[2013–14 Gib LR 520]

B. MARRACHE v. ATTORNEY-GENERAL

SUPREME COURT (Dudley, C.J.): June 25th, 2014

Administrative Law—Crown proceedings—proper defendant—public law proceedings against Attorney-General not "civil proceedings" for purpose of Crown Proceedings Act 1951, s.12—s.12 applies exclusively to proceedings brought by subjects against Crown in respect of Crown's private law obligations—Governor proper defendant

Courts—Supreme Court—Puisne Judges—no age limit for appointment of acting Puisne Judges in 2006 Constitution, ss. 62 or 63—s.64 intended to provide security of tenure and protection from arbitrary removal from office and judges over 67 explicitly allowed fixed-term appointments as substantive Puisne Judges

Courts—Supreme Court—Puisne Judges—Governor has power to appoint acting Puisne Judges, both under 2006 Constitution, s.63(2)(a), because number of Puisne Judges "prescribed by law" when complement of judges determined through mechanism established by legislature (e.g. Judicial Service Act 2007, s.26); and under s.63(2)(b) if business of court requires it

The claimant challenged the appointment a Puisne Judge of the Supreme Court.

The claimant was one of four defendants standing trial in the Supreme Court on two counts of fraud before Sir Geoffrey Grigson, an acting Puisne Judge. Sir Geoffrey was, at the time of his appointment as an acting Puisne Judge, over 67 years old. The claimant challenged Sir Geoffrey's appointment in both a Part 8 claim and by judicial review.

Choice of defendant

The claimant brought his claims against the Attorney-General on the basis of the Crown Proceedings Act 1951, s.12, submitting that "civil proceedings against the Crown," included public law proceedings.

The defendant submitted in reply that both claims failed even before the merits fell to be determined. The reliance on the Crown Proceedings Act 1951 was inappropriate and ill-founded, as neither claim involved "civil proceedings against the Crown."

Part 8 claim

The grounds for the Part 8 claim were constitutional. The claimant submitted that (a) an acting Puisne Judge had to be qualified for appointment as a substantive Puisne Judge, a substantive Puisne Judge could not be appointed over the age of 67 (since s.64 of the Constitution stated that judges should vacate their offices when they reached the age of 67 years), and the appointment of Sir Geoffrey by the Governor was therefore *ultra vires*; there was no provision on the Gibraltar Constitution explicitly allowing the appointment of acting judges over retirement age (as there was in the constitutions of other overseas territories, which should be read *in pari materia* with the Gibraltar Constitution) which indicated that no such appointment should be allowed in Gibraltar; and, in the alternative, (b) there was no power to appoint Puisne Judges at all, acting or substantive. The office of Puisne Judge was created by the 2006 Constitution, and s.60(2) of the Constitution stated that the Supreme Court would consist of "the Chief Justice and such number of Puisne Judges as may be prescribed by law." No number of Puisne Judges *had* been prescribed, the Supreme Court could therefore only consist of the Chief Justice, and no office of Puisne Judge existed. The prescribing of the number of judges was a principle that went to the root of the concept of judicial independence.

The defendant submitted in reply that (a) the Constitution did permit the appointment of acting Puisne Judges who were over the age of 67. The only necessary qualification, according to s.63(2) of the Constitution, was that the person be qualified to be appointed as a substantive Puisne Judge. The criteria in s.62(2) qualifying a person to be appointed as a substantive Puisne Judge did not include an age restriction, and Sir Geoffrey clearly met the criteria. The constitutions of other overseas territories were not *in pari materia* with that of Gibraltar, as each territory contributed its own ideas together with the United Kingdom, and while they would be similar, they would not therefore be the same; and (b) the office of Puisne Judge did exist. According to the Constitution, an acting Puisne Judge could be appointed if a post were vacant (s.63(2)(a)), or if the business of the Supreme Court required it (s.63(2)(b)). In the latter case, it did not matter whether there was a vacant post and so the fact that the number of Puisne Judges had not been prescribed did not preclude Sir Geoffrey's appointment. In any event, if the number of Puisne Judges were not prescribed by law, the provisions of the 1969 Constitution (which placed no limit on the number of Additional Judges) were carried over by virtue of para. 2(2) of Annex 2 of the 2006 Constitution.

The court considered whether, for the number of Puisne Judges to be "prescribed by law", it was sufficient that, rather than a specific number being set, there was a mechanism for determining the complement of judges in a manner fixed by the legislature (such as the Judicial Service Act 2007, s.26, which allows the Governor, in consultation with the minister with responsibility for justice, to create new judicial posts).

Judicial review

The claimant again advanced the submission concerning Sir Geoffrey's age, and, in the alternative, that s.63(5) of the Constitution (providing that the appointment of a person as an acting Puisne Judge remained valid until revoked by the Governor) was incompatible with art. 6 of the European Convention on Human Rights.

The defendant submitted in reply that the judicial review claim was out of time and no extension of time was justified, and the Part 8 claim could not be used to circumvent the judicial review time limits and should be struck out as an abuse of process.

Held, dismissing the claims:

(1) The claims had been brought against the wrong defendant and must therefore fail. The claimant could not rely on the Crown Proceedings Act 1951, s.12 to bring them against the Attorney-General, since "civil proceedings," for the purpose of that section, applied exclusively to proceedings brought by a subject against the Crown in respect of the Crown's private law obligations. It did not include the public law claims made by the claimant. The correct defendant would have been the Governor, and his involvement as an interested party did not cure that fundamental defect (paras. 33–34).

(2) Given that the challenge to Sir Geoffrey's appointment had implications for every judge appointed to the Supreme Court other than the Chief Justice, the substantive arguments would be considered, notwithstanding the fact that they failed for having been brought against the wrong defendant (para. 6).

(3) There was no age limit for the appointment of an acting Puisne Judge and the Governor's appointment of Sir Geoffrey was not *ultra vires*. Neither s.62 nor s.63 of the Constitution mentioned an age limit, and s.64 was intended only to provide security of tenure and protection from arbitrary removal from office. Further, s.64(7) provided for fixed-term appointments of substantive Puisne Judges, used the term "notwithstanding subsection (1)," and sub-s. (1) was the only place in which the age limit was to be found. It followed that if a person over 67 might be appointed for a fixed term as a substantive Puisne Judge, he might also be appointed as an acting Puisne Judge (para. 17).

(4) The Governor did have the power to appoint acting Puisne Judges. They could be appointed under s.63(2)(a) of the Constitution, because the number of Puisne Judges had been "prescribed by law". It was not required that a specific number be set, but rather that the complement of judges could be determined through mechanisms established by the legislature. The Judicial Service Act 2007, s.26 was such a mechanism. Acting Puisne Judges could also be appointed under s.63(2)(b) of the Constitution, as it did not require that there be a vacant post to appoint an acting Puisne Judge, merely that the business of the court required it. No

prescribed number of judges was therefore required for the operation of this section (paras. 22–25).

(5) The submissions relating to a breach of art. 6 of the ECHR did not require determination. Whilst the ECHR had been extended to Gibraltar, it had not been incorporated into Gibraltar law. The appointment of Sir Geoffrey was also not a breach of s.8 of the Constitution; the court was required to take account of decisions of the European Court of Human Rights, but these were not determinative. Sir Geoffrey's appointment had been made in accordance with the relevant provisions of the Constitution, and was therefore self-evidently constitutional (paras. 28–29).

(6) The judicial review claim alleging a breach of art. 6 of the ECHR would also fail as the case was wholly unarguable and the claimant would not have been granted permission to bring judicial review proceedings. The claim based on Sir Geoffrey's age was arguable enough to pass the permission threshold, but had permission nevertheless been denied, the fact that it had been brought against the wrong defendant would make the submission hopeless. No extension of time would be granted as the reasons for delay were wholly inadequate and, in any event, the claim would have failed on the merits (paras. 35–36).

(7) The constitutional claim would not be struck out as an abuse of process. Whilst reasonable diligence would have ensured that the arguments now made were dealt with much earlier in the litigation, and Part 8 claims should not be used to circumvent the time limits on judicial review, given that the present case involved exclusively constitutional allegations which, if established, would have amounted to a continuing breach of the claimant's right to have criminal charges against him determined by a court established by law, striking out was a wholly disproportionate sanction (paras. 40–41).

Cases cited:

(1) *Att. Gen. (Trinidad & Tobago)* v. *Ramanoop*, [2006] 1 A.C. 328; [2005] 2 W.L.R. 1324; [2005] UKPC 15, referred to.

(2) *Buckley* v. *Edwards*, [1892] A.C. 387, considered.

(3) *Davidson* v. *Scottish Ministers (No. 1)*, 2006 S.C. (H.L.) 41; 2006 S.L.T. 110; 2006 S.C.L.R. 249; [2005] UKHL 74, considered.

(4) *Harrikissoon* v. *Att. Gen. (Trinidad & Tobago)*, [1980] A.C. 265; [1979] 3 W.L.R. 62, distinguished.

(5) *Henderson* v. *Henderson*, [1843–60] All E.R. Rep. 378; (1843), 3 Hare 100; 67 E.R. 313, considered.

(6) *Kearney* v. *H.M. Advocate*, 2006 S.C. (P.C.) 1; 2006 S.L.T. 499; 2006 S.C.C.R. 130; [2006] H.R.L.R. 15; (2006), 20 B.H.R.C. 157; [2006] UKPC D 1, referred to.

(7) *R. (Building Socies. Ombudsman Co. Ltd.)* v. *Customs & Excise Commrs.*, [2000] S.T.C. 892; [2000] B.T.C. 5384; [2001] B.V.C. 3, referred to.

(8) *Stancliffe Stone Co. Ltd*. v. *Peak District Natl. Park Auth*., [2006] Env. L.R. 7; [2005] 4 P.L.R. 35; [2005] EWCA Civ 747, considered.
(9) *Starrs* v. *Ruxton*, 2000 J.C. 208; 2000 S.L.T. 42, 1999 S.C.C.R. 1052; [2000] H.R.L.R. 191; [2000] U.K.H.R.R. 78; 8 B.H.R.C. 1, referred to.

Legislation construed:
Crown Proceedings Act 1951, s.2(2): The relevant terms of this sub-section are set out at para. 31.
s.14: The relevant terms of this section are set out at para. 31.

Interpretation and General Clauses Act 1962, s.2: The relevant terms of this section are set out at para. 18.

Judicial Service Act 2007, s.26: The relevant terms of this section are set out at para. 25.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.57(2)(a): The relevant terms of this sub-section are set out at para. 12.
s.60(2): The relevant terms of this sub-section are set out at para. 12.
s.62(2): The relevant terms of this sub-section are set out at para. 12.
s.63(2): The relevant terms of this sub-section are set out at para. 12.
s.63(5): The relevant terms of this sub-section are set out at para. 12.
s.64: The relevant terms of this section are set out at para. 12.

Crown Proceedings Act 1947 (10 & 11 Geo. VI, c. 44), s.38(2): The relevant terms of this sub-section are set out at para. 31.

Senior Courts Act 1981 (c.54) s.4: (1):
"The High Court shall consist of . . .
(e) [*inter alia*,] not more than eighty puisne judges of that court . . .
(4) Her Majesty may . . . increase the maximum number of puisne judges of the High Court . . ."

C. Gomez and *Ms. L. Manley* for the claimant;
A. Maclean, *Q.C*., *L. Baglietto, Q.C. and C. Bonfante for the defendant and the Governor, as an interested party.*

1 **DUDLEY, C.J.:** The claimant, Mr. Benjamin Marrache, is one of four defendants indicted with two counts of fraud and presently (and since October 2013) standing trial before Sir Geoffrey Grigson, who is sitting without a jury.

2 The claimant has instituted two distinct actions in which he seeks to challenge the legality of Sir Geoffrey's appointment. The constitutional motion was issued on March 13th, 2014, whilst the claim for judicial review was issued on March 26th, 2014. On April 22nd, 2014, I ordered that both claims be listed and disposed of at the same hearing, and in

respect of the judicial review I further ordered that there be a rolled-up permission and substantive hearing including consideration of the application for an extension of time.

The constitutional claim

3 In the constitutional claim, which is instituted as a Part 8 claim, the following relief is sought:

> "A declaration that the purported appointment of the Hon. Sir Geoffrey Grigson as an acting Puisne Judge under s.63 of the Gibraltar Constitution is unlawful on account of the fact that the said judge was over the age of 67 on the date of his purported appointment . . . [and] a mandatory order that no further steps be taken in the criminal proceedings against the claimant presided [over] by the said judge."

That claim is advanced on two grounds, which can be summarized as:

(i) The age point—to be able to sit as an acting Puisne Judge, a judge must be qualified for appointment as a substantive Puisne Judge and, given that on appointment Sir Geoffrey had attained 67 years of age, the appointment is *ultra vires* the powers which are vested in the Governor by the 2006 Constitution.

(ii) No legal power to appoint Puisne Judges—absent statutory provisions prescribing the number of Puisne Judges, there is no power to appoint either a substantive or an acting Puisne Judge.

The judicial review claim

4 In the judicial review claim, the claimant advances the age point and, in the alternative, it is said that s.63(5) of the Constitution and the purported warrant of appointment which allows for the acting appointment to remain until revoked by the Governor, acting in accordance with the advice of the Judicial Service Commission ("JSC"), are incompatible with the requirement for an independent and impartial judiciary found in art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").

Preliminary grounds of objection

5 For the Attorney-General, it is submitted that for two reasons both claims fail even before the legal merits fall to be determined:

(i) The Crown Proceedings Act point—the claims have been brought against H.M. Attorney-General, apparently in reliance upon the Crown Proceedings Act, but it is said that such reliance is inappropriate and manifestly ill-founded.

(ii) The delay point—judicial review is substantially out of time and an extension of time cannot be justified. If an extension of time is not appropriate, it would be an abuse of process to circumvent the time limit by bringing a challenge via a constitutional motion.

6 Mr. Maclean acknowledges that the Crown Proceedings Act point (unlike the delay point) does not engage the court's discretion and therefore does not depend on the strength or weakness of the substantive case advanced. That is undoubtedly right. I cannot however ignore that aspects of the case have implications extending beyond Sir Geoffrey's appointment, and challenge all appointments to the Supreme Court bench other than my own. In those unusual circumstances and, given the wider public interest in having the substantive challenge to senior judicial appointments determined, I shall deal with the substantive arguments before turning to the two preliminary points.

Factual background

7 Sir Geoffrey, who is a retired English High Court judge, was born on October 28th, 1944 and he was, therefore, 67 years old when his appointment took effect. According to the evidence of Ms. Alison Macmillan, who is currently serving—and has been since May 2013—as Deputy Governor and is a member of the JSC, the then Governor, Sir Adrian Johns, by letter dated May 7th, 2012 and addressed to the Rt. Hon. Sir Paul Kennedy, *qua* Chairman of the JSC, requested that the JSC select persons for recommendation for appointment to the posts of additional Stipendiary Magistrate and acting Puisne Judge, "in particular to handle the litigation concerning Messrs. Marrache." On that same day, Sir Paul Kennedy replied to the Governor, *inter alia* informing him that the JSC's recommendation was that Sir Geoffrey be appointed as acting Puisne Judge, and confirming that the recommendation was made "in accordance with s.63(2)(b) of the Constitution, after consultation with the Chief Justice, and with the consent of the Chief Minister." By letter dated May 15th, 2012, the Chief Minister confirmed his consent. By letter also dated May 15th, 2012, the Governor informed Sir Paul Kennedy that in accordance with s.57(2) of the Constitution, he was appointing Sir Geoffrey to the post of acting Puisne Judge. By letter dated May 17th, 2012, the Governor informed Sir Geoffrey that he had accepted the advice of the JSC to appoint him as acting Puisne Judge.

8 On June 13th, 2012, a warrant of appointment was drawn up and signed by the Governor. A notice was published in the *Gazette* on June 7th, 2012, which recorded that the appointment was made with effect from January 17th, 2012. Although Ms. Macmillan cannot comment as to how that came about, she acknowledges that having regard to the commencement date on the warrants it was clearly erroneous and, in a letter to the claimant's solicitors dated March 11th, 2014, she observed that that

mistake was later rectified. No submissions are advanced in relation to the notices in the *Gazette*.

9 According to Ms. Macmillan, the June warrant was drawn up based on the original timetable of the trial, but in the event the trial process was delayed and Sir Geoffrey was not required to come to Gibraltar until December 2012. A further warrant was then drawn up to coincide with his arrival in Gibraltar and on December 19th, 2012, Sir Geoffrey swore both the judicial oath and the oath of allegiance and a second warrant was signed by the Governor. In the aforesaid letter to the claimant's solicitors, Ms. Macmillan speculates as to the existence of two warrants as follows:

> "Because of the gap between May and December, it seems that a first warrant, dated June 13th, 2012, was mislaid or believed to be inappropriate, and a further warrant was signed on December 19th, 2012."

10 In June 2012, the claimant brought (but later discontinued) a constitutional motion against the JSC in which—based on the composition of the JSC—he sought to challenge Sir Geoffrey's appointment.

11 At the hearing of these claims, Mr. Gomez informed the court that, by letter dated May 6th, 2014, he had sought information from the JSC as to the procedure which led to the recommendation that Sir Geoffrey be appointed, such as whether the post was advertised and interviews held, and if not advertised, how Sir Geoffrey had come to the JSC's attention as a prospective appointee. I fail to see how the information sought from the JSC is in any way relevant to the case now advanced. Indeed, the only relevant fact (other than possibly the terms of the warrants) is that Sir Geoffrey was 67 years old when his appointment took effect.

The statutory provisions

12 Although somewhat extensive, it is useful to set out the constitutional provisions which are engaged. Section 57 of the Constitution establishes the JSC and s.57(2)(a) provides that:

> "(2) The Governor, acting in accordance with the advice of the Judicial Service Commission, shall—
>
> (a) make and confirm appointments to the offices of Chief Justice, Puisne Judge, President of the Court of Appeal and Justice of Appeal . . ."

Section 60 establishes the Supreme Court for Gibraltar, and at sub-s. (2), provides that "the Supreme Court shall, subject to section 62, consist of the Chief Justice and such number of Puisne Judges as may be prescribed by law." Section 62(2) provides that no person shall be qualified for appointment as, *inter alia*, a Puisne Judge, unless—

"(a) he is, or has been, a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in Ireland, or of a court having jurisdiction in appeals from any such court; or

(b) he is entitled to practise as an advocate in such a court and has been entitled for not less than ten years to practise as an advocate or as a solicitor in such a court."

Section 63, which is headed "Acting judges," in so far as it relates to acting Puisne Judges, provides:

"(2) If—

(a) the office of a Puisne Judge is vacant, or if any such judge is acting as Chief Justice or is for any reason unable to perform the functions of his office; or

(b) it appears to the Governor, acting in accordance with the advice of the Judicial Service Commission and after consultation with the Chief Justice and with the consent of the Chief Minister, that the state of business in the Supreme Court so requires,

the Governor, acting in accordance with the advice of the Judicial Service Commission, may appoint a person qualified for appointment as a Puisne Judge to act as a Puisne Judge.

. . .

(5) Any person appointed under this section to act as a judge of the Supreme Court . . . shall, unless he is removed from office under section 64, continue to act for such period as may be specified in the instrument of his appointment or, if no such period is specified, until his appointment is revoked by the Governor, acting in accordance with the advice of the Judicial Service Commission:

Provided that a person whose appointment so to act has expired or been revoked may, unless he has been removed from office as aforesaid, continue so to act for such period and on such terms as the Judicial Service Commission may consider necessary to enable him to deliver judgment or to do any other thing in relation to any proceeding commenced before him before the expiration or revocation of his appointment."

Section 64, which is headed "Tenure of office of judges," begins: "(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 . . ." There is then a proviso which allows the Governor to allow the Chief Justice or a Puisne Judge to remain in office for a

further period not exceeding three years, and in exceptional circumstances for another further period, save that those offices cannot be held after the age of 72 has been attained. There is a further proviso which allows a judge to sit after the date on which he vacates office to enable him to give judgment in proceedings commenced before he vacated office. The remaining sub-sections of s.64 then deal with removal from office by reason of inability or misbehaviour, save that sub-ss. (7) and (8) provide as follows:

> "(7) Notwithstanding subsection (1), a person may be appointed to the office of Chief Justice or Puisne Judge for such term as may be specified in the instrument of his appointment, and the office of a person so appointed shall become vacant on the day on which the specified term expires.
>
> (8) The powers of the Governor under this section shall be exercised by him in accordance with the advice of the Judicial Service Commission."

The age point

13 The submission advanced for the claimant is that for a person to be appointed as acting Puisne Judge, s.63 requires that such person be "qualified for appointment as a Puisne Judge"; by virtue of s.64 (subject to the provisos), a Puisne Judge cannot serve after attaining 67 years of age, and therefore one who cannot be a Puisne Judge through age cannot be appointed as acting Puisne Judge; the provisos in s.64 strengthen the argument, because they use the words "remain in office," thereby specifically addressing and permitting office holders to remain in office after attaining 67 years of age; and the absence of a similar proviso in the provisions dealing with acting Puisne Judges shows that it is not permissible to appoint someone who, although otherwise qualified, is over the age of 67.

14 In support of this proposition, Mr. Gomez relies upon the constitutions of other Overseas Territories. In similar (but not identical terms) to our Constitution, the constitutions of Bermuda and the Cayman Islands establish an age by which a Supreme Court judge has to vacate office. Unlike our Constitution, when dealing with acting judges, both have specific provisions which allow for acting appointments notwithstanding the attainment of the retirement age. Mr. Gomez submits that those constitutions which, like the Gibraltar Constitution, are created by Orders in Council, are *in pari materia*, and therefore uniformity of language and meaning was intended. It is submitted that it follows that in the absence of an equivalent provision in the Gibraltar Constitution, acting appointments after the retirement age are not permitted.

15 For the defendant it is said that the qualification criterion in s.63(2) for an acting Puisne Judge is simply that the person be "qualified for appointment as a Puisne Judge." In turn, s.62(2) establishes the qualification criteria and Sir Geoffrey, having been an English High Court Judge, plainly falls within s.62(2)(a) and accordingly was eligible to be appointed as an acting Puisne Judge under s.63. Neither s.62 or s.63 impose any age restrictions as part of the qualification criteria, and therefore being under the age of 67 at the date of appointment is not a necessary component of being "a person qualified for appointment as a Puisne Judge."

16 In relation to the recourse which Mr. Gomez places upon the constitutions of Bermuda and the Cayman Islands, Mr. Maclean submits that they provide little assistance when construing the Gibraltar Constitution as they are not *in pari materia*. The *in pari materia* interpretative principle is described by Bennion, *Statutory Interpretation*, 5th ed., at 603 (2008) as follows:

> "The following are *in pari materia*.
>
> (a) Acts which have been given a collective title. This is a recognition by Parliament that the Acts have a single subject matter.
>
> (b) Acts which are required to be construed as one. Again, there is parliamentary recognition of a single subject matter.
>
> (c) Acts having short titles that are identical (apart from the calendar year).
>
> (d) Other Acts which deal with the same subject matter on the same lines. Here it must be remembered that the Latin word *par* or *paris* means equal, and not merely similar. Such Acts are sometimes described as forming a code. This does not mean that the Acts are codifying Acts, however.
>
> If the Acts are *in pari material*, it is assumed that uniformity of language and meaning was intended, attracting the same considerations as arise from the linguistic canon of construction that an Act is to be construed as a whole."

It is not in issue that Orders in Council are construed in the same way as Acts. It is also self-evident that the Orders in Council establishing the constitutions of Bermuda, Cayman Islands and Gibraltar do not fall within sub-paras. (a)–(c) of the exposition in *Bennion*. Sub-para. (d) requires some further consideration. It is apparent that the three Orders in Council deal with the governance of Overseas Territories. However, it is accepted that, as described in Hendry & Dickson, *British Overseas Territories Law* (2011), the practice in recent years has been to reach political agreement

on the text of new constitutions between UK representatives and representatives of the territory concerned. It must follow that whilst there may be significant similarities in the provisions of the various constitutions, they cannot be said to form a single code such that they should be construed as a whole. I conclude that the constitutions of those two jurisdictions do not assist when construing our Constitution.

17 Section 62—which sets out the qualification criteria for appointment as a Puisne Judge—does not impose an age limit. Section 63 merely requires that acting Puisne Judges be qualified for appointment as a substantive Puisne Judge. The qualification criteria in s.63 is to be interpreted as a reference to the qualification provision in the preceding section. For its part, s.64, which is headed "Tenure of office of judges," is not directed at establishing an age limit *simpliciter* but at affording protection from arbitrary removal from office by providing security of tenure to office holders. I am fortified in that view because s.64(7) creates a caveat to s.64(1) and allows for substantive fixed-term appointments to be made. Given the use of the words "notwithstanding subsection (1)" together with the fact that the age criteria is only found in sub-s. (1), it follows that an individual who is otherwise qualified may be appointed as a substantive Puisne Judge for a specified term, even if he or she is over the age of 67. In my view, the provisions when read as a whole do not impose any age restriction in respect of acting Puisne Judges.

No legal power to appoint Puisne Judges

18 It is properly said by Mr. Gomez that the 1969 Constitution made provision for the office of Chief Justice and for the appointment of Additional Judges of the Supreme Court, and that the office of Puisne Judge was created by the 2006 Constitution. Essentially, the submission advanced is that s.60(2) of the Constitution requires that the number of Puisne Judges be prescribed by law, and that given that since 2006 no statutory provision prescribing the number of Puisne Judges has been passed, the only judge of the Supreme Court is the Chief Justice. If no substantive office of Puisne Judge exists, an acting Puisne Judge cannot be appointed. In so far as my own position is concerned, Mr. Gomez submits that because at the time of the coming into force of the 2006 Constitution I was Additional Judge, by virtue of the transitional provisions, I became Puisne Judge, but that upon being appointed Chief Justice, the office of Puisne which I had held ceased to exist. In support of the proposition that no office of Puisne Judge has been created since then, Mr. Gomez also relies upon s.2 of the Interpretation and General Clauses Act which *inter alia* defines "Chief Justice," "Governor," "Supreme Court" and "Registrar," but in which list Puisne Judge does not feature.

19 Mr. Gomez submits that prescription of the number of judges is a principle that goes to the root of the concept of judicial independence. By

way of comparator he points to s.4 of the Senior Courts Act 1981 of England and Wales which establishes a fixed number of High Court judges and a mechanism for increasing that number as a model of a provision which would satisfy s.60(2) of the Constitution. He also relies upon *Buckley* v. *Edwards* (2), a Privy Council decision on appeal from the Court of Appeal of New Zealand, in which the issue for determination is succinctly set out in the judgment of the court delivered by Lord Herschell who said ([1892] A.C. at 391):

> "The question raised is one of grave importance, the contention on the part of the respondent being that as the law stands in New Zealand the Governor has the power of adding without limit to the number of the judges of the Supreme Court of that Colony without express parliamentary sanction, and in the absence of any parliamentary provision for the salaries of the judges so appointed."

As the headnote suggests, the Privy Council went on to find that the Governor of New Zealand only had power to appoint judges to whom an ascertained salary was payable by law at the time of their appointment. That was a case which turned on the statutory interpretation of New Zealand legislation and, whilst illustrative, does not in my view establish any broader principle.

20 It is in the context of this argument that Mr. Gomez seeks to rely upon the differences in the warrants issued in favour of Sir Geoffrey. The June 13th warrant read as follows:

> "Pursuant to s.63(2) of the Constitution, and acting in accordance with the advice of the Judicial Service Commission, I hereby, on behalf of her Majesty the Queen, appoint you to be acting Puisne Judge, with effect from May 17th, 2012."

The December 19th warrant is on the same terms, save that the appointment is said to be made pursuant to s.57(2)(a) and s.63(2)(b) of the Constitution. It is said that s.63(2)(b) requires the existence of a properly and legally constituted substantive office in respect of which an acting appointee can act. It is further said that in the absence of a substantive Puisne Judge, the Governor could not invoke the powers afforded to him under s.57(2)(a) of the Constitution.

21 The warrant point—to the extent that I understand it—does not add any substance to the primary submission that there is no extant legal power to appoint Puisne Judges. In my view, a warrant is evidence of an appointment but is not a necessary Constitutional component of an appointment. In relation to Sir Geoffrey's appointment, that process was completed when the then Governor wrote to Sir Paul Kennedy on May 15th, 2012 stating "I appoint . . . Sir Geoffrey Grigson," with its taking effect on May 17th, 2012 when it was communicated to Sir Geoffrey.

22 Mr. Maclean advances a simple, self-evident, cogent and short answer to counter the somewhat convoluted submission put forward by Mr. Gomez. Section 63(2) provides for two distinct alternative circumstances in which an acting Puisne Judge may be appointed. Section 63(2)(a) allows for such an appointment if an existing office of a Puisne Judge is vacant, whilst s.63(2)(b) allows for it if the state of the business in the Supreme Court so requires. For an acting appointment to be made pursuant to s.63(2)(b), there is no requirement that there be a vacancy in an office of Puisne Judge, or that any substantive office of Puisne Judge be in existence, or that the number of Puisne Judges be prescribed. Therefore, in so far as the appointment of Sir Geoffrey is concerned, this argument is devoid of merit and fails.

23 It follows from the foregoing that it is not necessary to determine the issue of prescribing the number of Puisne Judges. However, because it questions the propriety of extant substantive appointments, the wider public interest makes it desirable that I deal with the submission.

24 If there has been no prescription by law of the number of Puisne Judges, the argument fails because it does not take account of para. 2(2) of Annex 2 of the Constitution, which provides:

> "Where any matter that falls to be prescribed or otherwise provided for for the purposes of the Constitution by the Legislature or by any other person or authority is prescribed or provided for by or under any existing law or is otherwise prescribed or provided for by or under the existing Order, that prescription or provision shall have effect as if it had been made for those purposes by the Legislature or, as the case may be, by the other person or authority."

I accept Mr. Maclean's submission that in the absence of a legislative provision prescribing the number of Puisne Judges, this provision has the effect of maintaining the status quo, and the arrangements under the 1969 Constitution apply as if they had been prescribed by law pursuant to s.60(2) of the Constitution. There being no limit in the 1969 Constitution of the number of Additional Judges which could be appointed, the result is that the Governor acting on the advice of the JSC may appoint as many judges as is proper.

25 Whilst our legislative provisions may lack the elegance of s.4 of the Senior Courts Act 1981 of England and Wales, I am of the view that the number of Puisne Judges in Gibraltar is prescribed by law. The s.60(2) prescription as to the number of Puisne Judges under the Constitution does not, in my view, necessarily require the legislature to fix a specific number but rather, in much the same way as in *Buckley* v. *Edwards* (2), to have mechanisms whereby the complement of judges is determined in a manner established by the legislature. The effect of s.26 of the Judicial Service Act 2007 is to provide such a mechanism with the Governor after

consultation with the minister with responsibility for justice capable of creating a new judicial post:

> "The Governor, after consultation with the Minister, may make a request to the Commission for a person to be selected for a recommendation to fill a vacancy in the following circumstances—
>
> (a) when a new post has been created;
>
> (b) when it is anticipated that a vacancy will arise through the forthcoming retirement or resignation of a judicial office holder;
>
> (c) when a judicial office holder is to be appointed on a temporary basis or acting basis;
>
> (d) when a judicial office is vacant;
>
> (e) otherwise when it appears to the Minister appropriate."

That provision is also to be seen in the context of Parliament passing an Appropriation Act every year, the basis for which is the *Approved Government of Gibraltar Estimates of Revenue and Expenditure*. The 2013/14 *Estimates* reflects a complement of three Puisne Judges.

Breach of art. 6 of the ECHR/s.8 of the Constitution

26 Possibly because of the strong tentative views I expressed at preliminary hearings and during the substantive hearing, the alleged breach of art. 6 of the ECHR, although not formally abandoned, was not pursued. In any event the argument can be dealt with briefly.

27 It is said that by a declaration dated October 23rd, 1953, the United Kingdom, pursuant to the former art. 63 of the ECHR, extended its application to Gibraltar. Protocol No. 1 applies to Gibraltar by virtue of a declaration made under art. 4 of Protocol No. 1 on February 25th, 1988, and therefore the ECHR applies in all pertinent ways. It is submitted that s.63(5) of the ECHR and/or the wording of either of Sir Geoffrey's warrants of appointment are not compatible with the requirement for an independent and impartial tribunal as guaranteed by art. 6 of the ECHR and s.8 of the Constitution. Reliance is then placed upon a number of authorities, including *Starrs* v. *Ruxton* (9). For his part, Mr. Maclean cogently seeks to undermine the submission in his skeleton argument, relying upon the Privy Council decision in *Kearney* v. *H.M. Advocate* (6).

28 The submission does not require determination. Despite my entreaties to Mr. Gomez that he persuade me otherwise, it is clear that whilst the ECHR has been extended to Gibraltar, it has not been incorporated into Gibraltar law. It therefore follows that this court cannot determine whether or not there has been a breach of art. 6.

29 To the extent that the case is advanced as a breach of s.8 of the Constitution, the argument can also be dealt with shortly. By virtue of s.18(8) of the Constitution, this court is enjoined *inter alia* to take account of decisions of the European Court of Human Rights when dealing with any question which has arisen in connection with the rights and freedoms protected by Chapter I of the Constitution. Even if Sir Geoffrey's appointment could be said to breach art. 6 of the ECHR, that would not however be determinative but merely to be taken account of. Provided that the appointment (as I have found) has been properly effected in accordance with the relevant provisions of the Constitution, self-evidently, the appointment is constitutional and consequently it cannot be in breach of s.8 of the Constitution.

The Crown Proceedings Act

30 Mr. Maclean submits that neither the judicial review nor the constitutional motion are "civil proceedings against the Crown" within the meaning of the Crown Proceedings Act 1951, and that on that ground alone both actions fail. Curiously, both sides rely upon *Davidson* v. *Scottish Ministers (No. 1)* (3) in support of diametrically opposed propositions.

31 The Crown Proceedings Act 1951 at s.2(2) defines civil proceedings as follows: "'Civil proceedings' includes proceedings in the Supreme Court for the recovery of fines or penalties." In contrast, the UK Crown Proceedings Act 1947, s.38(2) defines civil proceedings as follows: "'Civil proceedings' includes proceedings in the High Court or the county court for the recovery of fines or penalties, but does not include proceedings on the Crown side of the King's Bench Division," the exclusion of the Crown side of the King's Bench Division being an express exclusion of the supervisory jurisdiction of the English High Court. However, s.14 of the 1951 Act mirrors s.21 of the UK 1947 Act, for the purposes of the issue before me. The material part provides that "(1) in any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects . . ."

32 Mr. Gomez's submission is essentially that the definition of civil proceedings in the 1951 Act serves to expand its scope to include public law proceedings. In support of that interpretation, he relies upon a passage in the judgment of Lord Nicholls in *Davidson* v. *Scottish Ministers (No. 1)* (3) who said (2006 S.C. (H.L.) 41, at para. 15):

> "In English law the phrase 'civil proceedings' is not a legal term of art having one set meaning. The meaning of the phrase depends upon the context. For instance, the phrase is often used when contrasting civil proceedings with criminal proceedings. So used, and subject

> always to the context, civil proceedings will readily be regarded as including proceedings for judicial review . . ."

He further submits that there are two good reasons why the position in Gibraltar should be different from that in the United Kingdom. First, at the time of its enactment, Gibraltar was a colony and that the legislature must have considered it inappropriate for the Governor and Commander in Chief to be susceptible to being sued. Secondly, there is no provision in the Crown Proceedings Act 1951 which is equivalent to s.17 of the UK Crown Proceedings Act 1947 allowing for proceedings to be instituted against designated government departments. I have to admit some difficulty in understanding why either of these two reasons justifies a basis for the distinction.

33 In any event, I am of the view that, given the decision of the House of Lords in *Davidson* v. *Scottish Ministers (No. 1)*, the contention advanced by Mr. Gomez is simply unarguable. In that case, the issue arose because the definition in s.38(2) of the United Kingdom Act does not explain how the reference to proceedings on the Crown side of the King's Bench Division is to be interpreted when applying s.21 (our s.14) in Scotland, where there is no precise analogous counterpart to the Crown side in the supervisory jurisdiction exercised by the Scottish courts. The determination by the House of Lords is succinctly set out in judgment of Lord Nicholls (2006 S.C. (H.L.) 41, at para. 33):

> ". . . [B]y analogy with the exclusion of Crown side proceedings from sec. 21 in England, when applied in Scotland references to civil proceedings in sec. 21 are to be read as not including proceedings invoking the supervisory jurisdiction of the Court of Session in respect of acts or omissions of the Crown or its officers. By this means effect can be given to the intention of Parliament. Uniformity will be achieved. The coercive remedies available in judicial review proceedings against the Crown and its officers will be substantially the same in both countries."

The same analysis must follow when interpreting our s.14 and it is clear beyond peradventure that our section applies exclusively to proceedings brought by subjects against the Crown in relation to the Crown's private law obligations.

34 It follows that the claimant cannot rely upon s.12 of the Crown Proceedings Act 1951 to bring either claim against the Attorney-General. I am of the view that the proper defendant would have been the Governor, and joining him as an interested party to the judicial review does not cure this fundamental irregularity. The claimant has aimed at the wrong target and for that reason also, both actions fail.

Permission to bring judicial review proceedings

35 Although both claims fail, in respect of the claim for judicial review I need to consider whether the permission threshold is met. For the purposes of permission, all that is required of a claimant is that he establish an arguable case. The purpose of the permission hurdle is, as put in the *White Book 2014*, at 54.4.2—

> "to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration . . ."

I am of the view that the case advanced in relation to breach of the Convention is wholly unarguable and can properly be categorized as hopeless. However, the age point, although it fails, would be sufficiently arguable to overcome the permission threshold. Nonetheless, in the event permission to bring judicial review proceedings is refused, given that the Attorney-General is the wrong defendant and the arguments advanced in support of that proposition are hopeless.

36 Because it has an impact upon the arguments advanced by Mr. Maclean in relation to the constitutional motion, I deal with the application for the extension of time, albeit briefly. Although it is unnecessary to condescend upon them, the reasons given for not bringing the claim timeously are wholly inadequate. In the context of a claim for judicial review not engaging the fundamental rights protected by the Constitution, the inordinate delay in the absence of good reasons would inexorably have resulted in the extension of time not being granted and permission to bring judicial review proceedings refused. However, had I determined that the claimant's right to be tried before a court established by law had been breached I would have extended time, because this court cannot allow its functions and offices to be usurped by someone who has not been properly appointed and allow the continuing breach of a fundamental right. In the event, Sir Geoffrey has been properly appointed so recourse to the merits of the claim do not avail the claimant. For those reasons the application for an extension of time is dismissed.

Abuse of process

37 The remaining issue is whether the constitutional motion brought by way of Part 8 action should be dismissed on the merits or struck out on the basis that it amounts to an abuse of process. The submission advanced for the defendant is essentially that the challenge to the lawfulness of Sir Geoffrey's appointment should have been brought by way of judicial review within the applicable time limit, and that the Part 8 constitutional motion is an attempt to circumvent the judicial review time limits via a different procedural route, and that if the application for an extension of

time in the judicial review proceedings fails then for the same claim to be advanced under the guise of a constitutional motion amounts to an abuse of the court's process.

38 In *Att. Gen. (Trinidad & Tobago)* v. *Ramanoop* (1), the Privy Council discussed the relationship between a constitutional motion and an application for judicial review, and considered the earlier Privy Council decision of *Harrikissoon* v. *Att. Gen. (Trinidad & Tobago)* (4). In the judgment of the Board in *Ramanoop* delivered by Lord Nicholls, applying the guidance in *Harrikissoon*, he said ([2006] 1 A.C. 328, at paras. 25–26):

> "25 In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.
>
> 26 That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But 'bona fide resort to rights under the Constitution ought not to be discouraged': Lord Steyn in *Ahnee* v. *Director of Public Prosecutions* [1999] 2 A.C. 294, 307, and see Lord Cooke of Thorndon in *Observer Publications Ltd.* v. *Matthew* (2001), 58 W.I.R. 188, 206."

39 Dealing with non-constitutional judicial review/private law challenges, the need for promptitude was explained by Buxton, L.J. in *Stancliffe Stone Co. Ltd.* v. *Peak District Natl. Park Auth.* (8) said ([2006] Env. L.R. 7, at para. 60):

> "This need for promptitude in bringing challenges to public law decisions that, if successful, will have a wide public impact is not to be avoided by casting the complaint in a private law form, the object or (as in this case) the effect of which is to by-pass the formal rules of judicial review."

By analogy, it is said that in the present case the judicial review rules should not be bypassed by casting the challenge as a constitutional motion.

40 I have some sympathy with the abuse of process argument advanced, not least because the claimant instituted his first constitutional motion in June 2012, which he then discontinued. It is clear that the *Henderson* v. *Henderson* (5) principle applies in public law proceedings (see *R.* (*Building Socies. Ombudsman Co. Ltd.)* v. *Customs & Excise Commrs*. (7)). In *Henderson* v. *Henderson*, the principle was expressed as follows (3 Hare at 115; 67 E.R. at 319):

> "The plea of *res judicata applies*, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

If reasonable diligence had been exercised, the arguments now advanced should have been made part of that litigation.

41 However, *Harrikissoon* v. *Att. Gen. (Trinidad & Tobago)* (4) involved the transfer of a school teacher from one school to another whilst *Att. Gen. (Trinidad & Tobago)* v. *Ramanoop* (1) involved an assault upon the respondent by a police constable. Those were essentially distinct incidents in time which, whilst capable of engaging constitutional rights, were also capable of being determined in the context of enforcement of private law or non-constitutional public law rights. In the present case, the alleged breach is exclusively constitutional in nature and one which, had it been established, would have amounted to a continuing breach of the claimant's fundamental right to have the criminal offences with which he is charged determined by a court "established by law." In those circumstances, although bringing the action at this late stage is capable of being categorized as an abuse of the court's process, striking it out would be a wholly disproportionate sanction. The Part 8 claim is therefore not struck out, but for the reasons given before it is dismissed.

42 Orders accordingly and I shall hear the parties as to costs.

Orders accordingly.