[2013–14 Gib LR 703]

B. MARRACHE v. ATTORNEY-GENERAL and GOVERNOR

COURT OF APPEAL (Aldous, Potter and Waller, JJ.A.): October 22nd, 2014

Constitutional Law—fundamental rights and freedoms—independent and impartial court or authority—acting Puisne Judge independent and impartial, not holding office at pleasure of Governor without security of tenure—formally appointed by Governor with approval of JSC and appointment only revocable with same safeguards

Courts—Supreme Court—Puisne Judges—no age limit for appointment of acting Puisne Judges in 2006 Constitution, s.63(2) but restricted to special circumstances and requires approval of JSC—scheme in s.64 for over-age extension of substantive Puisne Judges not undermined by appointment of acting Puisne Judge exceeding age limit for substantive Judges

Courts—Supreme Court—Puisne Judges—no requirement in 2006 Constitution, s.63 that number of acting Puisne Judges be "prescribed by law"—number of Puisne Judges nonetheless "prescribed" by inclusion of establishment in Government's annual estimates and requirement in 2006 Constitution, s.72(1) and (5) that named officers (including Puisne Judges) be paid salaries prescribed by legislature

The appellant challenged in the Supreme Court the validity of the appointment of the acting Puisne Judge who was trying him on two counts of fraud.

The claims in the court below were made against the Attorney-General only and were dismissed by the Supreme Court (Dudley, C.J.) on the ground that the proper defendant should have been the Governor, but since the ramifications of the case were wide, the court went on to consider the substantive arguments.

The principal argument was that the trial judge had been improperly appointed because he was at the date of his appointment as an acting Puisne Judge in Gibraltar (following his retirement from the English High Court) above the age of 67. The Supreme Court (in proceedings reported at 2013–14 Gib LR 520) held that (a) there was no age limit for the appointment of an acting Puisne Judge, since there was no mention of such an age limit in the Constitution, ss. 62 or 63; there was, however, provision in s.64(7) for fixed-term appointments of substantive Puisne

Judges without regard to any age limit, and it followed that if a person over 67 could be appointed as a substantive Puisne Judge, he might also be appointed as an acting Puisne Judge; (b) the Governor had the power to appoint acting Puisne Judges under s.63(2)(a) of the Constitution because the number of Puisne Judges who could be appointed had been "prescribed by law" and that number had not been reached, and also under s.63(2)(b) which merely required that the business of the court required it, not that there be a vacancy in the ranks of Puisne Judges; and (c) the appointment was neither a breach of art. 6 of the European Convention on Human Rights (which in any case had not been incorporated into Gibraltar law), nor of s.8 of the Constitution, requiring a fair trial by an independent and impartial court, as the appointment had been made in accordance with the relevant provisions of the Constitution.

On appeal, (a) the appellant, at the suggestion of the court, applied for and was granted leave to substitute the Governor for the Attorney-General as defendant (rather than as an interested party)—and the issue therefore fell away; (b) he submitted that the Supreme Court had been wrong to hold that an acting Puisne Judge could be appointed after he had reached the age of 67, since the language of ss. 63 and 64 made clear the overall scheme for the appointment, retirement and removal of judges—there were defined provisions in s.64 which enabled the age restriction to be extended in the case of an incumbent judge—by no more than three years (s.64(1)(a)), until the age of 72 in exceptional circumstances (s.64(1)(b)), or so as to be able to give judgment or complete pending proceedings (s.64(1)(c))—and there were no provisions allowing the appointment of a new judge over the age of 67; (c) the Supreme Court had been wrong in holding that the number of Puisne Judges had been "prescribed by law" as required by s.60(2)(e) and in consequence none had been validly appointed and in effect the Chief Justice was the only validly appointed member of the Supreme Court; and (d) the appointment of the acting Puisne Judge to try the appellant did not comply with the requirement of s.8 of the Constitution that he was entitled to a fair trial by an independent and impartial court—his appointment was in effect "during pleasure" with no security of appointment, even though he was admittedly not subject to any actual bias or prejudice.

The respondent submitted in reply that (a) in fact the acting Puisne Judge had been appointed in this case under s.63, which contained no age limits but under which the power to appoint could only be exercised in limited circumstances and on the advice of the Judicial Service Commission ("JSC"), a provision entirely suited to the circumstances of Gibraltar, where the judicial complement was small; (b) although s.60(2)(e) required that the number of Puisne Judges should be "prescribed by law" there was no comparable requirement in s.63 that the number of *acting* Puisne Judges should also be "prescribed by law"; and (c) in any case, looking outside the scope of the Constitution, the Government expenditure authorized under the Public Finance (Control and Audit) Act 1977 included the salaries of Puisne Judges (whose establishment was stated as being three

in number) and provision had been made for paying them out of the Consolidated Fund, itself an indication that their number had been "prescribed" by law; and (d) the method of appointment of the acting Puisne Judge did not offend the impartiality and independence requirement of s.8 of the Constitution since he was appointed by the Governor under s.63(2), acting on the advice of the JSC—his appointment could not be determined at the whim of the Governor and since no period was specified in his warrant, he continued to act as an impartial and independent judge until the appointment was revoked by the Governor, acting in accordance with the advice of the JSC

Held, dismissing the appeals:

(1) The acting Puisne Judge had not been improperly appointed to his office at the age of 67. Section 63(2) of the Constitution, under which he was appointed, did not contain any restriction as to the age at which a person could be appointed to act as a Puisne Judge. The power to make an appointment, however, could only be exercised in limited circumstances and upon the advice of the JSC. The due appointment of an acting Puisne Judge who had exceeded the age limit for Puisne Judges did not undermine the scheme for over-age extension provided by s.64—indeed, it allowed the flexibility to deal with the peculiarities or emergencies that could arise in a small jurisdiction such as Gibraltar, where the number of available judges was small (para. 34).

(2) Section 60(2) of the Constitution required that the number of Puisne Judges be "prescribed by law." There was, however, no requirement in s.63 that the number of *acting* Puisne Judges should be so prescribed—and it would have been surprising if there had been such a requirement, as the section contemplated the appointment of such judges to bolster the judiciary when needed and probably quickly. Nonetheless, since the Public Finance (Control and Audit) Act 1977 required estimates of revenue and expenditure to be issued annually, and an establishment of three Puisne Judges was stated under the Act, with provision duly made for the payment of their salaries (and those of Additional Judges) out of the Consolidated Fund, those financial provisions satisfied the requirements of s.72(1) and (5) of the Constitution that the holders of named offices (including Puisne Judges) should be paid such salaries and allowances as might be prescribed by the legislature. The number of Puisne Judges was therefore "prescribed by law" (paras. 37–42).

(3) It was not the case that the acting Puisne Judge in this case was not "independent and impartial" so as to breach the requirements for a fair trial prescribed by s.8 of the Constitution. He did not hold office at the pleasure of the Governor with no security of tenure. He had been formally appointed under s.63(2) of the Constitution by the Governor on the advice of the JSC (and neither the Attorney-General nor the Chief Justice, who were members of the Commission, had attended the relevant meeting which recommended him). His appointment, unless he was removed for

cause under s.64, was open-ended and was not determinable at the whim of the Governor. He continued to act until his appointment was revoked by the Governor, again acting in accordance with the advice of the JSC. There was nothing to suggest to an objective, informed observer that there was any lack of independence or impartiality in his appointment (paras. 44–47).

Cases cited:

(1) *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, referred to.

(2) *Davidson* v. *Scottish Ministers (No. 2)*, 2005 1 S.C. (H.L.) 7; 2004 S.L.T. 895; [2004] H.R.L.R. 34; [2004] UKHL 34, referred to.

(3) *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, followed.

(4) *Starrs* v. *Ruxton*, 2000 J.C. 208; 2000 S.L.T. 42; [2000] H.R.L.R. 191; [2000] U.K.H.R.R. 78; (2000), 8 B.H.R.C.1, referred to.

(5) *Yiacoub* v. *R.*, [2014] 1 W.L.R. 2996; [2014] UKPC 22, distinguished.

Legislation construed:

Crown Proceedings Act 1951, s.12: The relevant terms of this section are set out at para. 30.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.8(1):

"If any person is charged with a criminal offence, then . . . the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law . . ."

s.57: The relevant terms of this section are set out at para. 13.

s.60: The relevant terms of this section are set out at paras. 14 and 36.

s.62: The relevant terms of this section are set out at para. 15.

s.63: The relevant terms of this section are set out at para. 16.

s.64: The relevant terms of this section are set out at paras. 17–18.

s.68: The relevant terms of this section are set out at para. 39.

s.72: "(1) There shall be paid to the holders of the offices to which this subsection applies such salaries and such allowances as may be prescribed by the Legislature.

. . .

(5) Subsection (1) applies to the offices of Governor, Chief Justice, Puisne Judge, Attorney-General, Commissioner of Police and Principal Auditor."

s.78: The relevant terms of this section are set out at para. 20.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 17 (1953)), art. 6:

"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and

public hearing within a reasonable time by an independent and impartial tribunal established by law."

C. Gomez for the appellant;
A. Maclean, Q.C., *L. Baglietto, Q.C.* and *C. Bonfante* for the respondents.

1 **ALDOUS, J.A.:** Benjamin Marrache was indicted with two counts of fraud. During his trial, he issued these proceedings in which he challenged the legality of the trial judge's appointment. This appeal is against the Chief Justice's judgment which dismissed those proceedings.

The background facts

2 Marrache & Co. were a firm of lawyers based in Gibraltar. Benjamin was the managing partner. His brother Solomon was not a partner but Financial Director. Benjamin and Solomon lived and worked in Gibraltar. Their brother Isaac lived in London. He was a partner and ran the London office.

3 In 2009 Marrache & Co. had difficulties with their client account. The police started an investigation which discovered that a large sum of money, over £30m., was missing from the client account. Benjamin was arrested on February 9th, 2010 and was charged with conspiracy to defraud.

4 Marrache & Co. were a prominent firm of lawyers in Gibraltar and the partners were known by the Gibraltar judiciary. It therefore seemed appropriate that the trial judge should be appointed from outside Gibraltar. Thus the Deputy Governor wrote to the President of the Court of Appeal, as chairman of the Judicial Service Commission ("JSC"), requesting that the JSC should select persons for recommendation for appointment to the post of additional Stipendiary Magistrate and Acting Puisne Judge "in particular to handle the litigation concerning Messrs. Marrache." On the same day, the President replied to the Governor informing him that the JSC's recommendation was that Sir Geoffrey Grigson should be appointed as Acting Puisne Judge and confirming that the recommendation was made "in accordance with section 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, the Chief Minister confirmed his consent. By letter dated May 15th, 2012 the Governor informed the President 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.

5 Sir Geoffrey is a retired English High Court Judge who had considerable experience in trying criminal trials. He was born on October 28th, 1944 and therefore was over 67 years old when his appointment took

effect. For the purpose of the appeal, the appellant accepts that Sir Geoffrey is a well-respected retired English High Court Judge.

6 On June 13th, 2012, a warrant of appointment was drawn up and signed by the Governor. Due to an error, a further warrant was considered necessary and was drawn up to coincide with Sir Geoffrey's arrival in Gibraltar. 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. It was headed **ACTING PUISNE JUDGE** and was in these terms:

> "To: Geoffrey Grigson
>
> Greetings
>
> PURSUANT to sections 57(2)(a) and 63(2)(b) of the Constitution of Gibraltar 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 an Acting Puisne Judge with effect from 17th May 2012."

It was signed and sealed.

7 After a jury had been sworn in, the trial started on 7th October 2013. Difficulties arose as to some members of the jury and the judge dismissed them and continued with the trial. That was possible under the law in Gibraltar although his decision is under challenge in an appeal by the brothers. The trial lasted about eight months including adjournments for Christmas and for other reasons. It was expensive, with legal aid exceeding £1.5m. On July 4th, 2014, Sir Geoffrey sentenced Benjamin to 11 years' imprisonment. Solomon and Isaac were each sentenced to 7 years. All three brothers are appealing against their convictions and sentences.

8 The proceedings being appealed before us consist of a constitutional motion brought by Benjamin against the Attorney-General. It was issued on March 13th, 2014, about four months before Sir Geoffrey's judgment, and proceeded as a Part 8 claim. There was also a claim for judicial review issued on March 26th, 2014 naming the Attorney-General as defendant and the Governor as an interested party.

The issues

9 The Attorney-General submitted that both proceedings failed at the outset for three reasons.

(i) The proceedings had been brought against the wrong defendant. As I shall explain later, that no longer remains an issue in the appeal.

(ii) The judicial review was out of time and the court should decide that an extension of time was in the circumstances not justified. There was no

reasonable chance of success, so for that reason also leave should not be given.

(iii) Further, it was an abuse of process to circumvent the time limit for judicial review by bringing a challenge as a constitutional motion. It should therefore be struck out.

10 The appellant contends that the appointment was *ultra vires* and therefore a nullity. Both the constitutional claim and the judicial review depend upon the interpretation of the Constitution.

First, it was alleged that the appointment of Sir Geoffrey was *ultra vires* as he had exceeded the age limit in the Constitution for such an appointment, namely 67 years. The respondent supported the Chief Justice's conclusion that no such restriction was contained in the Constitution.

Secondly, did the Constitution provide any legal power to appoint Puisne Judges because of the statutory provision requiring prescription of the number of judges by the legislature? It was said that there had not been any prescription and therefore Sir Geoffrey's appointment as a Puisne Judge was not valid. The respondent asserted that he was appointed as an Acting Puisne Judge, not a Puisne Judge, and the Constitution did not require their number to be prescribed. In any case there had been appropriate prescription.

11 The judicial review added an allegation that the power to appoint judges under the particular terms of the Constitution and the warrant of appointment was incompatible with art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Thus the appointment was *ultra vires*. In essence, the allegation was that s.63 of the Constitution and the warrant of appointment were incompatible with the requirement for an independent judiciary found in art. 6. That case, advanced by the appellant before the Chief Justice, was altered before us so as to rely on s.8 of the Constitution. The issue needs the court to decide whether the appointment of Sir Geoffrey and the subsequent trial were contrary to the appellant's basic right to a trial by an independent and impartial judge.

The Constitution

12 Section 57 of the Constitution established the JSC, consisting of the President of the Court of Appeal as Chairman, the Chief Justice, the Stipendiary Magistrate, two members appointed by the Governor acting in accordance with the advice of the Chief Minister, and two members appointed by the Governor acting in his discretion.

13 Section 57 provides:

"(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 . . .

(3) The Governor, with the prior approval of a 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."

14 Section 60 established the Supreme Court of Gibraltar and sub-ss. (2) and (3) provide:

"(2) 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.

(3) The office of a Puisne Judge shall not be abolished without his consent during his continuance in office."

Section 61 is not relevant as it deals with the Court of Appeal. Section 62(1) states that the Chief Justice, any Puisne Judge, and the President of the Court of Appeal and the Justices of Appeal shall be appointed in accordance with s.57.

15 Section 62(2) provides that no person shall be qualified for appointment (*inter alia*) as 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."

16 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."

17 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 . . .

Provided that—

(a) the Governor may permit a Chief Justice or a Puisne Judge who has attained that age to remain in office for such period not exceeding three years as may have been agreed between that Chief Justice or that Puisne Judge, as the case may be, and the Governor;

(b) the Governor, being satisfied that it is desirable so to do because of exceptional circumstances, may permit a Chief Justice or a Puisne Judge to remain in office for such a further period as may have been agreed between that Chief Justice or that Puisne Judge, as the case may be, and the Governor but so that in any event the Chief Justice and any Puisne Judge shall not hold office after attaining the age of 72 years . . ."

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.

18 The remaining sub-sections of s.64 then deal with removal from office by reason of inability or misbehaviour. Sub-sections (7) and (8) provide:

> "(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."

19 Finance is dealt with in s.67 and following.

20 The definition section, s.78, states that "prescribed" means "prescribed in a law in force in Gibraltar."

The judgment

21 The Chief Justice dealt first with the substantive challenges to the appointment of Sir Geoffrey before turning to the preliminary points raised on behalf of the Attorney General.

22 The Chief Justice considered first the submission of Mr. Gomez, counsel for the appellant, that s.63 requires that a person to be appointed as Acting Puisne Judge must be qualified as a Puisne Judge; that by s.64 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 an Acting Puisne Judge. Thus the appointment of Sir Geoffrey, who was over 67, was a nullity.

23 Having considered the submissions of the parties, the Chief Justice concluded (2013–14 Gib LR 520, at para. 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 are 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 subsection (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."

24 The Chief Justice then considered the submission that s.60(2) of the Constitution requires that the number of Puisne Judges be prescribed by law. Since 2006 no statutory provision prescribing the number of Puisne Judges had been passed, with the result that the only properly appointed Judge of the Supreme Court was the Chief Justice. If no substantive office of Puisne Judge exists, an Acting Puisne Judge cannot be appointed.

25 The Chief Justice, after considering the submissions made on behalf of the appellant, said (*ibid.*, at para. 22):

> "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."

26 Although not relevant to the proceedings before him, the Chief Justice went on to consider the effect of the submission in respect of the judges other than Sir Geoffrey. He concluded (*ibid.*, at paras. 24–25):

> "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 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 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* . . .) 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."

27 The Chief Justice then came to the submission made on behalf of the Attorney General that both proceedings were against the wrong defendant. He agreed and decided that the proper defendant was the Governor and that joining him as an interested party did not cure the irregularity.

28 Finally, the Chief Justice decided that it was not appropriate to give permission to bring the judicial review claim as it had no reasonable chance of success, but that it would not be right to strike out the constitutional claim which he dismissed on merit.

The appeal

The parties

29 The proceedings were brought against the Attorney General with the Governor added as an interested party. That appeared odd as the appointment of Sir Geoffrey was made by the Governor and it would therefore seem that it would be that decision which should be challenged with the Governor as the defendant.

30 Mr. Gomez submitted that a litigant ought to have an effective remedy for a fault in a legal system. He went on to submit that the Attorney General was the appropriate defendant having regard to s.12 of the Crown Proceedings Act 1951, which states: "Civil proceedings by or against the Crown shall be instituted against the Attorney General."

31 Mr. Maclean, Q.C., who appeared for the Attorney-General, submitted that neither the judicial review claim nor the Part 8 claim constituted civil proceedings against the Crown within the meaning of those words in s.12 of the 1951 Act. That he submitted was clear from the speeches in *Davidson* v. *Scottish Ministers (No. 1)* (1).

32 During the hearing the court suggested that the Chief Justice appeared to be right in concluding that the Attorney-General was not the right defendant and for that reason the appeals could fail. Mr. Gomez, sensing that his submissions were not having the desired effect, applied for leave to amend to substitute the Governor as the defendant. That application was not resisted and we gave leave with the result that this issue falls away. As requested, we reserved the costs.

The age issue

33 Mr. Gomez submitted that the Chief Justice had come to an erroneous conclusion that an Acting Judge could be appointed after he had attained the age of 67. That he submitted was clear from an analysis of the scheme for appointment, for retirement and for removal of judges and from the language of ss. 63 and 64. Section 64 of the Constitution requires Puisne Judges to vacate office at the age of 67. There were, he submitted, defined provisions which enabled that age restriction to be extended. Thus s.64(1)(a) permits a judge to remain for a period of not more than three years. Section 64(1)(b) allows an incumbent judge to remain in office up to the age of 72 in exceptional circumstances. Sub-section (c) allows a judge to remain in office to give judgment or complete pending proceedings. There would be, he submitted, no point to any of the provisions of s.64(1) if the entire scheme could be circumvented by appointing any judge over the age of 67 as an Acting Puisne Judge. He went on to submit that the Chief Justice's interpretation undermined the scheme of s.64 and should not be adopted. Bringing the Chief Justice's conclusion to a logical

conclusion, an Acting Puisne Judge could be appointed at any age and a judge who had retired could still be appointed as an Acting Puisne Judge. As Sir Geoffrey was over the age of 67, his appointment was *ultra vires* the Constitution. It followed that the trial and verdict were a nullity.

34 Mr. Gomez rightly points to the age restrictions on those holding the office of Puisne Judge. However, Sir Geoffrey was appointed as an Acting Puisne Judge pursuant to the power provided in s.63(2). There is no statutory restriction of age in respect of Acting Puisne Judges; however, the power to appoint can only be exercised in limited circumstances and upon the advice of the JSC. The appointment as an Acting Puisne Judge, upon the advice of the JSC, of a qualified person who has exceeded the age limit for Puisne Judges, does not undermine the scheme in s.64. To the contrary, the power to appoint a qualified Acting Puisne Judge allows flexibility to deal with the peculiarities or emergencies that can arise in a jurisdiction such as Gibraltar where the judicial complement is small. The Chief Justice was right to reject this attack on the appointment of Sir Geoffrey.

35 Mr. Gomez also sought to bolster his submission by reference to the Constitutions of Bermuda and the Cayman Islands. Those Constitutions make provision for the appointment of judges older than the normal retiring age. He submitted that, if that had been the intention of the Gibraltar Constitution, then a similar approach could have been adopted. No doubt the Gibraltar Constitution could have been worded differently but, if it is clear, as I believe it is, then the adoption of a different approach elsewhere is not relevant. I conclude that the Chief Justice was right for the reasons he gave that the Constitutions of Bermuda and the Cayman Islands do not assist when construing the Gibraltar Constitution.

Prescription

36 Mr. Gomez drew our attention to s.60(2), which provides: "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." He submitted that, as there had been no Act of Parliament prescribing the number of judges since the Constitution came into effect, the only judge of the Supreme Court is the Chief Justice.

37 Section 60(2) requires that the number of Puisne Judges be "prescribed by law" and s.62 provides for their appointment. Section 63 deals with Acting Judges. It provides that they can only be appointed by the Governor in limited circumstances and in accordance with the advice of the JSC However, there is no requirement that the number of Acting Judges should be prescribed by law. Indeed, it would be surprising if there were such a requirement, as the section contemplates appointment of such

judges to bolster the judiciary when needed and probably quickly. For that reason this submission fails.

38 The Chief Justice went on to consider the position of the Puisne Judges in Gibraltar. Although there had been no specific Act explicitly dealing with the number of Puisne Judges, he rejected the submission that none had been appointed or prescribed. In my view he was right in this respect, given that the salaries of three judges payable pursuant to s.72 have been prescribed by the legislature (see para. 41 below).

39 Section 68 of the Constitution provides:

> "(1) No moneys shall be withdrawn from the Consolidated Fund except—
>
> (a) to meet expenditure that is charged upon the Fund by this Constitution or by any other law in force in Gibraltar; or
>
> (b) where the issue of those moneys has been authorised by an appropriation law or in such manner, and subject to such conditions, as may be prescribed in pursuance of section 70.
>
> . . .
>
> (3) No moneys shall be withdrawn from the Consolidated Fund except in such manner as may be prescribed by the Legislature."

And s.69 requires the Minister to prepare and lay before Parliament estimates of revenues and expenditure.

40 Section 72(1) requires holders of offices to be paid such salaries and allowances as may be prescribed by the legislature. Sub-section (5) applies sub-s. (1) to the office of *inter alia* Puisne Judge.

41 The management and control of the public finances is provided for in the Public Finance (Control and Audit) Act 1977. Section 3 requires the Minister responsible for finance to supervise the finances and have management of the Consolidated Fund. Section 4 empowers the Financial Secretary to pay out of the Consolidated Fund such sums as may be required to meet expenditure chargeable upon the Consolidated Fund. Section 41 requires estimates of revenue and expenditure to be issued. Salaries of Supreme Court Judges are listed in sub-head 02 as "Consolidated Fund Charges–Recurrent" with an estimate for 2013/2014 of £375,000. There is a note referring to s.72 of the Constitution (see the previous paragraph). Head 21(v) gives 3 as the establishment of Puisne Judges and the expenditure for Additional Judge(s) is said to be shown under "Consolidated Fund Charges."

42 The financial provisions considered above satisfy the requirements of ss. 72(1) and (5) of the Constitution in that they provide for payment of the salaries and allowances of three Puisne Judges as prescribed by the

legislature. In those circumstances I fail to see how it can be said that those judges have not been prescribed in a law in force in Gibraltar.

43 The Chief Justice also referred to para. 2(2) of Annex 2 of the Constitution which appears to maintain the status quo and the arrangements under the 1969 Constitution as if they had been prescribed by law pursuant to s.60(2) of the Constitution. There being no restrictions on numbers provided for under the 1969 Constitution, the Chief Justice concluded, rightly in my view, that there continued to be no restriction on numbers, other than the restrictions referred to in paras. 38 and 39 above, and that, save to that extent, the old position remained.

Fair trial

44 Before the Chief Justice, the appellant argued that the appointment of Sir Geoffrey pursuant to s.63(5) of the Constitution was contrary to art. 6 of the European Convention on Human Rights. Before us, similar arguments were deployed to show that the appellant's rights under s.8 of the Constitution had been infringed. It was said he had not had a fair trial by an independent and impartial court. No doubt he will on his appeal against conviction draw attention to instances where he believes that Sir Geoffrey made mistakes, but that was not the ground argued before us. As I have said, Mr. Gomez accepted that Sir Geoffrey was a retired and respected High Court judge. His submissions were directed at s.63 and the way that Sir Geoffrey was appointed. Mr. Gomez described the appointment as a "during pleasure" appointment with the judge having no security of tenure. In support he relied on a number of cases, in particular the Scottish cases of *Starrs* v. *Ruxton* (4); *Davidson* v. *Scottish Ministers (No. 2)* (2) and *Kearney* v. *H.M. Advocate* (3). Although the industry of Mr. Gomez placed before us a number of cases where art. 6 was in issue, I believe that this case can best be decided using the principles elucidated by the Privy Council in *Kearney.*

45 In *Kearney* the issue was whether the temporary judge was an independent and impartial judge within the meaning of art. 6 of the European Convention on Human Rights. As in the present case, it was not suggested that he was subject to any actual bias or prejudice. As in this case, the complaint was that he was not independent, having regard to the manner of his appointment, his term of office and the absence of guarantees against outside pressure. In *Kearney*, the head of the Scottish judiciary, with overall responsibility for the handling and dispatch of business in the higher courts, instigated the appointment of the temporary judge. That was in contrast to *Starrs* where the process was initiated by the Lord Advocate and therefore it was said that he had obtained office by favour of the Lord Advocate. In *Kearney*, the appointment was made by the Ministers, but that was not considered objectionable. His warrant of appointment provided that he would act as a temporary judge on such

occasions as the Lord President may from time to time direct. That, Lord Bingham said, was not even arguably objectionable. The submission was that his appointment did not comply with the Convention because he was removable at any time at the behest of the Ministers. That, Lord Bingham held, was not the position. Further, it is not the position in this case. Acting judges are appointed under s.63 of the Constitution and Sir Geoffrey was appointed under s.63(2). The Governor was the appointer, but he had to act in accordance with the advice of the JSC Sir Geoffrey's appointment, unless he was removed under s.64, was open-ended and was not determinable at the whim of the Governor. No period being specified in his warrant, he continued to act until his appointment was revoked by the Governor, acting in accordance with the advice of the JSC

46 Thus, Sir Geoffrey did not hold his position as an acting judge at the pleasure of the Governor; he could only make the appointment if so advised by the JSC As was the case in *Kearney,* Sir Geoffrey had the necessary security of tenure. His appointment was as an independent and impartial judge. Further, a fair-minded and informed observer could not have believed that the court was biased.

47 Mr. Gomez expressed his client's concerns as being a systemic accumulation of matters giving an appearance of a lack of independence and impartiality. Early on in his oral submissions he referred us to the Privy Council case of *Yiacoub* v. *R.* (5). That was an appeal from Cyprus. There the presiding judge not only appointed the judge, but nominated a judge to hear an appeal from himself. That, the Board concluded, carried an appearance of a lack of independence and impartiality in relation to the process, viewed as a whole, which would impact on an objective informed observer. The facts in that case bear no resemblance to those in these proceedings. In this case the Governor, acting upon the advice of the JSC, made the appointment of Sir Geoffrey. Neither the Attorney-General nor the Chief Justice attended the relevant meeting of the JSC An objective informed observer would not see any lack of independence or impartiality and in my view there was none.

Judicial review—procedure

48 The appellant needed permission to proceed with his application for judicial review and, as a first hurdle, needed to persuade the Chief Justice to extend the time. The Chief Justice concluded that the claim was hopeless as the wrong defendant had been named. That objection was removed by amendment and upon that basis, I conclude that the issues raised were sufficiently arguable to pass the permission threshold.

49 Like the Chief Justice, I believe that there was inordinate and inexcusable delay in making the application. Mr. Gomez sought to explain the delay upon the basis that knowledge of Sir Geoffrey's age only came

to the appellant's notice in February and March 2014. However, he was well aware that Sir Geoffrey was a retired High Court Judge and, had the appellant's advisers thought about it, they would have been surprised if he were under the age of 67. It seems that no attempt was made to find out his age against a background where the case was moving on, incurring costs and expenditure which would all have been wasted if the appellant were right that Sir Geoffrey had not been properly appointed. In a normal case the delay would have resulted in a refusal to extend time and consequent dismissal of the application. However, this is not a normal case because dismissal of the application on that basis would leave undecided the question of whether the Marrache brothers had been tried by a properly appointed judge of Gibraltar. That would have left it open to the appellant and his brothers to take the points here argued as grounds of appeal in their appeals against conviction which are due to be heard later. This, therefore, is an exceptional case. Having heard the submissions of the parties, it is in the interest of justice to extend time so as to decide the application for judicial review on its merits and that is the course that should be adopted.

The Constitutional Part 8 claim

50 The Chief Justice's judgment as set out in paras. 37 to 41 cannot be faulted. Like him, I believe that to strike out the claim would be counterproductive. It needs to be decided and is best decided by us after the extensive submissions of the parties, both written and oral.

51 At the end of the parties' submissions, we retired to consider how to proceed. We concluded that the appeals should be dismissed and we then returned to court and announced our decision with reasons to follow. These are my reasons. In so far as there remain issues as to costs and whether leave to appeal is necessary and appropriate, the parties agreed before us that those issues could be decided upon written submissions and we so ordered.

52 **POTTER** and **WALLER, JJ.A.** concurred.

Appeals dismissed.