inability to discharge the functions of his office or for misbehaviour. The independence of the judiciary requires that a judge should never be removed without good cause and that the question of removal be determined by an appropriate, independent and impartial tribunal. This principle applies with particular force where the judge in question is a Chief Justice. In this case, the latter requirement has been abundantly satisfied both by the composition of the tribunal that conducted the initial inquiry into the relevant facts and by the composition of this Committee. This is the advice of the majority of the Committee, namely, Lord Phillips of Worth Matravers, Lord Brown of Eaton-under-Heywood, Lord Judge and Lord Clarke of Stone-cum-Ebony.

Security of tenure of judicial office under the Constitution

2 Gibraltar has two senior judges, the Chief Justice and a second puisne judge. Section 64 of the Gibraltar Constitution Order 2006 ("the 2006 Order") provides:

"**Tenure of office of judges**

(1) Subject to the provisions of this section, a person holding the office of Chief Justice or of Puisne Judge shall vacate that office when he attains the age of 67 years . . .

(2) The Chief Justice . . . may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour . . .

(3) The Chief Justice . . . shall be removed from office by the Governor if the question of the removal of that judge from office has, at the request of the Governor made in pursuance of subsection (4), been referred by Her Majesty to the Judicial Committee of Her Majesty's Privy Council under section 4 of the Judicial Committee Act 1833 or any other enactment enabling Her Majesty in that behalf, and the Judicial Committee has advised Her Majesty that the judge ought to be removed from office for inability as aforesaid or misbehaviour.

(4) If the Governor considers that the question of removing the Chief Justice . . . from office for inability as aforesaid or for misbehaviour ought to be investigated, then—

(a) the Governor shall appoint a tribunal . . .

(b) the tribunal shall inquire into the matter and report on the facts thereof to the Governor and advise the Governor whether he should request that the question of the removal of that judge should be referred by Her Majesty to the Judicial Committee; and

(c) if the tribunal so advises, the Governor shall request that the question should be referred accordingly.

. . .

(6) If the question of removing the Chief Justice . . . from his office has been referred to a tribunal under subsection (4), the Governor may suspend him from performing the functions of his office . . .

. . .

(8) The powers of the Governor under this section shall be exercised by him in accordance with the advice of the Judicial Service Commission."

3 These provisions, other than those in sub-s. (8), reproduced provisions to the same effect in s.60 of the Gibraltar Constitution Order 1969 ("the 1969 Order").

Procedural background

4 On April 17th, 2007, all the Queen's Counsel in Gibraltar, with the exception of the Speaker in the House of Assembly, were among the signatories ("the signatories") to a memorandum to the Governor that expressed on behalf of themselves and their respective firms "their deep concern at a state of affairs which has developed seriously affecting the administration of justice and the reputational image of Gibraltar." They stated that they had lost confidence in the ability of the Chief Justice to discharge the functions of his office. At the request of the Governor, they submitted a supplementary memorandum ("the second memorandum"), dated May 21st, which set out in detail the reasons for their dissatisfaction with the Chief Justice. One firm, Hassans, wrote dissociating themselves from those parts of the second memorandum that related to matters in respect of which they had professionally represented the Chief Justice or his wife.

5 Copies of the two memoranda were supplied to the Chief Justice and his solicitors sent a preliminary response to the Governor. All of these documents were considered by the Judicial Service Commission, which advised the Governor to appoint a tribunal under s.64(4) of the 2006 Order. The Governor did so on September 14th, 2007, and on September 17th, he suspended the Chief Justice, pursuant to s.64(6) of the 2006 Order.

6 One member of the tribunal recused himself and was replaced, whereupon the tribunal consisted of Lord Cullen of Whitekirk, Sir Peter Gibson and Sir Jonathan Parker.

7 There were two directions hearings. These were attended by representatives of the Chief Justice and of the Government of Gibraltar, the Governor of Gibraltar and the signatories to the memoranda as interested parties. At the second hearing all agreed—

> "that in making its report to the Governor, the tribunal should express its own view on whether the facts found by the tribunal showed any inability on the part of the Chief Justice to discharge the functions of his office or any misbehaviour on his part and if so, to reach its own conclusion as to whether such inability or misbehaviour should warrant his removal from office."

The parties agreed a statement of issues that set out 23 episodes between 1999 and 2007 where the conduct of the Chief Justice had been the subject of criticism.

8 The tribunal sat from July 7th to 28th to hear evidence of fact and 18 witnesses gave oral evidence. The tribunal also had regard to written statements by a further 11 witnesses who did not give oral evidence. These included Mrs. Schofield, the wife of the Chief Justice, who had been expected to give evidence. She declined to give evidence on the ground

that she did not consider satisfactory the terms on which funding had been provided to her to enable her to obtain legal advice in relation to certain matters relating to her appearance before the tribunal. The tribunal indicated that it did not consider that this justified her failure to appear to give evidence. It was right to do so. Had Mrs. Schofield wished to give evidence there was no reason why she should not have done so.

The report of the tribunal

9 The report of the tribunal to the Governor is dated November 12th, 2008. It was provided to the Chief Justice on December 3rd, and published on the following day. The report makes findings of primary fact in relation to each of the 23 episodes identified in the statement of issues. In relation to all but one of these, it criticizes the conduct of the Chief Justice. Some of these criticisms are based on inferences drawn from the primary facts as to the knowledge, perception or motive of the Chief Justice. In making findings of fact, the tribunal has applied the civil standard of proof of balance of probability. The tribunal commented that in a number of instances the conduct of the Chief Justice amounted to impropriety, giving four examples of this, but added that no single instance of misbehaviour showed that the Chief Justice was unfit to hold office.

10 The conclusions of the tribunal were set out in the following final paragraphs of its report:

> "7.36 The conduct of the Chief Justice which we have summarised earlier in this chapter directly affected the way in which he discharged part of the responsibilities of his office, such as his relations with the Governor and the Government (covering such matters as funding, proposed legislation and appointments), and his relations with the representatives of the Bar. The conduct stemmed, in our view, from a number of characteristics of his personality and attitude, as follows:
>
> 7.37 First, the Chief Justice did not seem to be alive to the boundary between what was and what was not proper for someone in his position to do or say. He repeatedly showed a lack of judgment in this respect. He also showed the lack of a sense of proportion, and tended to over-react to perceived slights. He did not observe appropriate restraint or respect for accuracy in his public pronouncements.
>
> 7.38 Secondly, he showed a pre-occupation, bordering on an obsession, with judicial independence. He claimed that it was under threat when this was not the case. This led to his responding in an improper or excessive manner to executive action of which he disapproved. Allied to this was his pre-occupation with the status of his office and his continuance in office. This showed itself in a number of ways ranging from petty discourtesy to the Chief Minister to the

unfounded accusation that the Government had long sought to have him removed from office.

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

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

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

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

Our advice

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

The parties

11 The Chief Justice has been represented before the Committee by Mr. Michael Beloff, Q.C. and Mr. Paul Stanley, neither of whom appeared for

him before the tribunal. The other parties have been the Government of Gibraltar represented by Mr. James Eadie, Q.C., the Governor of Gibraltar represented by Mr. Timothy Otty, Q.C., and the signatories, who submitted a written case but were not represented at the hearing. These parties have supported the conclusions of the tribunal.

The significance of the tribunal's report

12 The Constitution does not expressly provide for the tribunal to express a view as to whether a judge's conduct justifies removal. All parties sensibly agreed, nonetheless, that it should do so for the tribunal's view, if not expressed, was likely to be implicit in its advice to the Governor. On May 17th, 2008, an application notice filed on behalf of the Chief Justice submitted:

> "The tribunal has been entrusted with a duty to determine and report on the facts and there will be no rehearing in relation to the facts if the matter progresses to the Privy Council. The tribunal therefore has a crucial determinative role in the removal of a Chief Justice."

Before the Committee, Mr. Beloff, Q.C. submitted that the Committee was exercising its own original jurisdiction under s.64 of the Constitution and s.4 of the Judicial Committee Act 1833 in advising Her Majesty whether the Chief Justice should be removed and could, if it chose, conduct its own hearing of the evidence. He accepted, however, that as master of its own procedure, the Committee was unlikely to do so, unless it accepted his submission that the tribunal had erred in its approach to fact-finding by applying the civil rather than the criminal standard of proof.

13 Section 64(4) of the 2006 Order provides for an inquiry into the facts by a tribunal of three present or past holders of high judicial office. This Committee is not bound by the findings of fact of that tribunal but can properly act upon them. In the present case, the primary findings of fact are not challenged. In some cases, secondary findings, or inferences from the primary findings, have been challenged. In those cases the Committee has reviewed the secondary findings in the light of the primary findings upon which they have been based.

14 In the event, it is not surprising that the hearing before us was treated by the parties as if it were an appeal against the conclusions of the tribunal. While the jurisdiction of the Committee is indeed original, it is convenient to follow the course taken by the parties and to consider the respects in which the conclusions of the tribunal have been challenged by Mr. Beloff, taking the issues of fact in chronological order. This advice will not refer to all the evidence that is set out in detail in the tribunal's report, and the two should be read together. Before turning to the facts, there are, however, a number of preliminary matters to consider.

Standard of proof

15 The tribunal applied the civil standard of proof when resolving issues of fact. It gave its reasons for applying this standard in Schedule 5 to its report. It held that the proceedings before the tribunal were not to be equated with disciplinary proceedings where the criminal burden of proof was applicable. They were concerned with the public interest that called, on the one hand, for the protection of a judge against unfounded or illegitimate interference with his tenure of office and, on the other, for his removal should he show unfitness for office that need not necessarily be based on misbehaviour. In these circumstances it was appropriate to apply the civil standard of proof.

16 We have not found the issue of standard of proof an easy one. Judicial independence is of cardinal importance. There is a case for saying that a judge should not be removed for misconduct unless this is proved to the criminal standard—see the comments of Lord Mustill at paras. 81–83 of the report of the tribunal of December 14th, 2007, into the question of removing from office the Chief Justice of Trinidad and Tobago pursuant to provisions of the Constitution of the Republic of Trinidad and Tobago that are similar to s.64 of the 2006 Order. The present proceedings are not, however, concerned with disciplining the Chief Justice for misconduct but with deciding whether he is fit to perform his office and the Committee has decided, as did the tribunal, that issues of fact that bear on that question should be determined according to the civil standard of proof. That said, this is not a case where our advice is going to turn on the standard of proof applied to fact-finding. Most of the primary facts are a matter of record and not disputed. The challenge made by Mr. Beloff is to the inferences drawn by the tribunal from the primary facts and to the tribunal's conclusion that the Chief Justice's conduct amounted to impropriety and that it justified his removal on the ground of his inability to perform the functions of his office. The latter is not a question of fact subject to a standard of proof but a matter for judicial assessment.

17 The tribunal applied the civil standard of proof according to what it described as the "flexible approach" that "the more improbable the event, the stronger must be the evidence that it did occur" (see *In re D* (2) ([2008] 1 W.L.R. 1499, at paras. 23 and 25, *per* Lord Carswell)). That approach is no more than the rational way of determining facts on a balance of probabilities. The more improbable the event the greater the weight of the evidence that must exist before the scales tilt in favour of a finding that the event occurred. There is one area in relation to which we consider that this approach is particularly important. In their written case the signatories have drawn attention to 21 instances (after allowing for the fact that two appear twice in their list) where the tribunal made findings adverse to the Chief Justice's credibility. The signatories rely on these as demonstrating "mendacity" on his part. A firm basis is required for any

finding that the Chief Justice was deliberately untruthful when giving evidence, albeit that in assessing any individual aspect of the Chief Justice's evidence, the tribunal could properly have regard to the content of his evidence overall and the manner in which he gave that evidence.

Procedural fairness

18 Mr. Beloff, Q.C. submitted that the procedure before the tribunal had not been fair in as much as the case against the Chief Justice had not been clearly spelt out at the start of the proceedings and some of the adverse findings made by the tribunal were in respect of matters that formed no part of the statement of issues. He also submitted that there was a lack of clarity in the reasons given by the tribunal for concluding that the Chief Justice's behaviour showed that he was unfit to remain in office. In general we reject this submission. The tribunal took great care to ensure that the Chief Justice had proper notice of the allegations that were made against him. As Mr. Eadie, Q.C., for the Government, pointed out in his printed case:

(i) the procedure was inquisitorial, not adversarial;

(ii) the terms of reference referred to the memorandum and the supplementary memorandum of the signatories that contained substantial and specific allegations against him;

(iii) a list of issues was prepared and amended that identified the case against the Chief Justice in some detail;

(iv) there were opening statements by all concerned, including counsel to the tribunal; and

(v) witness statements were prepared and circulated before witnesses gave evidence.

19 Mr. Beloff referred to two specific episodes in relation to which findings adverse to the Chief Justice were made that had not been foreshadowed in the statement of issues. We will deal with Mr. Beloff's submissions when considering the episodes in question.

The office of Chief Justice of Gibraltar

20 The tribunal recorded at the outset (para. 1.21) that no criticism was made of the Chief Justice's ability as a lawyer to decide the cases before him. The criticisms levelled against the Chief Justice related, with one important exception, to his behaviour outside court and to the manner in which he discharged other responsibilities of the office of Chief Justice of Gibraltar. What did that office involve?

21 Gibraltar is a self-governing British overseas territory of a modest size, covering a little less than 7 square km. It has a population of

approximately 29,000 and has two major political parties, the Gibraltar Social Democrats, headed by Mr. Peter Caruana, Q.C., which was at all material times in power, and the Gibraltar Socialist Labour Party, headed by Mr. Joe Bossano. The unicameral Parliament consists of 17 elected members.

22 The permanent professional judiciary of Gibraltar is very small. Apart from the Chief Justice and one puisne judge, who is the only other member of the Supreme Court, there is one stipendiary magistrate. The court is staffed by civil servants, who are headed by the Registrar. There is a Deputy Registrar and a small body of court staff, including three bailiffs.

23 The fused legal profession, as at January 2008, consisted of 26 firms comprising 166 lawyers. Firms that undertook a substantial amount of litigation included Hassans (54 lawyers), Triay & Triay (20 lawyers), Triay Stagnetto Neish (12 lawyers) and Attias & Levy (9 lawyers). The Gibraltar Bar is regulated by the Gibraltar Bar Council.

24 There was, when the Chief Justice was appointed, no formal position of head of the judiciary of Gibraltar but we consider that, as the senior resident judge, the Chief Justice could properly regard himself as occupying that position. He was responsible for the day-to-day administration of justice by the local judiciary. He presided over the formal ceremony of the Opening of the Legal Year and spoke at it. He was responsible for negotiating with the Gibraltar Government for the provision of an adequate infrastructure for the administration of justice.

25 In a jurisdiction as small as Gibraltar there is bound to be inter-relation between those in the different arms of State and indeed, in every aspect of life. In his first witness statement the Chief Justice commented:

> "By way of context, it is important to remember how closely connected are lawyers and members of the government. The Chief Minister is the son-in-law of J.E. Triay, Q.C. whose cousin is Louis Triay. Freddie Vasquez is a cousin of the Chief Minister as is Robert Vasquez. The Chief Minister was a partner in Triay & Triay until he went into politics. Guy Stagnetto is also a cousin of the Chief Minister and James Neish is a close friend of the Chief Minister. Daniel Feetham, Minister for Justice in this Government, was, until recently, a partner in Hassans. His brother and sister-in-law are still partners in Hassans. Keith Azopardi, a partner in Attias & Levy, was Deputy Chief Minister to Peter Caruana, Q.C. until his resignation and was a member of the select committee on the draft constitution."

26 In his written representation, Mr. Neish, Q.C., the Chairman of the Bar, remarked:

> "The seriousness of the matters complained of must be judged from the standpoint of Gibraltar and not from that of a larger jurisdiction. In, say, London with its large number of judges the conduct of individual judges would not have the same impact on the judiciary, or on the operation of the principle of the separation of powers or on the justice system generally as would the conduct of a Chief Justice in a two-judge jurisdiction like Gibraltar. Office holders in Gibraltar have to be particularly sensitive to the need to maintain the respect and confidence of the public, which are as necessary, if not more so than institutional safeguards, for the proper discharge of their functions. The public in Gibraltar is much closer to public figures than in the case of say, England. Their scrutiny is more intense and their actions more directly felt."

Similar comments were made by a number of other witnesses.

27 Gibraltar has a particularly lively press, anxious for copy and, in common with the media in other jurisdictions, eager to identify any actual or supposed conflict between the judiciary and the executive. As the senior first instance judge, the Chief Justice would normally preside over the trial of any dispute, whether of public or private law, that involved the Government. While it is entirely appropriate for a Chief Justice to take a firm stand in any matter that affects the independence of the judiciary or the due administration of justice, to the extent of making robust public pronouncement on these matters, both as *de facto* head of the judiciary and as the judge who would be dealing with actions involving the Government, in this small jurisdiction, the Chief Justice needed to exercise particular sensitivity and discretion in his dealings with the Government.

Standards of judicial conduct

28 Mr. Beloff did not challenge submissions made by other parties that the Bangalore Principles of Judicial Conduct 2002 and the *Guide to Judicial Conduct*, published by the Judges' Council of England and Wales in October 2004, provided guidance as to the standard of conduct to be expected of a judge. The following provisions of the Bangalore Principles are of particular relevance:

> "**IMPARTIALITY**
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> Principle:
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> Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

. . .

PROPRIETY

Principle:

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application:

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2 As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3 A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

. . .

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

. . .

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge."

29 To like effect, the *Guide to Judicial Conduct* advises:

> "**Judicial Independence**
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> 2.1 . . . The judiciary, whether viewed as an entity or by its individual membership, is and must be seen to be, independent of the legislative and executive arms of government. The relationship between the judiciary and the other arms should be one of mutual respect, each recognising the proper role of the others.
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> . . .
>
> **Impartiality**
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> 3.1 A judge should strive to ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants, in the impartiality of the judge and of the judiciary.
>
> 3.2 Because the judge's primary task and responsibility is to discharge the duties of office, it follows that a judge should, so far as is reasonable, avoid extra-judicial activities that are likely to cause the judge to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity."

Later the *Guide* deals with "personal relationships and perceived bias" and warns that "personal friendship with, or personal animosity towards, a party is . . . a compelling reason for disqualification" and warns under the heading "Activities outside the court" that "judges should exercise their freedom to talk to the media, with 'the greatest circumspection.'"

30 A summary of the standard of behaviour to be expected from a judge was given by Gonthier, J. when delivering the judgment of the Supreme Court of Canada in *Therrien* v. *Canada (Minister of Justice)* (7) ([2001] 2 S.C.R. 3, at para. 111):

> "The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens."

31 While the highest standards are expected of a judge, failure to meet those standards will not, of itself, be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function. As Gonthier, J. put it in *Therrien* (*ibid.*, at para. 147):

> ". . . [B]efore making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office."

We will revert to this topic when considering the statutory criteria for removal of a judge under s.64 of the 2006 Order in the concluding section of this advice. There are, however, two matters that call for further comment at this stage.

Freedom of expression

32 Gibraltar is subject to the European Convention on Human Rights. Mr. Beloff submitted that the tribunal had wrongly held the Chief Justice at fault for public statements made by him or his wife that were no more than the exercise by them of the right of freedom of expression that is recognized by art. 10 of the Convention. He argued that this freedom of expression could only lawfully be restricted by clear provisions of law that satisfied the requirements of art. 10(2) and that none such had been demonstrated. We do not accept this argument. So far as any judge is concerned, the proper exercise of judicial office necessarily circumscribes the freedom of expression open to those who do not have to ensure that they are seen to be acting without fear or favour, affection or ill-will. There is an abundance of jurisprudence, to some of which we have already referred, that defines the requirements of judicial office in this respect. The position of the wife of the Chief Justice calls for further comment.

Statements by the wife of the Chief Justice

33 The wife of the Chief Justice made a large number of public statements or allegations, including allegations in a libel action that she started against the Chairman of the Bar. The tribunal found that the majority of these were made with the knowledge and approval of the Chief Justice, sometimes rejecting evidence that he gave to the contrary on the ground that it was not credible. These allegations included attacks on the Bar Council which would have been improper if made by the Chief Justice himself. The tribunal held that the Chief Justice's implicit support of those attacks constituted misbehaviour. The tribunal further found that on a number of occasions the Chief Justice should have publicly dissociated himself from his wife's comments and criticized him for his failure to do so. Mr. Beloff submitted that these findings on the part of the tribunal were unsound. He submitted that there was no basis for doubting the Chief Justice when he said that he was not aware of his wife's activities. The

Chief Justice's wife was and should have been treated as being independent of the Chief Justice. He could not properly be associated with her actions and was under no obligation to dissociate himself from them.

34 The Chief Justice married his wife, Anne Kariuki, when he was serving as an acting judge of the High Court of Kenya. She was a practising member of the Kenyan Bar. They have two children. It appears plainly from the evidence that the Chief Justice and his wife were and are devoted to one another. It is equally plain that Mrs. Schofield has a strong, indeed headstrong, personality. When she believed that her husband was being attacked she made her feelings plain in coming to his defence. On a number of occasions she said in her witness statements that she was acting independently of her husband and that he was unaware of her actions. In general the tribunal rejected such evidence as incredible.

35 When reviewing the tribunal's conclusions we have borne the following matters in mind. Neither the Chief Justice nor his wife suggested that they had a deliberate policy of not discussing certain matters. They did not seek to build a "Chinese wall" in their home. In these circumstances the inevitable inference was that they would discuss matters that were of serious concern to either, or both. Indeed, on occasion the Chief Justice gave evidence that such discussions had occurred. It might have been the case that Mrs. Schofield had a deliberate policy of concealing from her husband actions that she proposed to take of which she knew her husband would disapprove, but neither of them suggested that this was so. Such a policy would have been almost certain to result in marital discord, but there is no hint of this in the evidence. Nor did the Chief Justice suggest that he ever sought to dissuade his wife from action that she proposed to take.

36 We will review the findings made by the tribunal that associated the Chief Justice with the public statements made by his wife. What is clear on the evidence is that others associated the Chief Justice with those statements. In so far as it was reasonable for them to do so, this was likely to impact on the standing of the Chief Justice and on his performance of his judicial duties, as indeed it did when applications were made that he should recuse himself from certain cases. Dissociating himself from his wife's actions and statements would have been an appropriate step to take in an attempt to avoid the implication that they had his approval, but the question would have remained, and does remain, as to how it was that his wife came to make public statements that were bound professionally to embarrass her husband if he was opposed to her doing so.

37 When giving evidence on July 23rd, 2008, the Chief Justice was asked by Lord Cullen whether his wife considered that his prosecution for the MOT offence was politically motivated. He did not answer that question because he said that he might be breaching confidences between himself and his wife. The failure of Mrs. Schofield to give evidence left a

number of questions unanswered. It may be that the answers to those questions would not have assisted her husband's case.

The conclusions of the tribunal

38 The tribunal found that the Chief Justice's public behaviour "fell far short of what befitted the dignity of his office" (para. 7.7). That office required him to have and to be seen to have "the detached, unbiased, unprejudiced, impartial, open-minded and even-handed approach which is the hallmark of a judge" (para. 7.9). The Chief Justice failed so to conduct himself in his relationship with the Governor, with the Government and with the legal profession. He addressed what he claimed to be threats to judicial independence in a manner that was "confrontational," "improper . . . inappropriate and disproportionate" (paras. 7.8–7.11). He showed "hostility" towards the Government, the Chief Minister and members of the legal profession including making "serious and unfounded allegations against the Government" (paras. 7.12–7.15; para. 7.35). He associated himself with, or failed to dissociate himself from, conduct by his wife that he could not himself have committed without impropriety (paras. 7.16–7.27).

39 Mr. Beloff challenged the conclusion of the tribunal that the conduct of the Chief Justice in the individual episodes justified these descriptions. He also challenged the tribunal's conclusion that the conduct of the Chief Justice, when taken as a whole, amounted to an inability to discharge the functions of his office or misbehaviour within s.64(2) of the 2006 Order justifying his removal.

40 We propose first to examine the individual episodes in the light of the attacks made by Mr. Beloff on the tribunal's findings in relation to these. In doing so it will consider, in particular, the findings relied upon by the signatories as demonstrating mendacity on the part of the Chief Justice. In the light of its conclusions, it will then consider Mr. Beloff's challenge to the tribunal's finding that the Chief Justice has shown himself unable to perform the functions of his office.

41 The episodes considered by the tribunal stretch back as far as 1999. If any of these episodes constituted serious impropriety on the part of the Chief Justice they might be capable, for this reason, of demonstrating his unfitness to remain in office despite their antiquity. The tribunal included two of the early episodes in its four examples of misbehaviour, while not suggesting that they fell into this category (para. 7.35). The early episodes have, however, additional significance:

(i) An important part of the case against the Chief Justice is that he publicly accused the Government, and in particular the Chief Minister, of improperly attempting to drive him from office when that accusation was unfounded and should not have been made. By the end of the hearing

before the tribunal, the Chief Justice accepted that the accusation was unfounded but contended that he had had reasonable grounds for believing in its justification—he himself relied upon the episodes stretching back to 1999 in support of this contention. Insofar as the reasonableness of the Chief Justice's belief that there were attempts improperly to oust him from office is relevant to the assessment of his behaviour, it is necessary to look at the earlier episodes.

(ii) The tribunal's conclusion that the Chief Justice was unfit to remain in office was based in part on the "characteristics of his personality and attitude" manifested by his conduct (para. 7.36). Insofar as these characteristics are significant, the early episodes have relevance to its assessment.

The address by the Chief Justice at the opening of the legal year in October 1999

42 This is dealt with in paras. 2.1–2.24 of the tribunal's report. The tribunal criticized a passage at the end of the Chief Justice's address. He referred to attending the Commonwealth Law Conference in Malaysia and there discussing the draft Latimer House Guidelines. He drew attention to principles set out in that draft including:

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

He then continued:

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

43 In making this statement the Chief Justice was subsequently to explain that he had two instances in mind. One related to the provision of funding for a proposal made by the Chief Justice that a number of

members of the Bar should be permitted to sit as part-time stipendiary magistrates for a period of three weeks in the coming year. The other related to the provision of funding to enable the Chief Justice to travel to Warwick to attend a Judicial Studies Board conference on Lord Woolf's reforms to civil procedure at the beginning of February 2000. The Chief Justice had told the Government that he considered that it was "vital" that he should attend this.

44 The tribunal expressed a number of "serious concerns" about this part of the Chief Justice's address. The first was that it was "seriously inaccurate and misleading." As to the funding of the stipendiary magistrates' scheme, the Government had agreed to fund the scheme. The reason why the scheme was not put into operation was not lack of funding but disagreement between the Government and the Chief Justice as to how the candidates should be selected. The Committee agrees that this incident could not properly be relied on by the Chief Justice in support of his comment that there had been "one or two instances."

45 As to the failure to fund the Chief Justice's travel to the conference, the tribunal commented that it was questionable whether it was "vital" for him to attend this, that he did not disclose the fact that funding had subsequently been provided by the UK Government to enable him to attend the conference and that the request had been for funding in excess of the judicial budget which the Government had met in full.

46 It seems to us that there was probably more to the refusal of the Government to provide funding for the Chief Justice's travel than met the eye. The facts are as follows. On November 10th, Mrs. Dawson, the Registrar of the Supreme Court, made a request to the Chief Secretary for funding to enable the Chief Justice to attend the Conference. She sent a chaser on November 20th, which crossed with a request from the assistant to the Chief Secretary for further details of the conference. Mrs. Dawson replied on November 23rd:

> "Lord Woolf, M.R. has put forward proposals for a complete overhaul of the system of procedures in the civil courts and this could impact heavily on our Supreme Court. I understand that the changes are imminent. The English Judicial Studies Board is holding a series of seminars to familiarize judges with the proposed new procedures and the Chief Justice has managed to secure a place for himself on one such seminar. He considers it vital that he attend."

On December 1st, Mrs. Dawson wrote stating that the Chief Justice was anxious to know whether approval had been given for the funding. The assistant to the Chief Secretary replied:

> "The Government does not consider that the subject-matter of this conference is of sufficient value to Gibraltar at this stage. Funding

> cannot be approved for this purpose. Please note that funds under the sub-head for conferences are now fully committed for the remainder of the financial year."

47 In a parliamentary debate on judicial independence on November 20th, 2000, the Chief Minister stated that with hindsight it would have been a much better decision to have allowed the Chief Justice to go to the conference. He explained that towards the end of the year, requests for supplementary funding are turned down except in the case of "enormous necessity" and that is what happened on this occasion.

48 In para. 13 of his witness statement, Mr. Garcia, who took over the office of Chief Secretary in March 2007, gave the following explanation of the Government's refusal to provide funding for the Chief Justice's visit to Warwick:

> "It transpired that indeed the Government had refused to provide the requested funds for the Chief Justice's attendance at the Warwick University course in 1998. This was because the Chief Justice had that year taken 66 working days leave of absence at a time when his contractual annual leave entitlement was 30 days. Although there was an element of absence relating to official business (6 working days at seminars and conferences) and possibly some sick leave, the Government felt that there was a significant excess over the annual leave entitlement."

49 When he gave oral evidence, Mr. Garcia was not asked about this statement but we consider it possible that it explains what, on the face of it, appears a surprising unwillingness to make available the small sum needed to cover the expenses of the Chief Justice's visit to Warwick. Mrs. Dawson in her witness statement, while not doubting the Chief Justice's professional ability as a judge, was critical of various aspects of his behaviour out of court. In particular, she criticized the Chief Justice for taking too much leave and attending too many conferences. She stated that she had a good relationship with Mr. Montado, Mr. Garcia's predecessor as Chief Secretary, and would often call or write to him to tell him things which the Chief Justice had done which she thought might potentially cause embarrassment. In oral evidence she agreed that she knew that there were people who were unhappy with the Chief Justice, including the Chief Minister. We consider it at least possible that the refusal to fund the Chief Justice's visit to Warwick was influenced by a perception that he had been spending too much of his time outside Gibraltar.

50 Whether or not this is correct, it was a serious rebuff to the Chief Justice, after he had stated that he considered it "vital" that he should go to the Warwick conference, to have his request for funding turned down on the ground that the Government did not consider that the conference was of sufficient value to Gibraltar. In the circumstances it would not have

been surprising if the Chief Justice had made a passing reference to this in his speech at the opening of the legal year. While it did not fully justify the statement that he made about funding, we do not consider that the tribunal was justified in describing as "seriously inaccurate and misleading" the statement that there had been "one or two instances in the past year where the denial or delay of the release of funds by the Government had had the potential effect to affect adversely the administration of justice." The wording implied that it had not, in fact, had that effect, and we do not see that the fact that the UK Government subsequently provided the funds for the visit to Warwick had, of itself, any bearing on the accuracy of the Chief Justice's statement. The tribunal also described the Chief Justice's statement as "highly critical of the Government," said that it demonstrated "a complete lack of judgment in his choice of language" and that the "language, tone and manner of his remarks were inappropriate for the holder of his office." Once again we do not consider the severity of these criticisms to be justified.

51 The remarks were made in the context of an account of the draft Latimer House Guidelines on the supremacy of Parliament and the independence of the judiciary. These included a principle that the administration of moneys allocated to the judiciary for the running of the courts should be under the control of the judiciary. This somewhat ambitious aspiration did not ultimately form part of the Latimer House Guidelines. We consider, however, that it was legitimate for the Chief Justice to make reference to this in his address. It was also legitimate for him to remark that the Chief Justices of the Commonwealth were all agreed that those who control the judiciary's purse strings exercise enormous influence and have the capacity to undermine the judiciary's independence.

52 What can be said about the Chief Justice's remarks is that they were injudicious in that they were unspecific and open to misinterpretation. This was particularly the case having regard to the juxtaposition of his reference to the one or two instances of denial or delay of release of funds and the reference to undermining the judiciary's independence. He said that he did not anticipate the reaction that greeted his remarks. The tribunal did not express any reservations about that assertion. It did, however, criticize the Chief Justice for doing nothing to assuage the furore that his remarks created. Furore it certainly was. On October 15th, *The Gibraltar Chronicle* reported as the major news item on the front page that Dr. Garcia, the leader of the Liberal Party, was calling for a public inquiry into "claims of potential or perceived interference by the Government with the judiciary" made by the Chief Justice. It reported that when asked to comment on the exact meaning of his comments, a spokesman had replied that if the Chief Justice had wished to elaborate, he would have done so in his speech. The Chief Justice confirmed that he instructed the response to be given in these terms. *The New People*, published on the same day, had

a banner headline: "Chief Justice warns of Government interference in Judiciary."

53 The Chief Justice said that he was surprised, albeit not horrified, at the manner in which his remarks had been distorted. The tribunal criticized him for not taking steps to put the record straight. We consider that this criticism was merited. Having been responsible for an unjustified political attack on the Government, the obvious course would have been to do his best to defuse the situation. The Government issued a press release contending that Dr. Garcia had distorted the Chief Justice's remarks and identifying what it claimed to have been the only two occasions on which it had refused to provide the judiciary with funding, one being funds for social entertaining and the other "international conferences including one by the Chief Justice in Malaysia."

54 The Chief Justice said that he formed the view that the Government was "trivializing" his complaint and indulging in "spin" and that this called for a public response from himself. This was not a rational reaction. Nor was the press release that the Chief Justice issued on October 18th, his subsequent public exchanges with the Government, his consultation of Mr. Causer in relation to constraints that he feared that the law might impose on disclosing details of the two incidents to which he had referred in his address, and his public and unwarranted challenge to the Government's statement in relation to the practice of consultation with the Chief Minister before making judicial appointments. This unhappy chapter demonstrated lack of judgment and inappropriate behaviour of a high order that brought the Chief Justice into unnecessary public confrontation with the Government that was of the Chief Justice's own making and that had no justification.

55 The tribunal held that the Chief Justice was "determined to embarrass the Government publicly" (para. 2.21) and that his concern about confidentiality and the Official Secrets Act (para. 2.24) was—

> "an irrelevant diversion from answering the substance of the point against him, namely that he had not told the Government about his concerns privately, so that it could be seen whether they truly had the potential to affect adversely the administration of justice."

We do not consider that these findings of bad faith are justified. We see no ground for concluding that the Chief Justice's consultation of Mr. Causer was a charade. It was, however, a further demonstration of bad judgment. There was no reason to think that the Government would object to the Chief Justice clarifying the concerns to which he had referred and, had he had any doubt, he could simply have explained the position and asked them if they minded.

56 The conduct of the Chief Justice in fanning the flames caused by his

comments at the 1999 opening of the legal year has relevance to the question of whether defects of character and personality have resulted in a current inability to perform the functions of his office. We do not consider, however, that the tribunal should have treated this matter as an incident of misbehaviour that formed part of the justification for removing him from office 10 years later.

The maids issue

57 This is dealt with in paras. 3.1–3.27 of the tribunal's report.

58 In 1996 and 1997, the Chief Justice was guilty of a number of breaches of the criminal law in relation to the employment of a Jamaican woman, Ms. Jackie Williams, as a domestic maid. The tribunal criticized the Chief Justice (i) for these breaches of the law; and (ii) for failing to give the Governor, David Durie CMG, a true account of the position in 2002.

59 Ms. Williams began to work for the Chief Justice in or about September 1996 and her employment was terminated in October 1997. In breach of reg. 7 of the Employment Regulations 1994, he failed to obtain a work permit for her. What he did was to sign in blank three forms, one of which was an application for a work permit, leaving it to Ms. Williams to fill these in and submit them. Ms. Williams filled them in as his agent, but she deliberately inserted false information as to her terms of employment in order to obtain the work permit that was subsequently issued. Ms. Williams stated that she was employed for 39 hours per week at £3.15 per hour. In fact her working hours were significantly less than this—the Chief Justice's evidence was that she worked less than 15 hours per week and earned £150 per month.

60 The following account of the Chief Justice's obligations in relation to tax and PAYE is based on a note provided to the Committee by Mr. Beloff. Although Ms. Williams' pay was too low to attract liability to income tax, she failed to obtain a certificate to that effect. In these circumstances the Chief Justice was under a liability under PAYE regulations to deduct tax at a "default" rate called Code X. The Chief Justice made no such deductions. While under the Social Security Regulations Ms. Williams was, because of the short hours that she worked, exempt from some aspects of the social security scheme, the Chief Justice was under an obligation to make social security payments to cover insurance against accident. The Chief Justice made no such payments. It was the Chief Justice's evidence that he had assumed that PAYE was not payable and was unaware of the social security obligation. He only became aware of his errors as a result of evidence given to the tribunal. He would have expected the authorities to make demands for payments if any payments were due.

61 By a written contract dated October 9th, 1997, the Chief Justice

employed Ms. Danvers as a housekeeper/cook at a salary of £450 per month. He obtained a work permit in respect of her. Her employment terminated in April 2000. At that point she lodged a complaint with the Ombudsman and with the TGWU that she had been paid less than the minimum wage. That complaint does not appear to have been well-founded. At this point the Chief Justice contacted both the tax and the social security authorities. He was informed that there were outstanding social security obligations and he paid these. He was also informed of outstanding PAYE obligations and entered into negotiations to determine the amount of these. On 28th June, he paid £990.30 in relation to these obligations.

62 On May 26th, 2000, under a headline "M'Lord you have broken the law," *Vox* devoted its front page to the story of Ms. Danvers' employment by the Chief Justice and his failure to pay PAYE and social insurance contributions. Correspondence ensued with the Governor, which related initially only to Ms. Danvers. The Governor made a public statement that he was personally looking into the matter.

63 On June 9th, *Vox* published an article under the headline "The Chief Justice must now resign" in which it was suggested that the Governor should widen his inquiry to cover Ms. Williams. The article raised the question of whether her social insurance and income tax were paid up. On June 16th, the Chief Justice wrote a lengthy letter to the Governor which largely related to Ms. Danvers but also referred to Ms. Williams. This included the statement that his recent researches had disclosed that he might be liable to pay social security contributions in respect of Ms. Williams.

64 On July 3rd, the Chief Justice wrote to the Governor:

> "I have placed the matter of Ms. Williams (now Mrs. Moreno) before leading counsel. Having perused the legislation with some care, counsel is satisfied that by reason of its terms and the hours she worked she does not come within the legislation. I am thus advised that there is no liability upon me. Mrs. Moreno did not earn sufficient wages to come within the PAYE legislation."

65 One of the duties of the Attorney-General, Mr. Rhoda, Q.C. was to give legal advice to the Governor. By July 12th, 2000, after discussions between the Attorney-General and Mr. Desmond de Silva, Q.C., who was advising the Chief Justice, an exchange of letters between the Governor and the Chief Justice had been agreed. That from the Governor was to read as follows:

> "Thank you for the information you have provided in response to my letter to you of June 1st. I have also received information from the relevant public authorities.
>
> I note that you registered your employment of Ms. Danvers with the

> Employment Training Board and that you have recently settled your outstanding obligations for PAYE and for social security in her regard. I find it regrettable that you did not make more effort to regularize this matter earlier but I accept that you did not deliberately seek to avoid your obligations.
>
> You will appreciate, I know, that someone in your position should be particularly careful to fulfil your legal obligations in good time and I would be grateful for your assurance that you will do so in future. As far as your earlier employment of Ms. Williams is concerned, I take your letter of July 3rd to mean that your considered view is that no liability falls to you in respect of either PAYE or social security. As you must be aware, I am not in a position to take an independent view of that matter. You will appreciate therefore that if in the event it turned out that there was an outstanding liability this could have the effect of calling the whole issue to be revisited."

66 The letter to be written by the Chief Justice in reply read:

> "Thank you for your letter of July 12th. I do regret that through oversight I did not make greater efforts to meet my obligations in time in respect of social security and PAYE in my employment of Ms. Danvers. I, of course, accept that I should be particularly careful to fulfil my obligations in good time and I can assure you that this situation will not arise again. I can also confirm that I have no reason to believe that I have any outstanding liabilities in respect of Ms. Williams."

67 These letters were not in fact released. Delay in bringing the matter to a conclusion was attributable, at least in part, to the MOT prosecution, to which we will shortly turn. On August 16th, 2000, the Chief Justice wrote a letter to the Governor which asked, among other things, whether he had taken advantage of the delay that had occurred to reach a conclusion in relation to the Ms. Williams matter. On August 23rd, the Chief Justice wrote a further letter in the course of which he observed that the Governor had determined the issue in relation to Ms. Danvers and invited him to do the same in relation to Ms. Williams. On August 31st, the Governor replied in relation to this:

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

It is not clear from the evidence what extra information was sought or in what circumstances.

68 Ultimately, on October 4th, the Governor made an announcement of

his decision. It stated that he had received full co-operation from all concerned, including from the relevant authorities. It continued:

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

69 On October 9th, the Government issued a press release that stated that as the decision was constitutionally for the Governor, the Government did not consider it necessary or appropriate to comment on his conclusions. It then said that since the Governor's statement only stated part of the facts in relation to the Chief Justice's two maids, the Government considered that the public interest required the facts of the two cases to be put into the public domain. The facts then set out in relation to Ms. Williams included the following:

> "Ms. Williams herself registered her employment with the Department of Social Services for the purposes of social insurance. The Department of Social Security has no record of social insurance contributions having been paid in respect of Ms. Williams' employment. The Commissioner of Income Tax has no record of tax having been paid in respect of Ms. Williams' employment and has no record of her employment. It is clear from the Governor's statement that the Chief Justice does not, in these circumstances, consider that he has any outstanding liability."

70 The maids issue was the second of the four examples of misbehaviour itemized by the tribunal at the end of its report. There, the tribunal summarized the misbehaviour as persisting "in a reckless disregard for compliance with the law" and making "a less than frank disclosure to the Governor" (para. 7.35).

71 As the Chief Justice accepted, his position required that he should show a scrupulous regard for the law. In these circumstances leaving Ms. Williams, without supervision, to fill in forms for the accuracy of which he was responsible and his failure to make any or adequate enquiries in relation to his obligations in respect of PAYE and social security payments were reprehensible, particularly in the case of Ms. Danvers. The false assumption that no obligations arose in relation to Ms. Williams was

perhaps more understandable. These failings were, however, water long under the bridge. The Governor had decided to draw a line under the Chief Justice's failings in relation to Ms. Danvers. Although he had not been informed of the true position in relation to Ms. Williams, we do not consider that it would or should have affected his decision. In these circumstances we do not consider that these breaches of the Chief Justice's legal obligations should, in 2009, have weighed against him in the scale as significant misbehaviour. Potentially more significant were the following matters relied upon by the signatories as part of their case that the Chief Justice was mendacious:

> "(a) the tribunal's rejection of the Chief Justice's assertion in oral evidence that he must have mentioned Ms. Williams to the Commissioner of Income Tax"; and
>
> (b) the tribunal's finding that the statement in the Chief Justice's fourth witness statement that he had given "a full explanation" to the Governor in relation to Ms. Williams was "plainly untrue."

72 In the course of cross-examination the Chief Justice said:

> "I discussed these issues with the Collector of Income Tax in relation to Ms. Danvers, and it is inconceivable I did not mention Ms. Williams at the time, and there was no comment by him to my recollection that I had fallen foul of the law."

73 This statement was made in the context of discussion of a statement made by the Chief Justice when giving evidence-in-chief that there was a relaxed attitude to matters such as PAYE in Gibraltar. The statement was not challenged. The Chief Justice was reconstructing what he believed must have been said in 2000 rather than asserting a positive recollection of what was said. It may well be that there was an element of wishful thinking in the reconstruction. It would not be right, however, to treat this as an example of deliberate mendacity.

74 The question of whether the Chief Justice had misinformed the Governor as to the advice that he had received from counsel was not included in the statement of issues. That he had done so was put to him, vigorously, by Mr. Eadie in cross-examination. Mr. Beloff submitted, with some justification, that it was not fair to expect the Chief Justice to meet this allegation without notice of it. He placed before the Committee an 18-page analysis of the evidence in relation to the maids issue. This demonstrated that the Chief Justice professed no longer to remember the details of the advice that he sought or received. He identified the leading counsel to whom he had referred as either Mr. Stagnetto or Mr. de Silva. His evidence was that he had been sure that the letter that he had sent to the Governor was accurate.

75 Mr. Stagnetto sent an e-mail dated July 21st, 2008 to the Chief

Justice's solicitors, which was put in evidence before the tribunal. It stated:

> "The issue of the employment of Ms. Williams arose in the context of a press release by the Governor, the terms of which had been negotiated by Mr. Desmond de Silva, Q.C. on behalf of the Chief Justice and the Attorney-General/Governor, in relation to the employment of Ms. Danvers. Before the agreed date of publication, it emerged that the Chief Justice had complied with all his obligations in relation to her employment before publishing his report. I was informed of this by the Chief Justice and he told me that her pay did not reach the threshold to bring her within the PAYE legislation. I replied to the effect that if that was so, he had nothing to worry about and he should inform the Governor accordingly. He may have taken advice from Mr. de Silva as indeed he did in the case of Ms. Danvers. I was never asked by the Chief Justice nor indeed did I give my opinion in writing on the matter."

76 In his fifth witness statement, the Chief Justice said that the Government's press release of October 9th—

> "whilst being strictly accurate, seems to suggest that the contributions were due in respect of Ms. Williams. This is a misleading innuendo since no contributions were due and unpaid in respect of her. Furthermore, on my understanding, the tax situation of Ms. Williams was unlawfully released to the public. If it was being suggested at the time, or if it is suggested now, that I had any liability in respect of Ms. Williams it would be astonishing indeed, given that at no time either before or since her departure from our employment in October 1997 has there been any communication to me of any existing claim from any Government department."

Mr. de Silva had no recollection of advising on this matter.

77 The submission made by Mr. Eadie, on behalf of the Government, is that the Chief Justice in 2000 instructed his lawyers to ascertain his position in 2000 rather than the position in 1996 to 1997 when Ms. Williams was working for him and then gave a misleading description of the position so as to lead the Governor to believe that he had been advised that he had committed no breach of the law during the earlier period. Implicit in this submission is that the Chief Justice believed that there was a difference between his legal obligations in 1996–97 and in 2000 and that he was or might be in breach of an obligation to pay PAYE in the earlier period that did not persist to 2000. We can see no basis for drawing such a conclusion. Right up to the time that he made his fifth witness statement the Chief Justice gave every indication of believing that no PAYE obligation could have arisen in relation to Ms. Williams. That was not an unreasonable belief, albeit erroneous. In fact, as a matter of strict law, the

obligation that he had been under to make PAYE deductions while Ms. Williams had worked for him had persisted to 2000. We do not consider that there is any basis for holding that the Chief Justice set out in 2000 deliberately to deceive the Governor. Because of the passage of time there is a question mark over the advice sought and given by leading counsel, but no case of mendacity on the part of the Chief Justice has been made out.

Dissatisfaction with the Chief Justice

78 On June 28th, 2000, five Queen's Counsel sent a memorandum to the Governor expressing regret at his delay in announcing whether he had found any grounds for establishing a tribunal of inquiry which was the limit of his powers in relation to the conduct of members of the judiciary under the constitution. They stated that—

> "the delay has resulted in division between those whose views on the quality and integrity of the administration of justice permit them to regard the allegations as a storm in a teacup and those who cannot so regard them."

It is clear that there was in Gibraltar, at least by this stage, a significant body of opinion, both at the Bar and outside it, critical of the conduct of the Chief Justice. Whilst the Chief Justice was not justified in alleging that the Government's press release of October 9th made a "misleading innuendo," the fact and terms of the release suggested that the dissatisfaction was felt within the Government. Lord Luce, who was Governor between February 1997 and March 2000, spoke of noticing a growing strain in the relationship between the Chief Justice and the Chief Minister and said that when he renewed the Chief Justice's contract in 1999 he was "not entirely happy with the lack of leadership of the Chief Justice in that capacity." At the ceremony of the opening of the legal year, Mr. Robert Vasquez, the Chairman of the Bar, who had been dissuaded from making a speech critical of the Chief Justice, instead, in breach of tradition, refrained from making any speech at all. The Chief Justice responded angrily by saying to him: "Robert, don't rape the Constitution." The tribunal commented that this language was not consistent with the dignity and status of the office of Chief Justice. We do not attach significance to this sentence, spoken no doubt in a moment of tension.

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

79 This issue is dealt with in paras. 3.28–3.31 of the tribunal's report. It relates to a request by the Chief Justice to the Registrar for the use of funds earmarked "for general and office expenses" to cover the costs of a party that the Chief Justice had organized at his residence on May 9th,

2000 to introduce the new Governor to the Bench and the Bar. The tribunal concluded that this issue was of "only limited significance" to the general issues falling for its consideration. We agree.

Allegations of interception of the Chief Justice's telephone in 1999 and 2000

80 In 1999, the Chief Justice and his wife became concerned that there might be interference with their telephones. The Chief Justice reported this concern to the police. On May 30th, 2000, the Gibraltar newspaper *Panorama* carried an article under a front page headline that stated "Police asked to investigate phone tapping claim at home of Chief Justice. 'Campaign to hound my husband out of office'—Mrs. Schofield." The article referred to the maids issue. It reported an interview with Mrs. Schofield in which she had said: "I am not the Chief Justice and I am going to fight for what I think is an unfairness . . . They are trying to discredit my husband. They are trying to hound him out of office." On the same day, an article in *Sunday Business*, which is not published in Gibraltar, reported that the Chief Justice had told friends that he believed that he was under surveillance because of a clash with the Chief Minister over claims of political interference in the judiciary's independence.

81 The Chief Justice denied the truth of the article in *Sunday Business*. He said that he and his wife had never regarded the telephone tapping to be in any way the responsibility of the Government of Gibraltar. His wife, in her second statement, accepted her responsibility for the article in *Panorama*. She said that her intention was to raise awareness in a matter of public interest.

82 The Chief Justice was asked whether he considered that the maids issue was part of an attempt to discredit him or drive him from office and he said that he did not, either at the time or in 2007. The Chief Justice was asked whether he discussed the article with his wife at about the time that it was published and he said that he had. He was not asked about the nature of the discussion. He was asked whether he considered making a public statement that it was not his view that he was being hounded from office and he said that he did not. The tribunal commented:

> "His unwillingness to correct what had been attributed to him and to dissociate himself from his wife's comments on this issue was not satisfactorily explained by him. He must have been aware of the damage thereby caused to Gibraltar's financial and legal reputation."

83 The Chief Justice at other points of his evidence made plain that it was not his policy to join issue with the press on misleading press reports as once one started such a dialogue there was uncertainty as to where it would lead. We accept that there are dangers in engaging in dialogue with the press, and would not on this occasion criticize the Chief Justice for not

publicly dissociating himself from his wife's comments to the press. Those comments were made, however, after statements made by his wife that she would be prepared to fight for her husband "in the gutter" (paras. 3.20–3.22). We consider that the Chief Justice should have been concerned by his wife's conduct. He should have made plain such concern to his wife. He should have explained to her that her conduct was damaging both to Gibraltar and to his position as Chief Justice.

The MOT prosecution

84 The tribunal's report (at paras. 3.39–3.52) describes the series of events relating to the prosecution of the Chief Justice for failing to have a valid MOT certificate for his car. We shall not repeat that exercise. The report criticizes the Chief Justice for behaviour which was not "consonant with the proper conduct of a Chief Justice in a small jurisdiction and with the dignity of his office." While we agree with that criticism, the report does not place this incident in its context nor set out the full story of this matter.

85 The Chief Justice's MOT certificate expired on January 11th, 2000. He overlooked the need to renew it. In May 2000, his road tax licence was about to expire. Mr. Mendez, the Deputy Registrar, drew this to his attention. He could not re-tax his car until he had obtained a new MOT certificate. The car's log book had been lost, and a duplicate had to be obtained before he could seek a new MOT certificate. A booking was made for an MOT inspection at the end of August. Mr. Mendez received an assurance on the telephone from a woman police officer that, if the Chief Justice had an appointment for an MOT, he could continue to drive pending that appointment. At the same time the police had announced a general amnesty for anyone driving a car that was untaxed that would expire on July 31st. Mrs. Dawson, the Registrar, advised the Chief Justice that he should not drive after that date.

86 On July 28th, the Chief Justice was stopped by Police Const. Perera, who was carrying out routine checks on vehicle documents. He explained why he did not have a valid MOT certificate or road tax licence. He then went on holiday.

87 On July 31st, his lawyer, Mr. Stagnetto, was contacted by the Attorney-General who said that the matter had been drawn to the attention of the Governor who wished to seek an explanation from the Chief Justice as the matter affected the agreed disposal of the maids issue.

88 On his return from holiday, on August 16th, the Chief Justice was seen at his residence in the presence of his lawyer, Mr. Stagnetto, by Police Const. Perera and Police Sgt. Vinales. He was asked to produce evidence of the appointment that had been made for the MOT test, which

he did. He was then told that he would be reported for not being in possession of an MOT certificate and a road tax licence.

89 On August 21st, the Chief Justice received a letter from the Governor, which ended as follows:

> "Whilst the allegations relate to motoring matters, they also relate to a failure to comply in a proper and timely fashion with obligations of a public nature. I am mindful of the fact that the allegations in respect of the Ms. Danvers affair related to a failure on your part to make proper and timely contributions to the public revenue.
>
> Two issues in particular require to be clarified, first whether the allegations relating to July 28th are true, and in the event that they are true, how it was that in the light of those matters you were prepared to give me assurances which were contained in your letter of July 12th. Unless, and until, I am satisfied by your explanations in relation to these matters, I cannot make a public statement in the terms which were initially envisaged, namely my continuing support for your position. It is for this reason that I want to discuss matters with you and would welcome the opportunity to do so later today."

90 The Chief Justice, through his lawyer, challenged the suggestion that the MOT matter had any bearing on the resolution of the maids issue. On August 23rd, the Chief Justice received a formal written caution signed on behalf of the Commissioner of Police indicating that it had been decided to issue him with a caution. The letter ended: "This caution has been recorded for further reference."

91 On August 25th, the Attorney-General, Mr. Rhoda, wrote to Mr. Stagnetto in the following terms:

> "I have now had the benefit of seeing both the Governor's letter of August 21st, 2000, to the Chief Justice, and the Chief Justice's reply of August 23rd, 2000. The matter has progressed and that my understanding is that a formal caution has now been issued by the Commissioner of Police to the Chief Justice. Until such time as I know whether or not the Chief Justice is prepared to accept the decision to caution him, thereby acknowledging the truth of the allegations, it would not be right for me to comment upon the causal connection between the events of July 28th, 2000, and the assurances given by the Chief Justice in his letter of July 12th, 2000. As your firm is now acting for the Chief Justice in respect of events of July 28th, 2000, perhaps you would let me know whether or not your client is prepared to accept the caution."

92 The Attorney-General explained the subsequent course of events in his witness statement:

> "I was not involved in issuing the first caution notice to the Chief Justice. The first caution notice that was issued was defective in that it did not require him to accept his guilt. Had the Chief Justice accepted the caution, matters might have ended there. Instead the Chief Justice's lawyers became involved and quibbled about the wording of the caution. At that point, the Commissioner of Police sought legal advice and the defect in the first caution was identified. A new caution was therefore issued which did require the Chief Justice to accept his guilt. The Chief Justice did not respond to this caution notice until the eleventh hour and effectively did not accept his guilt. In the circumstances, I made the decision as Director of Public Prosecutions to prosecute him."

93 Ultimately, on October 4th, the Governor published his decision on the maids issue without reference to the MOT matter, as this was *sub judice.*

94 The Chief Justice has always considered that his prosecution was "grossly unfair." We can understand that reaction. The evidence indicates that the first written caution that he received was the informal way that a trivial motor vehicle offence was normally dealt with at the time in Gibraltar. The subsequent action taken by the Attorney-General was, so it seems to us, taken by the Attorney-General because he wished to be in a position to advise the Governor on the Chief Justice's position with an unequivocal acceptance by the Chief Justice of the offences that he had committed.

95 The Chief Justice said in his fifth witness statement that he felt that the MOT matter could be used to try to pressurize him out of office or at least seriously embarrass him. His wife in her first statement said that it was her view that the matter was a "set up" intended to provide the Governor with further evidence to seek the removal of the Chief Justice.

96 The Chief Justice told the tribunal that he did not consider that his prosecution was politically motivated. When asked whether his wife had thought the prosecution politically motivated, he replied that he did not wish to breach any confidences between himself and his wife.

97 Mr. Beloff submitted that the tribunal erred in making any criticism of the Chief Justice in relation to the MOT affair. He could not be criticized for permitting international observers to be present at his trial, nor for raising defences that his lawyers had advised were arguable.

98 We do not agree. The conduct of the Chief Justice demonstrated a serious lack of judgment that was calculated to bring his office into disrepute, to put a heavy and unnecessary burden on the stipendiary magistrate of having to try his own Chief Justice in the full glare of

publicity and to cast aspersions over the fairness of that trial, which was, in fact, meticulously conducted.

99 Given that the Chief Justice did not consider it fair that the Commissioner of Police sought an express admission that he had committed the MOT offence and given that the Governor had indicated that this might have relevance to the disposal of the maids affair, it still made no sense at all not to admit that he had committed what was, in the circumstances, a trivial offence; there was, after all, no doubt that he had done so. Fighting the prosecution on technical defences was patently an absurd thing to do and one that, accordingly, brought his office into disrepute.

100 When being questioned by the tribunal, the Chief Justice said that he had no knowledge of any briefing that his wife made to the international observers. That answer was not challenged. The tribunal nonetheless said that it did not accept that he did not know the content of the observers' briefing. We do not consider that adverse finding to be justified. That said it can properly be inferred that the Chief Justice knew that his wife had arranged the attendance of international observers because she thought that his prosecution was politically motivated. He said that he did not share that view. Whether he did or not, there was no possible justification for observers at the trial unless there was a suggestion that the trial itself would be unfair. Their presence necessarily carried an inference adverse to the stipendiary magistrate that was unwarranted. The Chief Justice could and should have made it plain to the international observers that he did not consider that there was any justification for their presence.

101 The Chief Justice was asked about his view of the motivation for the MOT prosecution:

> "*Q.* Do you suggest that this prosecution was politically motivated?
>
> *A.* No, but it was instituted against a background of what was going on between Governor Durie and the Attorney-General and myself *vis-à-vis* the maids issue. I did consider that it was strange indeed that the Governor knew that a formal caution had been issued before me, before ever I did.
>
> *Q.* Did you—
>
> *A.* And I put it no higher than that. I can put it no higher than that.
>
> *Q.* Did you discuss that strangeness with your wife in 2000?
>
> *A.* Undoubtedly."

In the course of the discussion Mrs. Schofield must have expressed her view that the prosecution was politically motivated. This passage suggests that the Chief Justice was not convinced that she was wrong.

102 In August 2000, a conversation took place between the Attorney-General and Mr. de Silva, who had acted for the Chief Justice in connection with the maids issue, at Sotogrande where they were both on holiday. There was a degree of conflict of evidence about what was said at that meeting. It is common ground, however, that the Attorney-General agreed that it "would be a good idea if the Chief Justice could be found something elsewhere." The Chief Justice did not suggest that this view in any way affected the action taken by the Attorney-General in relation to the MOT prosecution. Had he had any doubts as to this, they should have been assuaged by (i) the fact that the Attorney-General offered to drop the prosecution and permit the Chief Justice to make a statement if he accepted that he had committed the offence; (ii) the statement by the Attorney-General after his conviction that if he dropped an appeal this would, in his opinion, have no effect on the tenure of his office; and (iii) the fact that his conviction had no adverse consequences on his tenure of office.

The one-year warrant

103 In paras. 4.7–4.26 of the tribunal's report, the tribunal deals with the reaction of the Chief Justice to the issue by the Governor on February 7th, 2002, of a warrant renewing his appointment for a period of only one year in place of the customary three-year warrant. The Chief Justice was given no warning of this, nor explanation for it. Nor was any explanation put before the tribunal or the Committee. The tribunal speculated that it may be that the Governor was dissatisfied with the Chief Justice's conduct and wished to mark his disapproval in some way. This seems a likely explanation. The tribunal described the Chief Justice's letter of response of February 11th, as "notable for its hostility and threat." We consider that it is not surprising that the Chief Justice responded in strong terms. The letter accused the Governor of an "intention to purport to limit my tenure of office."

104 The Governor replied on February 13th, giving no explanation for the one-year warrant and stating somewhat equivocally:

> "You raise the question of security of tenure and your independence as a judge. I know your views on the effect of the Constitution which are that, in accordance with the terms of s.60 of the Gibraltar Constitution Order 1969, the Chief Justice of Gibraltar has security of tenure until he attains the age of 67 years. The long-standing practice of issuing time-limited warrants is not intended to, nor could it, affect the provisions of the Constitution. I hope that this is clear, and that it will set your mind at rest."

105 Meanwhile, on February 12th, the Chief Justice had raised the question of the effect of the one-year warrant in a hearing in chambers in

a criminal trial in which Mr. David Hughes was appearing for the defendants. A note of the hearing taken by Mr. Mendez, the Deputy Registrar, includes the following statement by the Chief Justice:

> "*Chief Justice*: I have told the Governor that he may not offend the Constitution or violate my independence. If the Governor has not withdrawn his purported action by close of business today, I shall want the Attorney-General to be here, to address me on the validity of the Governor's purported action. I may feel that I must abandon this case and indeed suspend all sittings of the Supreme Court.
>
> *Hughes*: You are right. An opposite view to yours would not even be arguable . . . this is a grave matter. We may have to run arguments on this. You are correct in your views.
>
> *Chief Justice*: Hughes, how did you know so much about this? Is it out?
>
> *Hughes*: It was discussed at the Bar Council. Maybe you should ask the Chairman of the Bar to be present tomorrow as *amicus curiae*."

On the following day, in open court, he raised the question of whether his independence might be challenged, referring to the Scottish case of *Starrs* v. *Ruxton* (5). Counsel reassured him that no such suggestion would be made.

106 What had happened in chambers was reported in *The Gibraltar Chronicle* on the following day. On February 15th, *The New People* carried an article headed "Chief Justice in constitutional row with U.K." It quoted verbatim from an angry letter that Mrs. Schofield had written to the Foreign Secretary alleging attempts to hound her children out of their home and harassment aimed at inducing the Chief Justice to depart of his own accord.

107 The Chief Justice challenged the accuracy of Mr. Mendez's note. We agree with the tribunal that it provides the best evidence of how the Chief Justice reacted in court to the receipt of the one-year warrant save that, having considered the oral evidence given to the tribunal, it finds it more likely that the Chief Justice threatened to suspend all his own sittings rather than all the sittings of the court. We consider that the Chief Justice's behaviour in court once again showed lack of judgment or a sense of proportionality. If the terms of the warrants issued by the Government in fact impacted on the Chief Justice's term of office, the *Starrs* v. *Ruxton* (5) issue of whether the Chief Justice had the necessary independence already existed. The Chief Justice did not, however, believe that the terms of the warrants affected his security of tenure, nor did anyone else suggest that they did.

108 The Chief Justice said that he had no knowledge of how *The*

Gibraltar Chronicle obtained its information about the matter. He said that his wife told him about the letter that she had written to the Foreign & Commonwealth Office after she had written it. He did not think to dissociate himself from her letter as she was ploughing an independent furrow, talking about family rights. He said that he was not concerned about these because he did not feel that the warrant of appointment had any legal effect.

109 This was a further example of the Chief Justice's *laissez-faire* approach to actions of his wife that had implications for his own position. The tribunal pointed out, with justification, that there was an appearance of collusion between his wife and himself.

110 Mr. Beloff attacked, in particular, a finding of the tribunal that the Chief Justice had colluded with Mr. Hughes in raising the possible implication of the one-year warrant in court. He submitted first that it was procedurally unfair for this finding to have been made when the Chief Justice had had no notice that such an allegation was to be made. Secondly, he submitted that the finding was not justified on the evidence.

111 We agree with both points. This was a serious allegation of bad faith and one that required notice if it were to be properly addressed. On a full analysis of the evidence, the finding of the tribunal is not justified. That finding was that Mr. Hughes called on the Chief Justice in his chambers and between them they agreed that Mr. Hughes would raise the matter. It necessarily follows from this that the Chief Justice's question "Hughes, how did you know so much about this? Is it out?" And his reply "It was discussed at the Bar Council . . ." was a dishonest charade, designed to conceal their collusion. We have considered with care the detailed analysis of the evidence prepared by those acting for the Chief Justice and concluded that it does not support the finding of collusion made by the tribunal.

Summary thus far

112 These matters, some of them significant, form the background to the more immediate events that led to the appointment of the tribunal. They reflect badly on the judgment of the Chief Justice, leading to inappropriate behaviour on a number of occasions. They also establish a propensity on the part of Mrs. Schofield to take ill-advised action in support of her husband that was capable of carrying the implication that he associated himself with it and that was damaging to his standing as Chief Justice. There followed, however, a period of some four years without relevant incident. During this period, as the Chief Minister pointed out, nothing occurred capable of suggesting dissatisfaction on the part of the Government with the Chief Justice. On the contrary, the Government treated the Chief Justice generously by the provision of some financial assistance

beyond that to which he was entitled under his terms of service. Equally during this period there were no events that, on the findings of the tribunal, were cause for criticism of the Chief Justice.

The swearing-in of the Deputy Governor in July 2006

113 This matter is dealt with in paras. 4.32–4.37 of the tribunal's report. It was a single incident of thoroughly unattractive behaviour by the Chief Justice. He lost his temper because, in accordance with the wishes of the outgoing Governor, Sir Francis Richards, the Chief Minister had been given precedence over him in the grouping of those bidding him farewell at the Naval Dockyard. He took this out on the Deputy Governor whom he considered responsible for the arrangements. The tribunal was justified in describing this as disgraceful behaviour, governed by pique, that was inconsistent with the dignity of his office. It could properly be described as misbehaviour, albeit not of major consequence.

The debate over the 2006 Constitution

114 This matter is covered by paras. 4.38–4.63 of the tribunal's report. The facts can be summarized as follows. In 1999, a select committee had been established by the Gibraltar House of Assembly to consider reform of the Constitution. There was a consultation period which closed in February 2001. The first reaction of the Gibraltar judiciary was a paper submitted by the Chief Justice to the Governor, with a copy to the Chief Minister in March 2005, making recommendations for amendments to the Constitution. Although the Chief Justice described these as "made after extensive consultation with my colleagues and are those of the whole judiciary" this overstated the position. The recommendations included the institution of a Judicial Service Commission ("JSC") to make judicial appointments. Modified recommendations were made by a letter of February 21st, 2006, inspired by the provisions of the UK Constitutional Reform Act 2005. These recommended a Judicial Appointments Commission made up of the Chief Justice, the President of the Court of Appeal, the Chairman of the Justices of the Peace, a member of the Bar proposed by the Bar, one appointee of the Chief Minister and one appointee of the Governor.

115 On March 17th, a UK delegation and a Gibraltar cross-party delegation reached agreement on a new draft Constitution. The Chief Justice did not press for a copy of this. On July 5th, it was placed on the Government website. The Chief Justice did not obtain a copy until August 4th. On August 11th, following an earlier short letter of concern, he wrote to the Chief Minister enclosing "the submissions of the Chief Justice, the Puisne Judge, the Stipendiary Magistrate and the Registrar on the draft Constitution" ("the submission"). Section 57(1) of the draft Constitution provided for the creation of a JSC consisting of the President of the Court

of Appeal as Chairman, the Chief Justice, the stipendiary magistrate, two members appointed by the Governor in accordance with the advice of the Chief Minister and two members appointed by the Governor acting in his discretion. The submission objected that the majority of the JSC would be appointed by the executive and suggested that it should include a member of the legal profession and a lay member. It also suggested that the Chief Justice should be the chair of the JSC, or should not be a member at all.

116 The submission took particular objection to s.57(3) which provided:

> "The Governor, with the prior approval of the Secretary of State, may disregard the advice of the Judicial Service Commission in any case where he judges that compliance with that advice would prejudice Her Majesty's Service."

This, it was said, was in conflict with the requirements of judicial independence. A similar objection to s.57(3) was to be made by the Bar Council.

117 The submission concluded with a statement that the judiciary would consider all possible steps that it might take to prevent these errors of principle being promulgated including "reluctantly but if necessary, a petition to Her Majesty through Her Privy Council."

118 These objections to the draft Constitution received media coverage. This included an article in *Panorama* on August 15th, headed "Chief Justice in campaign against new Constitution."

119 On August 25th, Hassans wrote on behalf of the Chief Justice to the Acting Governor and the Chief Minister stating that some of the provisions of the draft Constitution would adversely affect judicial independence and the rule of law in Gibraltar and public confidence in due administration of justice by the courts. The letter complained of lack of consultation and called for consultation before any referendum on the Constitution, failing which, it would be necessary to have recourse to the Judicial Committee of the Privy Council. This was followed by a letter on September 5th, threatening that the Chief Justice would petition the Privy Council directly and unilaterally unless by September 8th, the Gibraltar and UK Governments confirmed that they would refer the matter to the Judicial Committee.

120 The Chief Secretary replied to the Chief Justice on September 7th, in a lengthy letter which refuted the points made by Hassans. So far as s.57(3) was concerned it gave the following explanation:

> "Section 57(3) was included in the draft Constitution at the behest of the UK side. It was said by HMG [the UK Government] to form an important element of the UK position in the negotiating process, as part of the UK's agreement to the establishment of the new Judicial

> Service Commission (which significantly reduces the Governor's powers in this area in comparison to the present Constitution and those of other Overseas Territories). According to HMG, it requires the provision to reflect the continuing constitutional relationship between the United Kingdom and Gibraltar and the UK's interest in the good administration of justice. The UK Government does not, therefore, accept that the provision is objectionable. Even though the Gibraltar Government does not consider the provision to be necessary, it does not consider it objectionable on the grounds that you allege.
>
> The UK Government has informed the Gibraltar Government and the Bar Council that it would only envisage the power being used in extremely rare and exceptional circumstances. These might include a case where the UK Government had information on a recommended candidate that could not be shared with the Judicial Service Commission for reasons of confidentiality, or where a wholly unqualified or unsuitable candidate were recommended for appointment to a particular office.
>
> The section is not intended to, and does not, give the Governor an enabling power. It is deliberately drafted as a veto power only. This was clearly agreed between the delegations during the negotiations on the text when the words 'and act in his own discretion' (which were in a previous draft) were removed at the request of the Gibraltar side. The effect in practice is that, if the veto power were exercised, the Judicial Service Commission would have to reconsider the matter and tender such further advice to the Governor as it thought appropriate."

A similar undertaking had been given in a letter sent on the previous day by the Chief Minister and the Acting Governor to the Bar Council.

121 The Assistant Deputy Governor also wrote on September 7th, refuting Hassans' contentions and offering the Chief Justice a meeting with officials in London who would explain in more detail the UK Government's position on the judicial aspects of the draft Constitution.

122 The Chief Justice's speech at the opening of the legal year on October 6th was devoted almost entirely to the draft Constitution. The tribunal's criticisms of the Chief Justice focus on this. In essence, the criticism is that the Chief Justice improperly used this speech to enter the political arena by making in public an attack on parts of the draft Constitution that had been agreed by the Governments of the United Kingdom and of Gibraltar and on which a referendum was shortly to be held. The consequence was that the press had a field day and the opposition seized on his remarks to justify opposing the proposed constitution, so that "consensus turned to dissent." Six specific criticisms were

made of his speech. Underlying those criticisms were express or implicit criticisms of the earlier conduct of the Chief Justice in relation to the draft Constitution. We will deal with each criticism in turn.

123 The first criticism is that in his speech the Chief Justice purported to be speaking on behalf of the locally-based judiciary when he had not properly consulted them in relation to the various steps that he had taken, or in relation to the text of his address. He was acting on his own initiative.

124 The judiciary in question consisted of Dudley, J., the puisne judge, Mr. Pitto, the stipendiary magistrate, and Miss Desoiza, the Registrar. Dudley, J. did not give evidence or make a witness statement, so there is no direct evidence on his views. Miss Desoiza's attitude was that she did not want to get involved. She had expressed concern at the possibility that she might get conflicting instructions from the Chief Secretary and the Chief Justice, but she had not expressed concern about being under the disciplinary control of the executive, as suggested by the Chief Justice in his speech. Mr. Pitto said that he did not consider that he had been consulted before the Chief Justice made the written submission of March 7th, 2005. He said that discussion "tended to be more about the Chief Justice giving me his views." He did not dissent from those views, but thought that ultimately they were a matter for those drafting the Constitution, not to be imposed by the judiciary. He was not happy with the proposal of petitioning the Privy Council, and the Chief Justice was aware of this. Mr. Pitto spoke of one short meeting at which the Chief Justice's views were discussed with Dudley, J. and he did not dissent from them. He also, however, was not in favour of a petition to the Privy Council.

125 The position can be summarized as follows. There had been no formal consultation of the local judiciary. While its members would not have dissented from the changes that the Chief Justice wished to procure to the draft Constitution, they would not have approved of proactive attempts by the judiciary to achieve those changes, such as the proposed petition to the Privy Council. Nor would they have approved the aggressive terms of the Chief Justice's speech, which he had not discussed with them. The Chief Justice was, in reality, conducting a one-man campaign in the name of the judiciary as a whole.

126 Also open to criticism is the letter by the Chief Justice to the Chief Minister of August 11th, which purported to contain the submissions of all four members of the judiciary. The threat, if necessary, to petition Her Majesty through the Privy Council against errors of principle in the draft Constitution, was one which had no support from the other members of the judiciary and Mr. Pitto had made it plain that he was opposed to it.

127 The second criticism is that the Chief Justice acted as if the judiciary had equal standing to the Governments of the United Kingdom and Gibraltar in negotiating the draft constitution. The tone of the Chief

Justice's communications in relation to the draft Constitution was indeed high-handed and did not reflect the reality that the new Constitution was primarily a matter for the Governments of the United Kingdom and Gibraltar.

128 The third criticism is that the speech was deliberately worded so as to give rise to an implication of bad faith on the part of the two governments. There is force in this criticism. Anyone listening to the Chief Justice's address would have formed the impression that he was alleging that the Government had deliberately withheld from him details of the three provisions of the draft Constitution that gave him particular cause for concern. We would have been inclined to conclude that this was the subjective view of the Chief Justice at the time, but he did not, when giving evidence to the tribunal, seek to defend his words on that basis. He claimed to have been misunderstood. We are satisfied that the impression that his words created was deliberate.

129 The fourth criticism is that the address did not present a balanced view of the proposed Constitution or of the process by which it had been agreed. The Chief Justice himself accepted in evidence the force of this criticism. His speech was indeed thoroughly unbalanced. The draft Constitution was, as we will shortly explain, beneficial overall to Gibraltar. The Chief Justice represented it as if it had at its heart an attack on judicial independence.

130 Fifthly, the tribunal criticizes the Chief Justice for failing to make plain in his address that he had been consulted about the composition of the Judicial Service Commission. That criticism is not valid. The Chief Justice stated that the Chief Minister had provided him with details of the proposed composition of the Judicial Service Commission and that the judiciary had made proposals in relation to this. The tribunal also criticizes the Chief Justice for not referring to the reservations of Mr. Pitto and Dudley, J. These reservations related, however, to the proposal to petition the Privy Council, to which the Chief Justice did not refer in his address. This criticism is more appropriately directed to the letter of August 11th.

131 The sixth, last and most important criticism is that the Chief Justice's remarks were polemic in tone. This is coupled with the general criticism that the Chief Justice acted improperly in undertaking a public campaign with regard to part of the subject of the referendum. This calls for more detailed consideration.

132 The Chief Justice ended his speech as follows:

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

> the assurances do indeed provide the necessary safeguards. I am therefore in the process of putting together a team of constitutional experts who will give an independent opinion on whether the Constitution does provide for an independent judiciary given the recent communication from the UK and Gibraltar Governments. I shall make that opinion available to both Governments, to all members of the Gibraltar Bar and will also make it public. If there are still issues of concern I have advised the UK Government that I shall take up their offer of a meeting. If we do not agree on a way forward I shall seek the further advice of the expert team. I am already some way towards putting the team together and I hope to have a detailed, joint, opinion in my hands by mid-November at the latest."

133 The Chief Justice consulted Sir Sydney Kentridge, Q.C., Keir Starmer, Q.C. and Richard Tur. Their opinion, provided in November, expressed "considerable reservations" about the provisions of s.57, "both as to general constitutional principle and European Convention compliance." These related to the composition of the JSC and to the power given to the Governor under s.57(3). The advice nonetheless pointed out that the institution of a Judicial Service Commission was "a significant step towards ensuring judicial independence." Furthermore, the advice opened with the statement that the authors had "left out of account that the draft Constitution is undoubtedly an advance on the existing Gibraltar Constitution and colonial constitutions generally."

134 The Chief Justice and Sir Sydney Kentridge, Q.C. attended a meeting at the FCO where the only concession that they achieved was an addition to the explanatory note to the Constitution stating that the executive powers of the JSC were "subject only to an exceptional power of veto by the Governor." This did no more than repeat the undertaking already given to the Bar Council. The Chief Justice took no further action and the new Constitution was approved in a referendum on November 30th.

135 The new Constitution, laboriously negotiated between the United Kingdom and Gibraltar, represented a significant advance for the independence of Gibraltar. The Chief Justice's criticisms of aspects of the Constitution that advanced judicial independence but did not, in his view, go far enough were criticisms that he could fairly advance. They were, however, relatively insignificant in the context of the Constitution as a whole. In his speech the Chief Justice presented the draft Constitution as if it were a threat to the independence of the judiciary rather than a significant advance of this. The fact that the advance did not go as far as he wished could not justify action that might derail, or assist in derailing, the approval of the new Constitution on the forthcoming referendum. The Chief Justice's address carried that risk. When giving evidence the Chief

Justice confirmed that he was conscious that a referendum was in the offing. He said that he was not trying to influence votes but to influence the Constitution. Later he added: "I did not seriously consider that this would derail the referendum."

136 We accept that the Chief Justice's actions were motivated by the praiseworthy aim of promoting judicial independence. But to attempt to achieve this by a public and unbalanced attack on the draft Constitution shortly before the referendum showed a serious lack of judgment. The Chief Justice accepted that, with hindsight, his actions might be open to criticism. The problem with his conduct was that he did not exercise the foresight required of someone in his position. It may be open to question whether his headstrong action amounted to misbehaviour. It certainly demonstrated an inability to pay due regard to the likely political consequences of his actions.

The draft Judicial Service Bill

137 This is dealt with in paras. 5.1–5.35 of the tribunal's report. It marks the start of the most critical part of the case against the Chief Justice. At the heart of this case is the relationship between the Chief Justice and his wife, the extent to which he was party to her actions and the extent to which he was reasonably perceived, and should have appreciated that he would be reasonably perceived, as being party to her actions.

138 We have already commented on the fact that the Chief Justice and his wife were and are clearly devoted to one another. Her actions, throughout the story, misguided as they frequently were, demonstrated a passionate concern for her husband and his position. Passages in his evidence disclose devotion to and support for his wife. The Chief Justice did not have a policy of keeping any matters confidential from his wife. He shared with her an e-mail address. He also shared with her his own concerns. We would not suggest that a man in his position should not share matters that are confidential with his wife. If he does so, however, he implicitly undertakes responsibility for the maintenance by her of that confidence.

139 In the course of introducing the 2006 Order, the Government announced its intention of creating a Minister of Justice and passing a Judicial Service Act. On February 20th, the Chief Minister wrote to the Chief Justice recording that, at a dinner that had been given for judges of the Court of Appeal the previous week, the Chief Justice had told him that he would be going on holiday in Argentina with his daughter at the end of the following week (February 24th) and that the Chief Minister had promised to try to get the draft Judicial Service Bill to him before he left. The Chief Minister enclosed the draft Bill. He stated that the Government intended to publish the Bill the following week, which would be the beginning of a six-week consultation period, so that the Chief Justice would have more

time to respond on his return from holiday before the Bill went to Parliament. The letter ended: "Finally, since no other consultee will yet have seen the draft Bill, I must ask that you treat it confidentially and 'for your eyes only' until the consultation paper issues next week."

140 In evidence the Chief Justice confirmed that the letter also enclosed the consultation paper, although it is possible that he received this a little later. It was addressed to "the President and Justices of the Court of Appeal, the Chief Justice and other judges of the Supreme Court, the stipendiary magistrate, the Chairman of the Justices, the Chairman of the Bar Council (for consultation with him and the Bar Council) and the Attorney-General."

141 The draft Bill very largely reflected, as the consultation paper pointed out, provisions of the British Constitutional Reform Act 2005. This was true of s.5, which provided a mechanism under which the President of the Court of Appeal and the Chief Justice could have what the consultation paper described as "an appropriate and dignified method of making [the views of the judiciary] known to the Parliament, and through the Parliament, to the public at large." Section 6 provided:

"**President of the Courts of Gibraltar**

(1) The President of the Court of Appeal holds the office of President of the Courts of Gibraltar.

(2) As President of the Courts of Gibraltar he has overall responsibility—

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

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

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

(3) The President of the Courts of Gibraltar is president of the courts listed in subsection (4) and is entitled to sit in any of these courts.

(4) The courts are—

(a) The Court of Appeal;

(b) The Supreme Court;

(c) The Magistrates' Court;

(d) The Coroner's Court."

As to these provisions, the consultation paper stated:

> "Although the Court of Appeal is an itinerant court, it is nevertheless a Gibraltar Court and its President is therefore the most senior member of Gibraltar's own judiciary. The Government no longer considers it appropriate, in the context of the new Constitution, for the Court of Appeal to 'look like' an external court (even though it has never actually been that). Accordingly, s.6 establishes the President of the Court of Appeal as the President of the Courts of Gibraltar."

142 The Chief Justice said in evidence that he was horrified at the implication of s.6 for the administration of justice. It is plain that he was also horrified at the implication of the section for his own position. This is not surprising. The Chief Justice had regarded himself as head of the judiciary of Gibraltar, although that position had received no formal recognition. We consider that he was reasonable to do so, for the leadership role of that position was one more naturally performed by the senior member of the local judiciary rather than the President of a Court of Appeal that only visited Gibraltar from time to time.

143 The Chief Justice and his wife formed the view that s.6 of the Bill was directed at him personally and was intended to drive him from office by forcing his resignation. By the end of the hearing before the tribunal this was no longer his position, nor was it before the Committee. We consider that the Chief Justice and his wife could reasonably have concluded that s.6 was motivated, in part, by dissatisfaction with aspects of his own conduct in the office of Chief Justice but not that it was deliberately aimed at him, or at forcing his resignation.

144 The Chief Justice wrote to the Chief Minister on February 21st, stating that the provisions which put the present functions of the Chief Justice in the hands of a visiting President of the Court of Appeal were of particular concern. He stated that he felt that he must discuss the draft Bill with the members of the Court of Appeal while they were in Gibraltar that week. This was a breach of confidence that he should not have committed. The proper course would have been for the Chief Justice to ask the Chief Minister to agree to him doing this. In the event, his action forced the Chief Minister's hand and he immediately distributed the consultation paper to all the consultees.

145 On February 23rd, the Chief Justice asked the Registrar to send a copy of the draft Bill to every member of the Bar, together with a statement that he felt that it might have wider constitutional implications and inviting the views of the recipients. The tribunal inferred that this was a further breach of confidence. We are not of that view. The Chief Minister

had asked the Chief Justice to treat his copy as confidential until the start of the consultation. His initial breach of confidence had caused the Chief Minister to advance the start of consultation, thereby releasing the Chief Justice from the duty of confidentiality. The tribunal found that the Chief Justice's conduct in bypassing the Bar Council was not merely high-handed but deliberately provocative. We would agree that it was high-handed and provocative, but do not feel justified in finding that the latter was deliberate. It was inappropriate and ill-judged, as was demonstrated by the fact that only two members of the Bar responded to his request for their views. The Chief Justice had, however, been indirectly responsible for a much more reprehensible publication of the Government's proposals.

146 On February 22nd, Mrs. Schofield went to see Mr. Charles Gomez, a barrister with a sole practice, taking with her a copy of the draft Bill. According to his witness statement, she asked him to advise on its implications so far as she and her family were concerned. On the following day, *Vox* published an article under the heading "Now Caruana Attempts to Twist the Law." It purported to be based on a "leaked draft" of the Judicial Service Bill. It set out s.6 in the context of a description of the Chief Justice's receipt of the "leaked draft" and his reaction to it. It reported that Charles Gomez had confirmed that he was "looking to initiate proceedings to declare the act invalid after being consulted by a concerned citizen." The article alleged that the draft Bill had been deliberately disclosed to the Chief Justice just when he was about to go on holiday.

147 The tribunal found that the "leaked draft" that Mrs. Schofield had taken to Mr. Gomez was the draft that had been sent to the Chief Justice and that Mrs. Schofield and Mr. Gomez were together responsible for the article in *Vox*. The Chief Justice did not challenge these conclusions. He said, however, that he had only showed his wife s.6 of the Bill; that he did not know how she had come by a copy; that, although he had become aware, perhaps before he left for Argentina, that she had been to see Mr. Gomez, he had not expected her to go public; and that he might have "skim read" the article in *Vox* before he left for Argentina but that he did not discuss with his wife whether she had provided *Vox* with a copy of the draft Bill.

148 All of this evidence the tribunal rejected. It found that the Chief Justice had shown the draft Bill and the consultation paper to his wife as soon as he received them; that he left the draft Bill in their house where it was available to her; that he expected that she would "go public" and was at the very least content that she should do so and supportive of her in that respect; and that he discussed the article in *Vox* with her before he left for Argentina.

149 The tribunal based this last finding on the "overwhelming likelihood" of the Chief Justice having behaved in this way and stated that it found the Chief Justice's evidence on each of these matters "deliberately evasive." We have read the relevant part of the transcript of the evidence of the Chief Justice, and share the impression that his evidence made on the tribunal. We also consider that the tribunal's findings accord with the overwhelming likelihood of the situation. Both the Chief Justice and his wife were understandably deeply concerned at the provisions of s.6. The Chief Justice accepts that they discussed this. It was only to be expected that they would also discuss what, if any, action to take in the face of it. No reason has been advanced as to why Mrs. Schofield should conceal from her husband the actions that she proposed to take. Her witness statements are significantly silent as to what transpired at this stage of the story.

150 This was a discreditable episode. The copy of the Bill that the Chief Minister had disclosed to the Chief Justice in confidence in advance of the consultation period had been used to provide copy for an attack by *Vox* on the Government's proposals. The Chief Justice bore responsibility for permitting this to occur.

151 While the Chief Justice was on holiday in Argentina, his wife entered into e-mail correspondence with Mr. James Neish, Q.C., the Chairman of the Bar. On February 25th she sent him a lengthy e-mail making recommendations "as a member of the public and a person who may be affected by any constitutional and contractual implications of the draft Bill." They included suggestions as to what the Bar Council should do before meeting to discuss the draft Bill. These included that members disclose "personal, political and business relationship[s] with the Government of Gibraltar, Minister for Justice or any other member of the Gibraltar Government" and whether they had discussed the proposed Bill prior to it being referred to the Bar Council for consultation. The matters that she suggested the Council should consider when it did meet to discuss the draft Bill ended with—

> "whether the Chief Minister, in including these provisions, is demoting, demeaning, harassing, the justice for statements or decisions that he may have made in the performance in his role as Chief Justice about the Chief Minister and whether this is an abuse of office and/or interference with the Chief Justice."

152 The e-mail ended with a demand for a reply by the end of the following day, failing which Mrs. Schofield would go public. She ended by alleging that the section [implicitly s.6]—

> "to my mind is an 'attempted rape' of the Gibraltar Constitution and the Chief Justice's office and contract. In my view, it is intended to force a resignation of the Chief Justice unless he accepts a demotion

or to force him to sue in which case we shall hear calls for him to resign."

153 Mr. Neish made a short and restrained reply on February 27th. At about this time, Mrs. Schofield went to visit her family in Kenya. While she was away *Vox* carried, on March 2nd, an article that reported the Chief Justice's personal consultation of members of the Bar under a headline "Schofield bypasses Bar in legal clash." It also reported Mrs. Schofield's letter to the Bar Council acting "in my capacity as a private individual." The tribunal accepted that Mrs. Schofield was not responsible for providing *Vox* with this information.

154 The Chief Justice returned from holiday on March 15th, by which time his wife had returned from Kenya. He accepted that on the day of his return his wife, probably in the late afternoon, told him the gist of the e-mails that she had sent to Mr. Neish. He said that she told him that Mr. Neish had sent a bland reply. When asked for details of the conversation he said repeatedly that he could not remember. He said that he took very little interest in the matter and expected it to blow over. The tribunal found the Chief Justice's evidence on this "wholly unconvincing" and "frankly incredible." It found that he acquainted himself fully with the terms of her correspondence, that he did not expect the matter to blow over but that he was fully aware that his wife intended to pursue the matter as vigorously as she could, which indeed she did.

155 On the evening of March 15th, Mrs. Schofield sent a further e-mail to Mr. Neish in aggressive terms alleging that he and/or members of his firm had been involved in the drafting of the Bill and alleging that this gave rise to a conflict of interest. The Chief Justice said that he recalled his wife telling him that she had received this information from a local lawyer, but that he could not remember when this was. He said that he was surprised that she should have been typing e-mails on the evening of his return from Argentina and could not remember her sending this e-mail.

156 We consider it incredible that, after discussing with her husband her e-mail correspondence with the Chairman of the Bar, Mrs. Schofield would have sent this e-mail without discussing her intention to do so with her husband. We share the tribunal's conclusion that the likelihood is that he would have read the earlier e-mail correspondence at this point. What is more significant, however, is that he did not seek to dissuade her from sending the e-mail that she sent that evening.

157 The Bar Council met to consider the e-mails that had been sent by Mrs. Schofield. As a result of their deliberations, Mr. Neish sent the three letters of April 3rd that are quoted in detail in the tribunal's report. The first letter was to Mrs. Schofield protesting in strong terms at her conduct and including the following paragraph:

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

158 The second letter was to the Attorney-General, enclosing the previous correspondence with Mrs. Schofield, including his letter to her of April 3rd. This stated:

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

159 The third letter was to the Chief Justice, informing him of the letter that had been sent to the Attorney-General. It ended:

> "Mrs. Schofield is not an ordinary member of the public—she is the Chief Justice's wife. Her e-mails were therefore liable to be construed—as in fact they have been—as enjoying your express or implied approval or knowledge or as reflecting your and Mrs. Schofield's common views. We note that you have not distanced yourself from those e-mails."

It was at this point that the Chief Justice said that he first gave detailed consideration to the earlier e-mail correspondence.

160 It was put to the Chief Justice that the last sentence in this letter was an implicit invitation to distance himself from the statements in his wife's e-mails to the Bar Council. He accepted that these and subsequent e-mails sent by his wife could not properly or appropriately have been sent by him, but denied that he would be associated with them. He said that his wife was known to the Bar and well-known in Gibraltar as an independent-minded person. He did not consider that public opinion would necessarily think that her views were his. He said that he did not consider that the last sentence in Mr. Neish's letter to him was an implicit invitation to dissociate himself from his wife's e-mails. It was simply a statement of fact.

161 The tribunal was highly critical of this passage of the Chief Justice's evidence, rejecting it as untrue. It found that it must have been clear to any reader, and most especially to the Chief Justice, that the Bar Council considered that he should have distanced himself from his wife's e-mails, that by not doing so he had provided tacit support for the statements made in them, and that by the final sentence of the letter, the Bar Council was

inviting him to remedy the situation by making a statement distancing himself from the statements. The tribunal found it "extraordinary" that he did not do so and concluded that he knew that his silence would almost certainly be interpreted as support for his wife's views and was more than content that should be so.

162 We do not agree that the last sentence in Mr. Neish's letter was an implicit invitation to the Chief Justice to distance himself from his wife's conduct. Rather it implicitly accused him, in the light of his failure to do so, of approving her conduct and sharing her views. It expressly spelt out to the Chief Justice that these conclusions were a consequence of his silence. The reality was that the Chief Justice did largely share his wife's views. He believed that the Chief Minister was trying to get rid of him as Chief Justice. He also believed that some members of the Bar Council, and in particular Mr. Neish "as a good friend and ally" of the Chief Minister, were "partisan." At no stage did the Chief Justice suggest that he attempted to dissuade his wife from making the statements that she did. In the absence of any statement that he should not be associated with them, the natural conclusion that was drawn was that he shared her views.

163 The same is true of his wife's subsequent communications at this time. These included her e-mail to Mr. Peter Schirmer of *Vox* of April 4th, which she gave him express permission to publish. This made the following allegations, which were among those quoted by *Vox* in an article published on April 13th:

> "I consider the action by the Bar Council an attempt to harass me into silence. In a matter where I assert that the Chief Minister now clothed as Minister for Justice has been trying to get rid of the Chief Justice, the use of consultation and legislation to legitimise this long held ambition is an attempted rape of the Constitution and the Chief Justice."

164 We consider that the tribunal was right not to accept the Chief Justice's evidence that he was unaware of the e-mail sent by his wife to Mr. Neish on April 5th, in answer to his letter of April 3rd. On his own evidence, the Chief Justice asked for copies of his wife's e-mail correspondence when he received Mr. Neish's letter of April 3rd. His wife was plainly incensed by the letter that she received from Mr. Neish on the same day. How could they possibly have failed to discuss how she was going to respond? In the event, her letter included the allegation that Mr. Neish and other members of the Bar Council were guilty of "conduct unbecoming" in failing to recuse themselves from taking a part in making decisions in relation to the Judicial Service Bill. It also alleged that no Chief Justice had been put through what the Chief Justice had been put through since the Chief Minister came to power.

165 On April 25th, Mrs. Schofield sent a fax to the International

Commission of Jurists in Kenya, with copies to the British Foreign Secretary, the Chief Minister and the Leader of the Opposition. The letter set out a list of events dating back to 1998 as evidencing the intention of the Chief Minister to get rid of the Chief Justice. These included the maids issue and the MOT prosecution. This letter immediately entered the public domain, for it was the subject of an article in *The Gibraltar Chronicle* on the following day under the headline "'Why the Chief Minister wants to get rid of the Chief Justice' Mrs. Schofield tells Kenya Jurists Committee." We are satisfied that the Chief Justice was content that his wife should make these allegations. Indeed, it is significant that in his evidence to the tribunal he never suggested that he at any stage disapproved of the allegations made by his wife, remonstrated with her for making them or sought to dissuade her from making similar allegations in the future.

Mrs. Schofield's libel action

166 This action and its repercussions are covered by paras. 5.37–5.93 of the tribunal's report.

167 On April 10th, on Mrs. Schofield's instructions, Mr. Gomez wrote a letter addressed to "the General Council of the Bar in Gibraltar" alleging that Mr. Neish's letter of April 3rd was "a very serious defamation" in as much as it accused her of "interfering in the affairs of the Bar with the intention of inhibiting the Bar's freedom of expression and undermining the independence of the Bar." The claim called for an undertaking on behalf of the Council members not to repeat the allegations, failing which he had "firm instructions to apply for an injunction." Mr. Neish replied on April 12th, alleging that it was Mrs. Schofield who had made defamatory statements about members of the Bar Council and refusing to give an undertaking.

168 On April 13th, Mrs. Schofield issued defamation proceedings, naming Mr. Neish as sole defendant. The claim alleged that Mr. Neish's letter of April 3rd meant that her communications with the Bar Council were a dishonest and cynical manoeuvre and that she was motivated exclusively by a desire to protect her personal interests by inhibiting the Bar's freedom of expression and undermining its independence.

169 The Chief Justice stated in evidence that he could not recall any conversation with his wife about her intention to issue libel proceedings though she might have told him that she had sent a letter before action. He said that it would not have been appropriate for him to have dissociated himself from the libel action or to have interfered with the exercise of her legal rights. The tribunal did not accept that the Chief Justice was unaware of his wife's intention to issue defamation proceedings and nor do we. The tribunal was prepared to accept that the Chief Justice did not know the detailed nature of those proceedings until after they had been issued. We

consider that had the Chief Justice exercised reasonable prudence he would have found out precisely what action his wife was minded to take, for it should have been obvious to him that if she commenced a libel action against the Chairman of the Bar in relation to his letter it would have the potential to make his position very difficult, as indeed it did. Had he discovered the details of the claim his wife proposed to make, he should have sought to dissuade her, both out of consideration for her position and for his own. The accusations that she had made in her e-mails had been intemperate and inappropriate and the Chief Justice had, not unreasonably, been associated with them. Mr. Neish's response had been robust, but to base a claim for libel on it was asking for trouble. And trouble there was.

170 The Bar Council had agreed that if Mrs. Schofield commenced the threatened libel action, Mr. Neish would ask the Chief Justice to recuse himself from hearing any matters involving members of the Bar Council or their firms. One of those firms was Hassans. This was on the basis that they could not properly appear before the Chief Justice when his wife had issued proceedings against them with the approval of her husband. Although, in the event, Mr. Neish was named in the action as sole defendant, the Bar Council considered that, in accordance with Mr. Gomez's letter before action, the action was aimed against them as a whole. They concluded that clients on whose behalf they were acting could not be sure of having a fair hearing before the Chief Justice.

171 On the morning of April 16th, 2007, a case management conference was listed before the Chief Justice in the case of *Sonia Bossino* v. *Att.-Gen*. Hassans were acting for the claimant. At their request, Mr. Neish appeared at the hearing. He informed the Chief Justice of the decision of the Bar Council and asked him to recuse himself for the reasons set out by the tribunal in its report. The Chief Justice adjourned the application.

172 What then transpired is set out in detail in the tribunal's report. It is a confused and confusing picture. The background is that information was received by Mrs. Schofield from Hassans that on the following day, April 17th, a vote of no confidence in the Chief Justice was to be moved at the AGM of the Gibraltar Bar. The conclusion reached by Mrs. Schofield and Mr. Gomez was that both the recusal application and the proposed resolution at the AGM were intended to undermine Mrs. Schofield's defamation claim. The latter conclusion caused Mrs. Schofield and Mr. Gomez to request a hearing in chambers before the Chief Justice on the afternoon of April 16th. The tribunal found that the Chief Justice deliberately omitted from his first witness statement the fact that his wife had telephoned him to inform him of the possibility of this request. Mr. Beloff drew attention to the fact that this conversation featured in his wife's second statement and comments that this indicates either that he and his wife had no intention of concealing this information or is powerful

evidence that they act independently. We see the force of the former point and are not satisfied that the Chief Justice deliberately concealed the fact of the telephone conversation with his wife.

173 The Chief Justice sat on the afternoon of April 16th, on a chambers hearing, convened at the request of Mr. Gomez, on behalf of Mrs. Schofield, at which Mr. Gomez and his wife were present. The basic facts in relation to that hearing (set out in para. 5.73 of the tribunal's report) are not challenged. The tribunal concluded that the Chief Justice's conduct demonstrated "a reckless disregard for the requirements and reputation of the office of Chief Justice" and constituted "judicial misconduct of the most serious kind." We consider that these findings are over severe. The Chief Justice should not have agreed to an *ex parte* hearing when the party in question was his wife. The capacities in which she and Mr. Gomez appeared were as claimant and counsel in her libel action. Having wrongly entertained the hearing, the Chief Justice should have ascertained this at the outset and, having done so, permitted the hearing to go no further. That said, he granted no relief and made no order. His actions showed lack of judgment of a high order and amounted to judicial misconduct. It was not, however, judicial misconduct of the most serious kind. Nor would we conclude that the Chief Justice was motivated by "the need (as he saw it) for Mrs. Schofield's position as a claimant in her libel action to be protected" (para. 5.64). His conduct was bred of muddle, not design.

174 On May 3rd, Triay & Triay, who acted for Mr. Neish in the libel case, wrote a letter to the Deputy Registrar ("Re: *Schofield* v. *Neish*") asking for a copy of the judge's note of the application in that case that had taken place on April 16th. On instructions from the judge, Mr. Mendez wrote back on May 4th saying that no notes were taken and that the matter which was brought before him was not *Schofield* v. *Neish* but the *Bossino* recusal application. The Chief Justice's assertion that the hearing had been in the *Bossino* matter appears to us to have been a piece of *ex post facto* rationalization in an attempt at damage limitation. We do not, however, share the tribunal's view that his reply that no notes were taken was highly misleading or that his statement to the tribunal that he thought that Triay & Triay's request related to notes taken by him was an "afterthought." His understanding of the situation was, in fact, correct, as demonstrated by Triay & Triay's letter of May 9th expressing surprise that the judge should not have taken notes and asking for a copy of the notes taken by the court clerk.

175 In the event a vote of no confidence was not passed on April 17th. Instead the signatories' first memorandum was sent to the Governor.

176 The general recusal application that had been made in *Bossino* was restored on April 24th, and then withdrawn in the circumstances described in the tribunal's report. The Chief Justice permitted Mr. Gomez to be

present to represent his wife. Mr. Gomez explained that he was there because of concern that the "flurry of applications" was meant to put pressure on Mrs. Schofield in her libel action. The tribunal found that in treating Mrs. Schofield as an interested party, the Chief Justice was "to put it no higher" giving a degree of judicial credence to Mr. Gomez's submission that the purpose of the recusal application was to stifle the libel action and that he should not have done this. Rather, he should have recognized that his wife's continuing involvement in the application was yet another reason for his recusal and that his failure to recuse himself could only have inflicted further damage on his office of Chief Justice.

177 We do not draw the same conclusions from this episode. The hearing was in open court and it was on that basis that the Chief Justice said that it was open to Mr. Gomez to remain, albeit that he recognised the possibility that Mr. Gomez might seek to play some part in the proceedings. We cannot see that Mr. Gomez had any legitimate part to play in the recusal proceedings and it would have been better had the Chief Justice so held. It did not follow, however, that he accepted Mr. Gomez's assertion that the recusal proceedings were designed to put pressure on his wife. Nor do we think that the Chief Justice should have recused himself in the *Bossino* case. No application was made that he should do so. He came prepared to hear the general recusal application, which was not pursued.

The second memorandum

178 On May 21st, the signatories submitted to the Governor their second memorandum, setting out in detail their reasons for asserting that they had lost confidence in the ability of the Chief Justice to discharge his functions and that his continuance in office would cause prejudice to the administration of justice and to the reputation and image of Gibraltar. A copy of this was sent to the Chief Justice. This document ran to 20 pages. Most of the individual matters relied upon, subsequently featured in the statement of issues, were considered by the tribunal and have been considered by the Committee in its turn. There was one recurrent theme. Mrs. Schofield had repeatedly acted in a reprehensible manner in support of the Chief Justice and the Chief Justice had done nothing to dissociate himself from her conduct, leading to the inference that it had his approval.

The recusal application of May 22nd

179 The tribunal deals with this at paras. 5.94–5.102 of its report. The application was made by counsel for the claimant company, which was wholly owned by the Government. It was that the Chief Justice should recuse himself on the ground of apparent bias resulting from certain public statements by his wife from which he had not dissociated himself. The Chief Justice adjourned the application so that he could seek the assistance of an *amicus curiae*, but in doing so stated that there was an

interested party who had a right to be heard and who should be notified. The tribunal observed that there was no possible ground on which Mrs. Schofield could be treated as an interested party in this application and that the Chief Justice's failure to appreciate this was another example of his inability to comprehend the constraints and responsibilities of his office, in particular where Mrs. Schofield was concerned. We consider that that observation was well founded.

180 Before the date for the hearing of the adjourned application, the Chief Justice was suspended from office.

The cancellation of the opening of the legal year 2007–2008

181 This episode is dealt with in paras. 6.1–6.8 of the tribunal's report. On July 11th, Mr. Mendez, then the Acting Registrar, received instructions from the Chief Justice that he understood to mean that he would no longer be holding a ceremonial opening of the legal year. He made an announcement to that effect. There was an issue before the tribunal as to whether the Chief Justice had intended his instructions to relate solely to the forthcoming ceremony or to indicate the abolition of the ceremony for all time. The tribunal resolved this issue against the Chief Justice. We do not consider that there was a firm basis for doing so, nor that the issue is of significance. Nor do we consider that there was a firm basis for the tribunal's conclusion that the Chief Justice's decision was motivated by concern not to afford those whom he perceived as hostile to him the chance to criticize his conduct or challenge his views. Our conclusion is that the Chief Justice's conduct was probably motivated by a desire to mark his objection to being deprived of the position of head of the judiciary. The ceremony was a well-established part of Gibraltar's traditions and the Chief Justice must have anticipated that his action, even if restricted only to the forthcoming ceremony, would cause concern and dismay in Gibraltar. If he had any concern as to whether it would be appropriate for him to conduct the ceremony, this was a matter that he could and should have discussed with Stuart-Smith, P. who, in the event, took over responsibility for the ceremony. The cancellation occupied the front page of *The Gibraltar Chronicle* on July 12th, and provoked a leader headed "Justice is not one man's property." Once again the Chief Justice showed a lack of judgment in relation to his public conduct in a respect that was damaging to his office. The tribunal was justified in describing it as a "deliberately provocative act which only served to exacerbate existing tensions."

Mrs. Schofield's complaint against Mr. Vasquez, Q.C.

182 The tribunal deals with this in paras. 6.9–6.14 of its report. Mrs. Schofield made an unfounded disciplinary complaint against Mr. Vasquez in relation to a letter that he wrote to *The Gibraltar Chronicle*, which was

published on August 14th, 2007. She complained among other matters that this letter sought to undermine the Chief Justice in the eyes of the public. This is but one example of an ill-advised attempt by Mrs. Schofield to fight her husband's battles. The tribunal did not find that the Chief Justice was complicit in his wife's action, albeit that there would have been a natural inference that he approved it. We agree with Mr. Beloff that this was not an incident of overall significance.

The Chief Justice's proceedings for judicial review

183 The tribunal deals with this at paras. 6.15–6.36 of its report. The background to this part of the story is as follows. The Chief Justice was not the only person who had had criticisms to make of s.6 of the Judicial Service Bill. Thus:

(i) On March 5th, 2007, Sir Paul Kennedy wrote to the Legal Secretary to the Chief Minister giving the view of the members of the Court of Appeal. These were that, while there was no objection to the President of the Court of Appeal being given the office of President of the Courts of Gibraltar and overall responsibility for those courts, as he was not permanently resident in Gibraltar, the Bill should make it clear that "the *direct* responsibility for the day-to-day discharge of the duties set out in s.6(2)(b) and (c) of the Bill (as opposed to the *overall* responsibility) lies with the Chief Justice." [Emphasis supplied.]

(ii) On March 23rd, Dudley, J. wrote making similar points, but also questioning whether it was practical or desirable for the President rather than the Chief Justice to be the titular head of the courts. He suggested that the powers in s.6(2)(a) (b) and (c) should be vested in the Chief Justice. On April 2nd, Stuart-Smith, P. wrote on behalf of the Court of Appeal endorsing his comments in relation to s.6(2)(a).

(iii) On March 23rd, the President of the Gibraltar Magistrates Association wrote saying that on occasion the Association required prompt access to the head of the judiciary and expressing concern at the practicability of accessing the President at short notice.

(iv) On March 26th, the Governor wrote pointing out that it was likely to prove necessary for certain administrative functions to be carried out by the resident judiciary and suggesting that the Act should make express provision for this.

(v) On March 30th, the Bar Council wrote:

> "(i) Whilst recognising that the present incumbent of the Office of President of the Court of Appeal is the most senior judge in our 'judicial system' and, notwithstanding the advances in telecommunications systems, the Bar Council is not persuaded that it is practicable for the President of the Court of Appeal to be *de facto* President

of the Courts of Gibraltar. Accordingly, the Council does not support s.6(2) of the draft Judicial Service Act.

(ii) Section 6(3) may contravene or alternatively be inconsistent with the provisions of ss. 60(2), 62 and 64(1) of the Constitution."

184 The Government subsequently responded to these comments by amending s.6(3) of the draft Bill to read:

"(3) As President of the Courts of Gibraltar he has overall responsibility—

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

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

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

(4) Subject to subsection (3), for the Supreme Court and all lower courts the Chief Justice shall have direct day to day responsibility for the matters set out in subparagraphs (b) and (c) of subsection (3)."

The Act containing this wording came into force on July 5th.

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

186 On August 30th, 2007, the Chief Justice filed an application for judicial review as a claimant in his own court seeking a declaration that ss. 6

and 37(3) of the Judicial Service Act were *ultra vires* of the Constitution. The grounds for the claim attached to the claim form ended:

> "4.9 It is submitted that to demote the office of Chief Justice, and to appoint the President of the Court of Appeal as President of the Courts of Gibraltar, is to undermine the principle of judicial independence in Gibraltar, and to imperil the rights guaranteed in ss. 8(1) and 8(8) of the Constitution. This is because appointments to the Court of Appeal are short term and renewable. Renewal is on the recommendation of the Judicial Service Commission whose members are appointed in such a way as not to offer any guarantee of their independence.
>
> 4.10 It is not uncommon for the head of the judiciary not to sit habitually in the highest court of the jurisdiction in question. See the position of the Lord Chief Justice in England and Wales, the Lord President in Scotland, the Lord Chief Justice of Northern Ireland. See also the position of the Chief Justice of New Zealand before the abolition of appeal to Her Majesty in Council from that jurisdiction.
>
> 4.11 In contrast, the claimant is unaware of any jurisdiction in which a full-time professional judge resides, but in which the head of the judiciary is a short-term, part-time judge residing outside the jurisdiction."

The claim was withdrawn on December 13th on the ground that the Chief Justice could not cope simultaneously with judicial review proceedings and proceedings in relation to his own suspension.

187 The Chief Justice filed a statement in support of his application for judicial review which included the following allegations:

> "**Personal attempts to remove me from office**
>
> 14 In the course of late 1998 and early 1999 I was called to a number of meetings with the then Governor Sir Richard Luce. Sir Richard asked me to consider my position as Chief Justice and ultimately suggested that I accept a six-month warrant of appointment. When I pressed him as to the reason for his suggestions, he told me that the Chief Minister had made representations that my 'contract' be not renewed. I made it clear to the Governor that I had security of tenure under the Constitution and would stay in post as per the Constitution.
>
> 15 In 1999, at the ceremonial opening of the legal year, I spoke publicly of instances in which the delay or denial of funds by the Government had had the potential adversely to affect the administration of justice. A copy of my address is exhibited hereto as exhibit 7.
>
> 16 I referred to two particular incidents. First, I had sought funding

to attend a Judicial Studies Board seminar on the Woolf reforms which were to be introduced into Gibraltar. Gibraltar has no equivalent of the Judicial Studies Board. Funding for this was refused by the Government, although the U.K. Government eventually provided funding.

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

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

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

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

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

22 On September 4th, 2002, Desmond de Silva, Q.C. wrote to me, to record that he had received an approach from the Attorney-General, indicating that I would be assisted in finding judicial employment elsewhere if I were to leave Gibraltar. A copy of Sir Desmond's letter is exhibited hereto as exhibit 8.

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

188 The tribunal was critical of the Chief Justice in relation to a number of aspects of his application for judicial review. First, it found that, so far as this stage of the story were concerned, there was evidence that the Chief Justice and his wife were working together in relation to the legal proceedings that each had initiated. Secondly, it criticized the Chief Justice for the allegations against the Chief Minister and the Attorney-General that he chose to make in his statement in support of his application in that the allegations were neither well founded nor relevant to the application. Thirdly, it questioned the justification for bringing judicial review proceedings at all.

189 So far as the first point is concerned, there could be no objection to the Chief Justice and his wife assisting one another if the endeavours to which their mutual assistance related were not open to criticism. Indeed, it would be strange if they were not helping one another. Nevertheless, his wife stated in her witness statement that her husband had no involvement in her defamation proceedings and the Chief Justice confirmed this. Equally, he said that she had no hand in his judicial review application. So far as the latter is concerned the tribunal pointed out that papers disclosed by the Chief Justice's solicitors included an e-mail from his wife to them which expressed her views on some legal questions with which the action was concerned. Faced with this, the Chief Justice accepted that she was "putting her fingers in the pie" but said that this was to be discouraged. So far as the former is concerned, the tribunal drew attention to the strong similarity between the application by the Chief Justice and orders for which Mrs. Schofield applied on July 17th, in her libel action. The Chief Justice sought to explain this by saying that he and his wife, both lawyers, were likely to articulate matters in the same way.

190 The tribunal did not find this explanation acceptable and nor do we. Mrs. Schofield gave notice that she intended to apply for the following orders in her libel action:

> "3 A declaration that the current composition of the Judicial Service Commission as the Governor's advisory body on, *inter alia*, appointments for acting judges undermines the fundamental right to a fair trial under the Gibraltar Constitution ('the Constitution') and European Convention of Human Rights ('ECHR').
>
> 4 A declaration that s.6 of the Judicial Service Act is *ultra vires* the Constitution and therefore null and void.
>
> 5 A declaration that s.26(e) of the Judicial Service Act is *ultra vires* the Constitution and undermines independence of the judiciary.
>
> 6 Declarations that ss. 33(3) and 33(4) of the Judicial Service Act undermine independence of the judiciary in Gibraltar and therefore are null and void.

7 Sections 7(1)(d) and 37(3) of the Judicial Service Act are *ultra vires* the Constitution and therefore are null and void.

8 A declaration that ss. 42(1)(a), (b), (c), (d) and 42(2) of the Judicial Service Act are *ultra vires* the Constitution and undermines the independence of the judiciary in Gibraltar.

9 A declaration that the devolved powers to the Gibraltar Parliament do not empower Parliament to change any constitutional provisions or structures."

These were not appropriate orders to seek in her libel action. They appear to have been an attempt to duplicate the battle that the Chief Justice was about to launch by his judicial review proceedings. Their source would seem to be documents prepared in relation to those proceedings, kept in a file that was common to both the Chief Justice and his wife, together with conversations that she must have had with the Chief Justice about those proceedings.

191 What is more significant is that in his judicial review proceedings, the Chief Justice, for the first time, himself advanced allegations that his wife had previously made as to attempts by the Chief Minister to get rid of him stretching back to 1999. This lends strong support to the conclusion that the Chief Justice was in sympathy with the allegations made publicly by his wife at the earlier stages of the story.

192 In his statement, the Chief Justice accused the Chief Minister of having made personal attempts to oust him from office and alleged that the provisions of the Constitutional Reform Act and the Judicial Service Act that related to the role of the Chief Justice were designed to achieve the same end. This remained the Chief Justice's case at the start of the hearing before the tribunal. The Chief Justice's stance received some support from the Leader of the Opposition. He told the tribunal that he believed that there had been "an orchestrated campaign against him politically driven." Later he said:

"It seems to me that the only reason we have a head of the judiciary based in London is because Mr. Caruana got a bee in his bonnet about it and wanted to do it to spite the current Chief Justice. It is a pure value judgment, but it is consistent with his normal reactions when he deals with other people that cross him."

193 The Chief Minister gave evidence to the tribunal. He was asked about the Chief Justice's contention that Lord Luce had told him, in relation to the expiry of his warrant in 1999, that the Chief Minister had made representations that he should vacate office. He said that he had no recollection of making any such representation. He added in relation to that period:

> ". . . [I]t has never been my position that Derek Schofield should be removed from the bench and certainly not for any of the reasons at the time that the Government was unhappy with him about. But there have been occasions where we have believed that his behaviour was not what the Government would have expected of him."

194 The Chief Minister said that he knew nothing about the decision in 2002 to offer the Chief Justice a one-year warrant of appointment in place of the usual three-year warrant. He said that the Government exercised restraint in its public handling of "pretty provocative events, politically damaging, electorally damaging to the Government." The beginning of the "terminal process" that led the Government to form the view that Mr. Schofield could no longer remain as Chief Justice of Gibraltar were his wife's statements to the Bar Council and the Kenyan Jurists that the Chief Minister was trying to hound the Chief Justice out of office. He added that the process was concluded by—

> "Derek Schofield's witness statement in which for the first time, although the Government of course had believed it from the beginning, and we said so in our recusal application, that we thought it was not possible to distinguish so clinically the position of Mr. and Mrs. Schofield. It was actually confirmed in his statement when he actually swore a statement in his own court, openly accusing the Government of using executive and legislative means to remove him from office. At that point I think the Government decided that this is it. One of us has got to go."

195 By the end of the hearing before the tribunal, the Chief Justice had ceased to contend that the Chief Minister had tried personally and by legislative means to drive him from office. Instead it was submitted, as it has been before the Committee, that the Chief Justice had had reasonable grounds for forming that view. Our conclusions are as follows. At the time of the maids incident and the MOT prosecution, the Chief Justice had reasonable grounds to believe, and there are still reasonable grounds to believe, that the Government would have been happy to see the Chief Justice replaced, having particular regard to the furore that had followed his statement at the opening of the legal year in 1999. The Government may well have hoped that there would prove to be some means by which this could properly be achieved. The Chief Minister may well have made that view clear to Lord Luce in his regular meetings with him. It may well be that he shared the view, agreed to by the Attorney-General in August 2000, that "it would be a good idea if the Chief Justice could be found something elsewhere." The Chief Justice had, however, security of tenure, and no attempt was made to deprive him of this.

196 There was no justification for concluding that the Chief Minister had been involved in attempts to remove the Chief Justice from office in

1999 or 2000 or that he was responsible for the decision of the Governor to issue a warrant for only one year in 2002. Nor in the period from 2002 to 2006 was there any basis for concluding that the Chief Minister wished to engineer the removal of the Chief Justice from office.

197 The Chief Justice and an objective observer might have concluded that there was a possibility that the diminution in the standing of the Chief Justice brought about by the provisions in the 2006 Order and the Judicial Service Act reflected at least in part a conclusion, influenced by the Chief Justice's own performance in office, that it would be better for the position of head of the judiciary of Gibraltar to be filled by a person who had achieved judicial office carrying higher standing than that of Chief Justice of Gibraltar. It was not reasonable to conclude that the motive for the legislative changes was to get rid of the Chief Justice or to reduce his personal standing.

198 Had the Chief Justice's application for judicial review been supported by argument that focussed solely on the question of whether s.6 of the Judicial Service Act was constitutional, we consider that his action in making that application would have shown a grave lack of judgment. Bringing legal proceedings in the court over which he presided would have been bound to raise severe practical problems to the administration of justice in Gibraltar. They would be likely to be seen to be motivated not simply, or perhaps not at all, by the Chief Justice's concern for the Constitution of Gibraltar, but by concern for his personal position and as part of the battle that his wife was fighting on his behalf.

199 In the event, the Chief Justice ensured that such a conclusion would be drawn by supporting his application with a statement that alleged that the legislation was motivated by personal animosity against him on the part of the Chief Minister. This was based not on hard evidence but on conjecture. Even if that conjecture had been reasonable, which it was not, the Chief Justice should not have founded allegations upon it in his judicial review application. In the first place, the motives of the Chief Minister had no relevance to the constitutionality of the Judicial Service Act. In the second place, the allegations were calculated to damage the standing of his office and to render it at least questionable whether he could continue to hold that office. The tribunal was correct to hold that the action of the Chief Justice in bringing the judicial review proceedings constituted misbehaviour.

Inability and misbehaviour

200 As Mr. Beloff pointed out, there is a lack of clarity in paras. 7.35–7.42 of its report as to the precise basis upon which the tribunal held that the Chief Justice's conduct justified his removal from office under s.64(2) of the 2006 Order. They gave four instances of misbehaviour,

commenting that no single instance demonstrated that the Chief Justice was unfit to hold office, but did not hold that his cumulative misbehaviour demonstrated that he was unfit for office. Rather, the tribunal appears to have held that, by reason of a combination of defects of character, misbehaviour and the effects of his behaviour on how he and his office were perceived, his removal was justified because of his "inability" to discharge the functions of his office.

201 There is considerable jurisprudence on the test of both "misbehaviour" and "inability" in the context of the removal from office of a judge or public official. This demonstrates that there is a degree of overlap between the two. The most recent authoritative guidance on the meaning of misbehaviour is to be found in the advice of this Committee in the case of *Lawrence* v. *Att. Gen. (Grenada)* (4). That appeal was against the removal from office of the Director of Audit of Grenada under a provision in identical wording to that of s.64(2). Her misbehaviour had consisted of the single act of sending to the Minister of Finance, who was also the Prime Minister of Grenada, with copies to the Clerk of Parliament and the Speaker of the House of Representatives, of an intemperate and abusive letter that accused him of tampering with her report prior to its being laid before Parliament.

202 Giving the advice of the majority of the Committee, Lord Scott of Foscote remarked in *Lawrence* ([2007] 1 W.L.R. 1474, at para. 23) that "misbehaviour" was a word which drew its meaning from the context in which it was used. He went on (*ibid.*, at para. 25) to quote with approval para. 85 of the decision of Gray, J. in *Clark* v. *Vanstone* (1):

> "It is clear from these expressions of opinion that, in order to constitute misbehaviour by the holder of an office, the conduct concerned need not be criminal conduct and need not occur in the course of the performance of the duties of the office. For present purposes, the important proposition to be drawn from these expressions of opinion is that, in a case in which the term 'misbehaviour' is used with reference to the holder of an office, the content of its meaning is to be determined by reference to the effect of the conduct on the capacity of the person to continue to hold the office. In turn, the capacity to continue to hold an office has two aspects. The conduct of the person concerned might be such that it affects directly the person's ability to carry out the office. Alternatively, or in addition, it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed. In either case, the danger is that the office itself will be brought into disrepute as a result of the conduct of its holder. If that is likely to be the case, then the conduct

is properly characterised as misbehaviour for the purposes of the relevant legislation."

203 Lord Scott derived from this passage four ingredients that will normally need to be present before conduct can be characterized as "misbehaviour" for the purposes of removal from office. We consider that Lord Scott's analysis can helpfully be applied in the present case. The search for the four ingredients raises the following four questions:

(i) Has the Chief Justice's conduct affected directly his ability to carry out the duties and discharge the functions of his office?

(ii) Has that conduct adversely affected the perception of others as to his ability to carry out those duties and discharge those functions?

(iii) Would it be perceived to be inimical to the due administration of justice in Gibraltar if the Chief Justice remains in office?

(iv) Has the office of Chief Justice been brought into disrepute by the Chief Justice's conduct?

204 So far as "inability" is concerned, assistance can be derived from the decision of the House of Lords in *Stewart* v. *Scotland (Secy. of State)* (6). That appeal arose out of a report by the Lord President and the Lord Justice-Clerk to the Secretary of State for Scotland, pursuant to s.12(1) of the Sheriff Courts (Scotland) Act 1971, that the appellant was "unfit for office by reason of inability, neglect of duty or misbehaviour." The conduct that was the subject of investigation consisted of a consistent pattern of bizarre behaviour both on and off the Bench. The finding was that this did not constitute "misbehaviour" but was attributable to a character flaw which amounted to "inability." The House upheld the finding of the Court of Session that "inability" was not to be restricted to unfitness through illness but extended to unfitness through a defect in character. In the leading speech, Lord Jauncey of Tullichettle rejected the submission that the importance of judicial independence required that "inability" be accorded a narrow meaning. He held that the fact that the decision as to a sheriff's unfitness lay with two senior judges was the bulwark standing between the sheriff and any undue interference by the executive.

205 A similar point can be made in the present case. There is good reason to give "inability" in s.64(2) the wide meaning that the word naturally bears. If, for whatever reason, a judge becomes unable properly to perform his judicial function, it is desirable in the public interest that there should be power to remove him, provided always that the decision is taken by an appropriate and impartial tribunal.

206 We consider that it was open to the tribunal to proceed on the basis that defect of character and the effects of conduct reflecting that defect,

including incidents of misbehaviour, were cumulatively capable of amounting to "inability to discharge the functions of his office" within s.64(2). It remains to consider their finding that, on the facts of this case, such inability had been demonstrated in the case of the Chief Justice.

An overview

207 The tribunal heard the Chief Justice give evidence over the best part of two days. It took an adverse view of him as a witness. Repeatedly it found his evidence incredible and rejected it. We have reviewed the tribunal's findings and, on a number of occasions, concluded that there was no firm basis for rejecting the Chief Justice's evidence. However, on the central issue of the extent to which the Chief Justice was aware of his wife's actions and intentions we have concluded that the tribunal had good reason to reject the Chief Justice's evidence that he neither knew nor was particularly interested in what his wife was doing. The transcript fully supports the tribunal's finding that the Chief Justice was evasive. Repeatedly he said that he could not remember matters that one would expect to have been etched on his memory. It is simply incredible that he and his wife would not have discussed matters that were of great mutual concern and how they were going to react to them.

208 The evidence demonstrates that Mrs. Schofield has a strong personality and we have concluded that, in her relationship with her husband, it was the dominant personality. From the time of the public exchanges between the Government and her husband that followed his comments at the opening of the legal year in 1999 she formed the view that the Government, and in particular the Chief Minister, was bent on hounding her husband from office. She undoubtedly communicated her views to her husband. If he was not persuaded that she was right, he was not persuaded that she was wrong. Over time he also came to believe that the Chief Minister was trying to hound him from office.

209 The Chief Justice initially kept his thoughts to himself. His wife did not. She went public with them and she acted on them. There was never any indication that he was not content that she should do so, nor has he given any such indication to this day. His attitude has been that his wife is an independent person, that she is entitled to do and say what she chooses and that no one would reasonably associate him with his wife's conduct. In that he has been wrong. He has been associated, and reasonably associated, with his wife's conduct.

210 Finally, in his judicial review proceedings, the Chief Justice publicly adopted his wife's contention that the Chief Minister had, from 1999, been bent on driving him from office. Through his counsel he persisted in so contending at the opening of his case before the tribunal.

211 The Chief Minister gave evidence. He vigorously refuted the

suggestion that he and his Government had been attempting to drive the Chief Justice from office. He stated that, on the contrary, his Government had acted with considerable restraint in the face of provocation from the Chief Justice, and illustrated that contention at some length.

212 The transcript of the Chief Minister's evidence is compelling. So, it seems, was his evidence itself. It was not challenged by Mr. Fitzgerald, Q.C., who was acting for the Chief Justice. Rather, it was put to him that the Chief Justice had reasonable grounds for believing that he was bent on driving him from office. That also he refuted. "Reasonable grounds for belief" was the way in which the Chief Justice's case was advanced in Mr. Fitzgerald's closing submissions. Neither then nor since has the Chief Justice apologized for the allegations made against the Chief Minister that he has accepted were not justified.

213 This case has aspects of a Greek tragedy. The Chief Justice's wife's conduct in reaction to what she mistakenly believed were attempts to drive him from office threatened to make that office untenable by him unless he publicly dissociated himself from her conduct. This he was not prepared to do. He was not persuaded that her allegations were unfounded and in the end he publicly associated himself with them.

Conclusions

214 We turn to the four questions based on the approach of Lord Scott in *Lawrence* (4). The first requires consideration of the practical effect of the Chief Justice's conduct on his ability to discharge the functions of his office. So far as that is concerned the debate before us has focussed on the extent to which the Chief Justice might be obliged to recuse himself from trying cases involving those whom he himself has attacked or is seen as having attacked by reason of association with attacks made by his wife. As this depends in part on perception, it is convenient to address first the second question, which relates to the perception of others as to the Chief Justice's ability to perform his functions.

215 The tribunal had before it an abundance of evidence of the perception of others as to the consequences of the Chief Justice's conduct. The signatories to the memoranda were Louis Triay, Q.C., signing on his own behalf and on behalf of his firm Triay, Stagnetto & Neish; J.E. Triay, Q.C., signing on behalf of himself and of his firm Triay & Triay; James Levy, Q.C., on his own behalf and on behalf of his firm Hassans; A. Levy, on his own behalf and on behalf of his firm Attias & Levy; A.V. Stagnetto, Q.C.; David Dumas, Q.C.; and A.A. Vasquez, Q.C. A common theme of the second memorandum to which the signatories subscribed and of individual witness statements made by signatories or members of their firms was that, having failed to dissociate himself from his wife's public utterances, the Chief Justice was seen as supporting these. In a witness

statement which impressed the Committee as balanced and moderate, Mr. Francis Triay put his viewpoint as follows:

> "The size of our community is small, and because most land is owned by the Government of Gibraltar and most business activities require licensing by the Government in some way or another, the Government is necessarily involved in a large number of legal and business matters. The legal profession is also small in number and accordingly, it is very important for the proper functioning of the community and the administration of justice that Government representatives and those involved in the administration of justice keep to their proper roles within the small community. When the Chief Justice began to involve himself in political matters, I felt that he was exceeding his role as Chief Justice and this would undermine the administration of justice. This situation was made worse when unfortunately his wife began to crusade to protect him from what she perceived to be a conspiracy, since her actions have only served to further undermine his position as Chief Justice, especially as the Chief Justice has invariably taken up the same crusades.
>
> In my view, Mrs. Schofield has attempted to protect her husband but, in the process, she has created the very situation which she says she has tried to avoid, namely undermining and further polarising the position of the Chief Justice, especially as the Chief Justice has fought the same battles.
>
> I cannot know the extent to which the Chief Justice operated in a joint enterprise with his wife. My overall impression is that they must have acted in concert to some large extent in view of the fact that the points that she made were all ultimately to protect or related to the Chief Justice and that the Chief Justice did nothing to intervene or dissociate himself from what she did or her allegations. It would also be very unusual in a marriage, for a husband or wife to take such high profile action on a matter which necessarily affects the other, without the other being privy to and being part of the action taken, especially where the views of both are, in the main, the same."

216 We quote this because it reflects our own conclusions as to the association of the Chief Justice with his wife's public utterances. As to the consequences of this perception, the signatories put these as follows in their second memorandum:

> "We feel it is impossible for Schofield, C.J. to sit in cases involving judicial reviews of Government or ministerial decisions when his wife has very publicly accused the Chief Minister of wanting to get rid of her husband . . . Schofield, C.J. has not dissociated himself from those comments. Because he has not done so, a fair-minded and

> informed observer is bound to conclude that the Chief Justice either shares those views and is therefore likely to be biased against the Government or any Minister concerned or that, at the very least, there is a real possibility of subconscious bias on his part. Administrative law is an expanding area of law as much here in Gibraltar as in England and Wales. There are increasing numbers of court challenges to the decisions of public authorities. A judge who is prevented from dealing with such cases because of perceived prejudice or bias is a judge who cannot properly discharge his functions."

217 The second memorandum was polemic in tone and it would not be right to treat its contents as reflecting a universal viewpoint. Mr. Triay observed that the Chief Justice's conduct had polarized the legal profession in Gibraltar with some lawyers at times supportive of the Chief Justice whilst others have been against him. It would not be right, however, to treat the large body of lawyers who were prepared to subscribe to the memoranda as partisan. We accept that the picture painted in the second memorandum portrayed the fairly held views of a significant proportion of the legal practitioners in Gibraltar.

218 The tribunal made findings as to the effect that perceptions of bias caused by the Chief Justice's conduct would have on his ability to try cases. He himself had accepted that he would have problems in sitting on any case in which the Chief Minister was involved either as a witness or because a policy of Government for which he was responsible was in issue. The tribunal rightly observed that these were likely to be among the most important so far as concerned their impact on the public. The tribunal queried, however, the practicability of identifying cases involving the Government which did not involve the Chief Minister. We endorse these findings.

219 The tribunal further found that the Chief Justice would face a similar problem in sitting on cases involving Mr. Rhoda, the Attorney-General because of his allegation that the Attorney-General had been involved in an attempt to remove him in 1999. We do not consider that this could give rise to any appearance of bias 10 years later. More pertinent is the statement by Mr. Rhoda that he would feel a great deal of unease in appearing before the Chief Justice having regard to the fact that "the Schofields have taken issue and asked me to recuse myself from the Judicial Service Commission and as chairman of the Admissions and Disciplinary Committee in respect of Mrs. Schofield's complaint against Freddie Vasquez, Q.C." and the e-mail that she sent on April 5th, 2007, stating that she would be instructing her lawyers to ask the Attorney-General to recuse himself from dealing with any issue relating to herself or her husband. Overall, we consider that there would be no more than a possibility of a recusal application and that only in relation to a case in which the Attorney-General was personally involved.

220 The tribunal also found that the Chief Justice's known antipathy towards certain members of the Bar Council, in particular Mr. Neish, the leader of the Bar, would be likely to affect the ability of the Chief Justice to be seen to do justice in some individual cases. This raises the wider question of whether there would be a perception of bias against the lawyers who were, or who were in the firms of, the signatories to the two memoranda. Mr. Catania, a partner in the firm Attias & Levy, suggested in his witness statement that the Chief Justice would be perceived as favouring those lawyers who had supported him and his wife as opposed to those who had been party to the memoranda. While there would be a risk of this, we do not consider that it would be right in principle to consider as a ground for removal of a judge, an appearance of bias based on resentment that the judge might be thought to feel towards advocates who had sought his removal. Were this not so, an application to a judge to recuse himself might be self-fulfilling.

221 While we have not accepted all the allegations of apparent bias that would arise if the Chief Justice were to continue to sit, those that we have accepted are significant. A Chief Justice of Gibraltar who was unable to sit on cases involving the Government would be substantially disabled from performing his judicial function.

222 We turn to the third and fourth questions based on *Lawrence* (4), which are linked. Essentially the question is whether the behaviour of the Chief Justice has brought himself and his office into such disrepute that it would damage the image of the administration of justice in Gibraltar if he continues to serve as Chief Justice. No question has ever been raised as to the Chief Justice's judicial ability to resolve issues of fact and law. His conduct has, however, shown repeated and serious shortcomings and misjudgments in his public behaviour. The office of Chief Justice, it must be recognized, carries demands well beyond those placed upon ordinary sitting judges, however senior. We have concluded that the tribunal was right to criticize his conduct in that office in relation to the following episodes:

(i) The content of his address at the opening of the legal year in 1999 and his interchanges with the Government thereafter.

(ii) Failure to have due regard to his legal obligations in relation to the maids that he employed in 1996 and 1997.

(iii) His defence to the MOT prosecution in 2000.

(iv) His behaviour in court after the issue of the one-year warrant.

(v) The swearing in of the Deputy Governor in July 2006.

(vi) His reaction to the draft 2006 Constitution culminating in his speech at the opening of the legal year.

(vii) His initial reaction to the Judicial Service Bill.

(viii) Allowing his wife to appear before him in court on April 16th, 2007.

(ix) His reference to his wife's interest at the recusal application of May 22nd, 2007.

(x) The cancellation of the 2007 opening of the legal year ceremony.

(xi) His implicit support of repeated accusations made by his wife against the Government and the Chief Minister and against members of the Bar Council.

(xii) His judicial review proceedings and the allegations made against the Chief Minister in support of them.

223 These episodes demonstrated the defects of personality and attitude identified by the tribunal (at paras. 7.37–7.39 of its report). That indeed is the principal relevance of the episodes that predated 2006. The last two items also resulted in an inability to preside over hearings involving the Chief Minister because of the appearance of bias. There would also be a risk of applications to recuse himself in hearings involving the Attorney-General.

224 This conduct infringed almost every one of the principles in the two guides to judicial conduct that are set out in paras. 28 and 29, namely 2.2, 2.3, 4.1, 4.2, 4.3, 4.6 and 4.8 of the Bangalore Principles and 3.1 and 3.2 of the *Guide to Judicial Conduct* and the warning in this guide in relation to disqualification and to talking to the media with the greatest circumspection.

225 The conduct of the Chief Justice has brought him and his office into disrepute. The tribunal had evidence and submissions from a large proportion of those who practise in the courts of Gibraltar that in its perception his conduct had adversely affected his ability to carry out his duties and functions and that it would be inimical to the due administration of justice in Gibraltar if he remained in office. Indeed, it went further and submitted that his occupation of his office had been rendered untenable.

226 Mr. Mendez, who had always loyally served the Chief Justice as Deputy Registrar and who was praised by the tribunal as a reliable witness, spoke in his witness statement of his perception of the loss of respect sustained by the Chief Justice among the people of Gibraltar and added that if the Chief Justice returned to his post he would not continue working with him.

227 We have reached the conclusion that the actions of the Chief Justice and his wife have rendered his position as Chief Justice of Gibraltar

untenable. The Chief Minister was realistic in saying that the terminal process began with Mrs. Schofield's publicized statements to the Bar Council and to the Kenyan Jurists that the Chief Minister was trying to hound her husband out of office and ended when he brought judicial review proceedings in which he publicly adopted that allegation.

228 Although there were a number of incidents that qualified as misbehaviour we would follow the example of the tribunal in finding that these were incidents in a course of conduct that has resulted in an inability on the part of the Chief Justice to discharge the functions of his office.

229 Accordingly, we humbly advise Her Majesty that Schofield, C.J. be removed from the office of Chief Justice of Gibraltar.

230 **LORD HOPE OF CRAIGHEAD**, on behalf of himself, **LORD RODGER OF EARLSFERRY** and **BARONESS HALE OF RICHMOND:** I regret that I am unable to agree with the opinion of the majority in this extremely important and very troublesome case. While we share their view that in numerous respects the tribunal's criticisms of the Chief Justice of Gibraltar cannot be accepted (see paras. 50–52, 55–56, 71–73, 78, 82–83, 110–111, 113, 145, 172–174, 181 and 219–220), I find myself in the same position as Lord Rodger and Lady Hale. We do not regard the remaining grounds of criticism as justifying the conclusion which the majority have reached that he ought to be removed from his office of Chief Justice on the ground of inability to discharge the functions of that office. The following are my reasons for reaching this view.

Procedural background

231 Section 64 of the Gibraltar Constitution Order 2006 ("the Order") provides that the Chief Justice shall be removed from office by the Governor if the question of his removal has, at the request of the Governor made in pursuance of s.64(4), been referred by Her Majesty to the Judicial Committee of the Privy Council and the Judicial Committee has advised Her Majesty that the judge ought to be removed from office "for inability to discharge the functions of his office . . . or for misbehaviour": see s.64(2). Section 64(4) lays down the procedure that the Governor must follow before he makes such a request. He must appoint a tribunal whose task is to inquire into the matter, to report on the facts to the Governor and to advise him whether he should request that the question of the judge's removal should be referred by Her Majesty to the Judicial Committee. If the tribunal so advises, the Governor is required by the sub-section to request that the question be referred accordingly.

232 The steps laid down by s.64(4) of the Order have all been fulfilled. A tribunal was duly appointed. There were two hearings for directions, which were followed by a full hearing at which evidence was led. Having

considered the evidence and a substantial number of documents, the tribunal concluded that the Chief Justice is unable to discharge the functions of his office and that this inability warrants his removal from office: para. 7.42. Accordingly, it advised the Governor that he should request that the question of his removal should be referred by Her Majesty to the Judicial Committee. It is now for the Board to consider whether the Chief Justice should be removed from office. It is a heavy responsibility. We must look at the facts with an appropriate measure of detachment from the cut and thrust that characterized the events that gave rise to this procedure. Our task is to set them into a wider context in the light of our own knowledge and experience of the relationships that may develop between the judiciary and the executive. We must be sensitive to the fact that it takes two to create an argument, and to the risk that one side or the other may be overreacting to perceived insults. Above all, we must be careful not to undermine the principle of independence by judging too harshly one man's judgment of what it required of him.

233 The Board is not, it must be appreciated, sitting as a court of appeal. The jurisdiction which it is required to exercise in a case of this kind is an original jurisdiction. It must make up its own mind as to whether or not the allegation that the Chief Justice is unable to discharge the functions of his office has been made out. The raw material that it needs to address this issue is to be found in the report and the supporting documents. But the tribunal's findings are not binding on the Board, nor is the conclusion that the tribunal drew from those findings. The weight to be given to them must depend on whether the Board is satisfied that the tribunal addressed the issues that were before them fully and fairly, and that it directed its mind to the right questions when it reached the conclusion that the Chief Justice should be removed from office.

234 The report is, as one would expect of such a distinguished tribunal, clear and comprehensive. I see no reason to doubt the fairness of the procedure that was adopted. Nevertheless, it seems to me that the report suffers from a number of significant defects and that, taken overall, it requires to be approached with a great deal of caution. Although the tribunal says in para. 1.21 that it took full account of complimentary remarks made by a number of witnesses, the impression that is created by the remorseless criticism of him that follows is that there was a marked lack of balance in its approach to the issues that were before it. I have the distinct impression that it failed to give proper weight to the context in which the various events which it was considering had arisen and to analyse them with a due sense of perspective and detachment. It seems to me that, in the result, it has presented us with a one-sided version of these events. It did not pay adequate regard to the situation in which the Chief Justice found himself as those events unfolded, to the room for differences of opinion as to what upholding the principle of judicial independence

required of him and to the nature of the jurisdiction in which he was operating.

235 I accept with gratitude the careful way in which, for the majority, Lord Phillips has reviewed the facts and analysed the tribunal's report. But, for the reasons I shall explain, I would draw a different conclusion than he does from the product of this analysis. Here too I think that the approach lacks the necessary sense of perspective and detachment. It fails to give proper weight to the crucial importance of protecting senior judges against attacks by the executive upon their efforts to uphold judicial independence in their jurisdiction. Errors of judgment there may well have been. But to say that this amounts to an inability to discharge the functions of the office within the meaning of s.64(2) of the Order which justifies his removal from office seems to me to go too far. It risks setting a dangerous precedent.

Judicial independence

236 It is a striking fact that the first and last of the episodes listed by the majority as those for which they consider that the tribunal was right to criticize the Chief Justice's conduct (para. 222) were instances where he was addressing himself to what he saw as risks to the independence of the judiciary. This was the theme of the relevant part of his address at the opening of the legal year in 1999. It was also the theme of his statement that was filed in support of his proceedings for judicial review on August 29th, 2007. Leaving aside some of the earlier episodes which fall outside this pattern, it is a theme that runs right through the problems that his relationship with the executive gave rise to. One of the central questions in this case is how far it was open to the Chief Justice to exercise his own judgment as to what the need to protect the independence of the judiciary required of him.

237 In his address to the Commonwealth Law Conference in Nairobi on September 12th, 2007, Lord Phillips of Worth Matravers, C.J. said: "A judge should value his independence above gold. Not for his or her own benefit, but because it is of the essence of the rule of law." Nine years earlier, in June 1998, the Chief Justice was among the group of parliamentarians, judges, lawyers and legal academics who joined together at Latimer House at a colloquium on parliamentary sovereignty and judicial independence within the Commonwealth. He participated in these discussions as a representative of the Commonwealth Magistrates' and Judges' Association and presented a paper on maintaining judicial independence in a small jurisdiction. He brought to these discussions his own experience of the risks to the independence of the judiciary in Commonwealth Africa. There were other examples that would have had a part to play in these discussions, notably the way in which Gubbay, C.J. of Zimbabwe had been forced out of office in that jurisdiction by the executive. The product

of the colloquium was the Latimer House Guidelines in which various principles were set out for preserving judicial independence. There is no doubt that the Chief Justice saw it as part of his mission in life to promote these principles and, by doing so, to set an example for others in small jurisdictions such as his own. He may be criticized for the way in which he pursued this aim. He was perhaps too ready to perceive threats to his independence when in reality there were none. Perhaps he took insufficient care in his choice of language. But the importance of the principle is not in doubt. I do not detect any reasons for doubting his good faith in seeking to do all that he could to uphold it.

238 The Chief Justice is by no means alone among the holders of this office in having said or done things in pursuit of judicial independence or the rule of law that have given rise to controversy. In his address at the opening of the legal year in Trinidad and Tobago on September 16th, 1999, de la Bastide, C.J. said that efforts were being made to make the judiciary's access to funds voted to it by Parliament subject to the approval or disapproval of the Attorney-General and that if this were to happen he would have a stranglehold on the judiciary. He went on to express fears that the independence of the Bar was being compromised and that the President of the Law Association had joined with the Attorney-General to subvert the independence of the judiciary. These and other remarks gave rise to a lengthy and acrimonious statement by the Attorney-General and a caustic press statement by the President of the Law Association: Sir Fred Phillips, *Commonwealth Caribbean Constitutional Law*, at 280. Rt. Hon. Telford Georges was asked to intervene in the dispute. He drew attention to flaws in a statement to Parliament by the Attorney-General in which he claimed that he had responsibility for overseeing the judiciary, but he ended his report with a warning that highly placed judges should not lose their nerve and descend, or threaten to descend, into the arena when provoked (Phillips, *op. cit.*, at 281–282). A commission of inquiry was appointed by the Government to investigate the administration of justice in Trinidad and Tobago presided over by Lord Mackay of Clashfern. It found that the Chief Justice's allegations that the executive was endeavouring to undermine the independence of the judiciary were not well founded. But the Chief Justice's ability to continue to perform the duties of his office was not called into question.

239 Bruising exchanges between the senior judiciary and the executive are not unknown in England and Wales, and the behaviour of the senior judiciary is not always above reproach. In December 1934, Lord Hewart, C.J.'s attack on the Lord Chancellor and permanent officials in the Lord Chancellor's Department for their supposed attempt, in the Supreme Court of Judicature Bill, to interfere with the independence of the judiciary was so scathing, so ill-judged and so extreme that only the intervention of the Marquess of Reading saved the day: *Hansard*, *H.L. Debates*, vol. 95, at

cols. 224–237. Lord Lane was Chief Justice when Mrs. Thatcher was Prime Minister and it fell to Lord Mackay of Clashfern as Lord Chancellor to promote the reforms to the legal profession which were introduced by the Courts and Legal Services Act 1990. In a debate in the House of Lords on April 7th, 1989, he was subjected to a sustained and bitter attack by the senior judiciary. In the course of the debate, Lord Lane accused him of discourtesy in failing to consult him before he announced the proposed reforms and, in a passage which was widely regarded as intemperate, of conduct that was reminiscent of that perpetrated by Nazi Germany: *Hansard*, *H.L. Debates*, vol. 505, at cols. 1329–1331. In a debate in the House of Lords on April 7th, 1989, Lord Mackay was able to set the record straight by referring to an exchange of letters between himself and Lord Lane before the green papers were published. He told the House that Lord Lane had authorized him to say he withdrew the word "discourteous" (*op. cit.*, at col. 1475). No-one, of course, suggested that any steps should be taken to remove either Lord Hewart or Lord Lane from office because of their remarks.

240 It is also not unknown for a member of the executive to perceive a slight by a member of the senior judiciary in asserting his independence when in reality there is none. In the course of his address to the Commonwealth Law Conference in Nairobi on September 12th, 2007, Lord Phillips recalled Charles Clarke's furious public reaction, when he was Home Secretary, to the refusal by Lord Bingham of Cornhill, the Senior Law Lord, to meet him to discuss issues of principle that might be raised by the measures that he was proposing to meet the challenge of terrorism. He failed to appreciate, of course, that it was not open to Lord Bingham to risk compromising his judicial independence by entering into discussions of that kind with the executive.

241 The ability of the press too to stir up trouble must not be underestimated. As Lord Phillips has mentioned (para. 27), Gibraltar has a particularly lively press, anxious for copy and, in common with the media in other jurisdictions, eager to identify any actual or supposed conflict between the judiciary and the executive. I encountered this phenomenon during my last year as Lord President of the Court of Session when Michael Forsyth was the Secretary of State for Scotland. He decided to follow the example of the Home Secretary, Michael Howard, in his approach to criminal justice which had been criticized vigorously and in public by the Chief Justice, Lord Taylor of Gosforth. In *H.M. Advocate* v. *McKay* (3) in which the Crown sought to abandon an appeal against a sentence on the ground that it was unduly lenient. I took the opportunity (1996 J.C. at 115), in view of the concern that was being expressed on this issue south of the border, to assert the court's right to exercise leniency in the matter of sentencing whenever this was appropriate. This attracted the headline in *The Scotsman's* report the next day: "Warning over threat to

justice." From then on, the press sought to exploit what they saw as a rift between me and the Secretary of State over issues of policy. As report fed upon report, the number of occasions on which I had intervened were said to have been much greater than they actually were. So much so that when it was announced that I was to resign as Lord President on my appointment as a Lord of Appeal in Ordinary the headlines were "Was he pushed or did he jump?" and "Forsyth tightens grip on crime as Lord Hope quits." I was able to correct this impression in an interview after my resignation. But it was obvious to me that any attempt to do so earlier would only have provided the press with further copy and made matters worse.

242 I refer to these examples, and others could no doubt be cited (see, for example, the matters referred to in para. 5 of Lord Mustill's report of the tribunal in the question of removing Sharma, C.J. from office as Chief Justice of Trinidad and Tobago), in order to emphasize the latitude that must be given to senior judges when they engage with the executive on matters which may be thought to affect the independence of the judiciary. Upholding that principle is one of their most important responsibilities. The rule of law depends upon it. Of course, they must be careful, as Rt. Hon. Telford Georges remarked, not to descend into the arena when they are provoked. To do so risks bringing their office into disrepute. But sometimes a venture in that direction is unavoidable in order to make the point that there is a boundary beyond which the executive may not go in its dealings with the judiciary. From time to time mistakes will be made, as tends to happen in the heat of battle. But they should not be characterized as instances of misbehaviour or indicative of inability. That would only be appropriate in the most extreme case. Ideally, it would only be after a warning has been given by a higher judicial authority that conduct of a kind which has given offence out of all proportion to the circumstances must not be repeated. In the case of this Chief Justice no such warning was given. It is unclear who, if anyone, was in a position to do this. He was, in effect, on his own. All the more reason for according him a measure of latitude, so long as his actions were not malicious or in bad faith.

The episodes in general

243 The majority have concluded that the tribunal was right to criticize the Chief Justice in relation to the 12 episodes that they list in para. 222 of their judgment. I wish to concentrate on only four of them: the first, the seventh and the last two. As for the remainder, I would make these brief points. First, as the majority have observed (para. 112), there was an interval of four years between the fourth episode, which relates to his behaviour after the issue of the one-year warrant on February 7th, 2002 in respect of which the majority reject the tribunal's findings of bad faith and collusion (para. 111), and the fifth episode in July 2006. No criticism is

made of the behaviour of the Chief Justice during this period, either on or off the Bench. This is a strong indication that, whatever one is to make of these earlier episodes, they are not indicative of an inability to discharge the functions of his office. So I would discount the second, third and fourth episodes entirely from the overall assessment. The first episode, as it forms part of a pattern, does deserve further scrutiny.

244 As for the fifth episode, the swearing-in of the Deputy Governor, the majority say that the tribunal was justified in describing this as disgraceful behaviour and that it could properly be described as misbehaviour although not of major consequence. It seems to me, however, that if, as they say, it was not of major consequence—a view with which I agree—it must follow that it was not misbehaviour of the kind that would justify removal from office. This was an isolated incident, and I accord it a low priority in the overall assessment of inability. The sixth episode relates to the debate over the 2006 Constitution. The majority conclude that the Chief Justice's actions on this occasion were motivated by the praiseworthy aim of promoting judicial independence but that this showed a serious lack of judgment. They say that it may be open to question whether this amounted to misbehaviour but that it showed an inability to pay due regard to the consequences of his actions. In my opinion the appropriate finding, in the light of these remarks, is that it has not been shown that this was an example of misbehaviour. I agree that his lack of judgment falls to be taken into account in the overall assessment of inability. But I would accord him greater latitude for mistakes of judgment in pursuit of that aim than he has been given by the majority.

245 I leave aside for the moment the seventh episode. As for the eighth which relates to the Chief Justice's action in allowing his wife to appear before him in court on April 16th, 2007, I think that the proper conclusion in the light of the majority's comments (para. 177), with which I agree, is that it cannot be characterized as an example of misbehaviour. In regard to the ninth episode as to his wife's interest at the recusal application of May 22nd, 2007, the majority accept the tribunal's conclusion (para. 179) that he had no possible ground for treating his wife as an interested party who should be notified and that this was an example of his inability to comprehend the constraints and responsibilities of his office, particularly where his wife was concerned. While his conduct on this occasion is open to some criticism, it is not said to have led to an injustice and had no lasting effect. I would regard it as insignificant in the overall assessment. In regard to the tenth episode, the cancellation of the opening of the legal year 2007 to 2008, the majority reject the tribunal's main conclusions about it which were against the Chief Justice. But they accept its description of it as a deliberately provocative act which only served to exacerbate existing tensions (para. 181). I agree that he showed a lack of judgment, but I also agree that his conduct was probably motivated by a

desire to mark his objection to being deprived by the legislative reform of the position as head of the judiciary. I would not leave this episode out of account in the overall assessment of inability. But it needs to be put carefully into the overall context.

246 As for the overall context, two other factors need to be taken into account in the assessment. The first is the absence of any suggestion that the Chief Justice was incapable of performing his judicial duties. As the majority recognize, no question has ever been raised about his judicial ability to resolve issues of fact and law (see para. 222). This is an important factor in his favour. To a substantial degree, his performance of the duties of the office was beyond reproach. The second is to be found in the evidence of Mr. Peter Caruana, Q.C., the Chief Minister of Gibraltar. He gave evidence on the sixth day of the hearing. The tribunal preferred his evidence to that of the Chief Justice where they were in disagreement. He insisted that it had never been his view that the Chief Justice's contract should not be renewed or that he should be removed from office until the Government had adopted that position in the light of the events of 2006 and 2007. He said that it had never been his position that he should be removed from the Bench, although there had been occasions when the Government believed that his behaviour was not what it would have expected of him. In cross-examination, when asked to pinpoint the stage at which, in his view, the public interest required him to be no longer Chief Justice of Gibraltar, he said that the beginning of the terminal process was probably his wife's statements about him being hounded out of office and the things she was saying to Kenyan jurists and the Bar Council, and that it was concluded by his witness statement in support of his claim for judicial review in which he openly accused the Government of using executive and legislative means to remove him from office. Looking at the overall history, he accepted that, while there were periods of tension, there were quite long periods of complete normality of relations.

247 The conclusion that I would draw from this evidence is that the key to the case against the Chief Justice lies in these two episodes: his wife's behaviour and the extent to which, if at all, it is right to hold what she said or did against him; and the remarks that he made in his witness statement. As for the rest, there is an obvious danger in highlighting in a single inquiry a series of relatively isolated instances of misguided, tactless or irritable behaviour which extend over many years. A sense of perspective is lost unless one takes account of the whole picture, including the long periods when relations with the executive were perfectly normal. Had it not been for these two episodes, which the Chief Minister himself identified as marking the start and the end of the terminal process, there would have been no case for his removal from office. It is with that background that I turn to the first, seventh and last two episodes.

The first episode: the opening of the legal year 1999

248 As I have said, the interval of time between the group of episodes of which this forms part and those that follow is a strong indication that, whatever one is to make of them, they are not indicative of the Chief Justice's inability to discharge the functions of his office. The Chief Minister's evidence supports this assessment. Furthermore the majority, I think rightly, reject the tribunal's findings of bad faith and its decision to treat this matter as an incident of misbehaviour forming part of the justification for removing him from office ten years later (paras. 55 and 56). But they say that his remarks, which are quoted in para. 2.4 of the tribunal's report, were a demonstration of bad judgment which has relevance to the question whether there was a defect of character and personality resulting in a current inability to perform the functions of his office.

249 In my opinion, against the background of what had been discussed and agreed at Latimer House in June 1998 and was published as the Latimer House Principles in the *Commonwealth Judicial Journal* in December 1998, this is an unduly harsh judgment. The Chief Justice's remarks were comparatively restrained in comparison with those which had been made on the same theme by de la Bastide, C.J. in Trinidad and Tobago a month earlier. It is true that the principle in the guidelines that the administration of moneys allocated to the judiciary should be under the control of the judiciary did not meet with the approval of the Commonwealth heads of government in December 2003. But that was long after the date of this episode. A fair interpretation of the Chief Justice's remarks is that he was putting down a marker for further discussion with the executive during the coming year. This was in accordance with the agreed guidelines as they stood at the time, although the unspoken examples of interference that he had in mind did not really stand up to detailed scrutiny. The political storm which ensued was due to a substantial extent to the efforts of opposition politicians and the press which provoked what might be thought to have been a surprising overreaction by the executive. Wisely, the Chief Justice did not pursue this line in his future addresses.

The last episode: the statement in the judicial review proceedings

250 I take this episode next, as it is linked to the first by the Chief Justice's concern to uphold and protect the independence of the judiciary. The majority say that there are grounds for thinking that, even if the application for judicial review had been supported by argument that focussed solely on whether s.6 of the Judicial Service Bill was unconstitutional, his action in making the application in his own name would have shown a grave lack of judgment in view of the practical problems to which this would give rise (para. 198). But the real burden of their criticism of

him is directed to what he said in his statement, passages from which are quoted in paras. 6.19–6.20 of the tribunal's report.

251 The statement should, of course, be read as a whole. It is true that there are passages in it which contain serious allegations against the executive under the headings "Personal attempts to remove me from office" (in paras. 14–23), "Legislative attempts to remove me from office/diminish the office of Chief Justice" (in paras. 24–32) and "Reduction of powers of the office of Chief Justice" (in paras. 33–48). But the Chief Justice set out his reasons for making the statement (in paras. 3–4), where he said:

> "I have given anxious thought before bringing this action, but consider that I am obliged to do so. I am gravely concerned that the [Judicial Service Act] undermines the rule of law in Gibraltar, in that it undermines the principle of judicial independence. The JSA diminishes the office of Chief Justice and gives its powers to the President of the Court of Appeal who resides outside Gibraltar and necessarily will be less familiar with domestic issues.
>
> In order to demonstrate that my concerns are not of a purely theoretical nature, I will give examples of instances in which those whom the JSA entrusts with safeguarding judicial independence failed to act with proper regard for the independence of the judiciary."

In para. 32, although he said that he believed that the executive's determination to press ahead with the Bill was born out of a desire to diminish his powers as Chief Justice because he would not leave, he referred to his concern that this would have on the powers of future Chief Justices. In para. 42, he said that he was taking the proceedings not for the purpose of protecting his own position but to safeguard the office of Chief Justice and the principle of judicial independence.

252 As the tribunal records in para. 6.22 of its report, the Chief Justice said in evidence that he had signed the statement after taking legal advice and in good faith and that he considered that there was an evidential basis for everything that he had stated. He repeated his belief that he had been the victim of a series of personal and legislative attempts to remove him from office and that the Attorney-General was knowingly involved in an improper attempt to remove him. He said that he had been reluctant to include these claims because he knew that this would be criticized but that he had accepted legal advice that he ought to do so. The tribunal was shown evidence that contradicted the Chief Justice's evidence about his reluctance and it did not accept his evidence on this point (para. 6.23). It also rejected his claim that his allegations were well founded. But it did not go so far as to hold that he was acting in bad faith because he knew that his allegations were baseless. The majority do not make such a

finding against him either. Their criticism of him is that his allegations would be seen as motivated not simply by concern for the Constitution of Gibraltar but by concern for his personal position and as part of the battle that his wife was fighting on his behalf (para. 198). But it seems to me that it is open to question whether this is a fair reading of the statement as a whole, having regard to what he said in paras. 4, 32 and 42.

253 That having been said, I would accept that the Chief Justice's conduct in bringing these proceedings and supporting it by a statement in these terms raises a serious question as to whether he had shown that he was unable to discharge the functions of his office or was guilty of misbehaviour of a kind which justified his removal.

The seventh and penultimate episodes: Mrs. Schofield

254 Common to these episodes is the allegation that the Chief Justice was aligning himself with his wife's allegations, which she started making after the opening ceremony in 1999, that the executive were trying to hound him out of office, and that his actions give rise at least to the perception that they were helping each other in the respective legal proceedings which they were taking.

255 This gives rise to an important issue of principle. To what extent, and in what circumstances, is a judge to be held accountable for the actions of his or her spouse or other close relatives? It should be said at once that the circumstances of this case are, in this respect, highly unusual. Mrs. Schofield is, as the majority have noted, a practising member of the Kenyan Bar and she possesses a strong, indeed headstrong, personality (para. 34). Some indication of her highly unconventional behaviour can be obtained from the terms of her written application for disclosure which the tribunal received in the course of its inquiry and which, at the close of the proceedings on the sixth day of the hearing, it rejected (see the opening pages of the transcript of the proceedings on that day). At first sight, of course, she alone is answerable for her own actions and anything that she said or did that might be regarded as misbehaviour cannot be attributed to the Chief Justice. But the case is not as easy as that, because she was conducting a highly articulate and provocative campaign in his defence in the belief that he was being hounded out of office. The question is whether it is a fair reading of the situation that he had associated himself with that campaign and that it was in reality being conducted by them both in concert with each other.

256 The majority, following observations to a similar effect by the tribunal, say that dissociating himself from her conduct would have been an appropriate step for the Chief Justice to take in an attempt to avoid the implication that what she was doing had his approval (para. 36). They also say, more generally, that his conduct infringed almost every one of the

principles in the Bangalore Principles and the *Guide to Judicial Conduct* in England and Wales which was published in October 2004 (paras. 29, 30 and 224). But it is difficult to find anything in these guides which tells the judge what to do in the unusual circumstances exemplified by this case. Paragraph 3.3 of the *Guide to Judicial Conduct* contains a warning that care must be exercised when a close member of a judge's family is politically active. But that is not really this case. As for the suggestion that the Chief Justice should have taken steps to dissociate himself publicly from what she was doing, it seems to me to be open to a series of objections.

257 As the Chief Justice himself said in his first witness statement, his position was that there was no joint enterprise between him and his wife. His approach was and had always been that she was absolutely entitled to take her own view and her own course of action, and he would never seek to interfere or endorse or dissociate himself from her independent opinions. I, for my part, would accept and respect the position which he said he adopted. There can be no doubt that she was entitled to the freedom of her own opinions, her own way of expressing them and her own beliefs. The days are long gone when a husband and wife were treated as one person in law and the husband was that person. It is not unknown for senior figures in public life to have spouses or partners who pursue their own careers and interests, in the course of which they may say or do things that are controversial and embarrassing. Any difficulties that this may give rise to should be resolved between themselves, if they can be resolved at all, in private. Judges are not to be taken as supporting or endorsing their spouse's or partner's conduct if they do not publicly dissociate themselves from it. The law should recognize that they are independent actors and that the deeds of the one are not to be visited on the other.

258 Furthermore, no findings have been made about the nature and efficacy of any steps the Chief Justice might reasonably have taken to dissociate himself publicly from her course of conduct. Such information as the Board has about her activities suggests that she would strongly resist any such interference, claiming with some justification in public that it was her right to do so. Public dissociation in such circumstances would be likely to lead to even more public controversy. The whole question as to how the Chief Justice was to go about this exercise and its likely consequences remains unexplored. I cannot accept that this provides a sound basis for alleging that he was guilty of misbehaviour by association with what his wife was doing. As for the question whether he indicated by the remarks that he made in his statement in the judicial review proceedings that he associated himself with his wife's allegations, as the Chief Minister suggested, I would for the same reasons reject that conclusion. His remarks can be taken, on their own terms, to be an expression by him

of his own beliefs. I do not think that there is a sound basis for holding that he was, by making these remarks, endorsing his wife's behaviour.

259 It is not difficult to understand that, in such a small and highly charged community to which she did not belong either by birth or upbringing, Mrs. Schofield's activities would be likely to give offence to those who were the target of her allegations. But she and the Chief Justice were distinct individuals, leading separate lives. That this was how, up until the end, their activities were perceived is borne out by the Chief Minister's evidence that the beginning of the terminal process was Mrs. Schofield's statements to the Kenyan jurists and the Bar Council which, he said, was beginning to cross the bounds of what society at large in Gibraltar and the Government at large ought to be expected to tolerate. Up until then relations between the Chief Justice and the executive had been normal for long periods. It is true that the Chief Minister then said that it was not possible to distinguish clinically between them, and that the Government's suspicions were confirmed when the Chief Justice swore his statement. But the important point is that it was not until the end that, according to this evidence, the executive formed the view that the Chief Justice could be associated with what she had been saying for many years.

260 For these reasons, I cannot agree with the conclusion of the majority that his wife's behaviour was one of the circumstances that rendered the position of the Chief Justice untenable (para. 227). In my opinion, it is by reference to his own actions alone, not those of his wife, that his ability to perform the functions of his office must be judged.

Misbehaviour and inability

261 Section 64(2) of the 2006 Order provides:

> "The Chief Justice, a Puisne Judge, the President of the Court of Appeal or a Justice of Appeal may be removed from office *only* for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be removed except in accordance with subsection (3)." [Emphasis supplied.]

262 I have emphasized the word "only" in this quotation because it serves as a reminder that the grounds for removal of these judicial officers are limited to those expressly mentioned in the sub-section. This means that careful attention needs to be given to the meaning of the expressions it uses and to the application of that meaning to the facts of the case. This is not to say that those expressions must be read narrowly. But one must understand what they mean, having regard to what must follow from a finding that the facts show that the concepts described by one or other of them are satisfied. The principle of judicial independence has a part to play in this assessment. It is protected by the nature of the procedure that

the section lays down. But the procedure, which places the responsibility for advising Her Majesty on the Judicial Committee, is not the only protection. It lies too in the principle that judicial officers should not be removed from office save in circumstances where the integrity of the judicial function itself has been compromised.

263 There is not much guidance in the authorities as to how the circumstances of this case should be approached. *Therrien* v. *Canada (Minister of Justice)* (7) was a case of misbehaviour. The judge was faced with a complaint that he had failed to disclose information that was prejudicial to him to the members of the committee to select persons qualified for appointment as judges. Gonthier, J. said that the public's confidence in its justice system was at the very heart of the case ([2001] 2 S.C.R. 3, at para. 147):

> "Thus, before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office."

In *Lawrence* (4), the allegation was that the Director of Audit had written an intemperate and abusive letter to the Minister of Finance containing allegations of improperly tampering with her report prior to it being laid before Parliament. Lord Scott of Foscote quoted with approval a passage in the judgment of Gray, J. in *Clark* (1) which is quoted by the majority (at para. 202). As Gray, J. said, the word "misbehaviour" takes its meaning from the statutory context. If the conduct is such that it is liable to bring the office itself into disrepute it can be properly characterized as misbehaviour. But even if the conduct can be so characterized the question remains whether it is conduct of such gravity, applying the standard referred to in *Therrien*, that the recommendation must be that the judge must be removed from office.

264 This case has been treated, however, by both the tribunal and the majority as one of inability. The tribunal said in para. 7.35 of its report that, while there were a number of instances of misbehaviour of the Chief Justice, it would not go so far as to say that any single instance amounted to such misbehaviour as to show that he was thereby unfit for office. Its conclusion was that he had shown by his conduct overall that he was unable to discharge the functions of his office (para. 7.42). The majority adopt the same approach (para. 228). I too would look at his conduct overall.

265 The only case which offers guidance as to the meaning in this context of the word "inability" is *Stewart* v. *Scotland (Secy. of State)* (6).

In the Inner House, Lord McCluskey said that the word should be given its ordinary understood meaning, reading it in the context of the question whether the person was unfit for office (1996 S.C. at 283). Lord Clyde said that the intention of the statutory provision was that sheriffs may be removed from office if they are found to be unfit for office because they have failed to do things which it was their duty to do, or they have done things which they should not have done, or because there are things that they are unable to do (*ibid.*, at 285). In the House of Lords, Lord Jauncey of Tullichettle, rejecting the appellant's argument for a narrow construction, said (1998 S.C. (H.L.) at 86) that it would be absurd if the senior judges were required to report that a sheriff was fit for office although they were entirely satisfied that due to some defect in character or quirk of behaviour not amounting to mental illness he was "wholly unfitted to perform judicial functions."

266 I think that the phrase "wholly unfitted to perform judicial functions" captures the essence of what the word means in this context. It sets a high standard. But it seems to me right, if the rule of law is to be preserved, that it should do so. The rule of law is in the hands of the judges, and it is of crucial importance that their independence should be protected against allegations which do not achieve that standard. Section 64(2) is in harmony with this approach, as it refers to infirmity of body or mind or any other "cause." This was indeed what the senior judges found established in the case of *Stewart*, as he had persisted in his unacceptable behaviour notwithstanding two previous warnings that his conduct could not be tolerated in perpetuity. They held that this demonstrated an underlying defect in character which manifested itself in various ways to the severe prejudice of the sheriff's function as a judge. It was this defect in character which was the cause of his inability.

The assessment

267 I would apply that approach to this case. The question, as I see it, is whether the conduct of the Chief Justice in the respects that, for the reasons already given, I would take into account demonstrated that he was wholly unfit to perform the functions of Chief Justice in the jurisdiction to which he had been appointed. The tribunal said, in support of its conclusion, that his conduct stemmed from a number of characteristics of his personality and attitude (see para. 7.36). It sets out these characteristics in paras. 7.37–7.41 of its report. The majority, in making their assessment, say that the defects of personality demonstrated by the episodes on which they rely are those identified by the tribunal at paras. 7.37–7.39: in short, a lack of judgment as to what was and was not proper for someone in his position to do or say; showing a preoccupation, bordering on an obsession, with judicial independence; and his inability to grasp that his association

with his wife's communications would be perceived by a fair minded and well informed observer as improper.

268 For the reasons already given, I do not accept that the Chief Justice's attitude to his wife's behaviour can be regarded as a defect in his character or personality. The suggestion that his pre-occupation with the principle of judicial independence was such a defect seems to me to be venturing into very dangerous territory. I refer to what I have already said about the importance of the principle, the duty of a Chief Justice to preserve and uphold it and the latitude that must be given to him in the performance of this function. It must also be borne in mind that the Chief Justice was not without some justification for his suspicions in his dealings with the Government. The reasons for the one-year warrant, referred to by the majority at para. 103, have never been explained. Nor have the reasons for publicly depriving him of his *de facto* position as head of the Gibraltar judiciary.

269 I would agree that there are instances where his conduct showed a lack of judgment. But it must not be forgotten that in contrast to the cases referred to above, no criticism is made of the Chief Justice's ability to perform his judicial functions, and the fact is that for most of the time he was fulfilling his other functions as Chief Justice in a way that did not attract criticism. The events of the concluding period must be seen in that light. As the tribunal was not prepared to say that those events in themselves amounted to misbehaviour of such gravity as to justify his removal from office, the case must stand or fall on the issue of inability. Taking the whole progress of events in the round, including the absence of criticism of his conduct on the Bench and the Chief Minister's acceptance that there were long periods when the relationship between the Chief Justice and the executive were harmonious, I do not think that the proposition that his conduct demonstrated inability to fulfil the functions of his office, in the sense that he was wholly unfitted to perform them, has been made out.

Conclusion

270 The Chief Justice has now been suspended from office for more than two years. He has been exposed to a long and bruising inquiry, the effect of which has been to harden attitudes on either side. In these circumstances, it is probably unrealistic to think that he could now resume the functions of his office. I would not hold this consequence against him. It was not his choice that he should be suspended. But we are where we are, and it seems to me that the proper course for him now to take would be for him simply to resign. I would hold that he should be given that opportunity and that, if he were to do so, no adverse inferences of any kind should be drawn against him. The case that was made against him has not been made out. We would have humbly advised Her Majesty that

the Chief Justice ought not to be removed from his office as Chief Justice of Gibraltar.

Order accordingly.