[2017 Gib LR 1]

R. (MINISTER FOR JUSTICE) v. PAROLE BOARD (EL OUAHABI as Interested Party)

R. (MINISTER FOR JUSTICE) v. PAROLE BOARD (I. MARRACHE as Interested Party)

SUPREME COURT (Jack, J.): January 23rd, 2017

Prisons—parole—application for consideration by court—on application by Minister for Justice under Prison Act 2011, s.54(5) for court's consideration of parole, Minister not required to give reasons—court acts inquisitorially and hearing de novo—court not required to pay particular deference to Parole Board's decision

Prisons—parole—order for release—decision to release offender requires balancing of risk of reoffending against benefit to prisoner and community of release under supervision

The Minister for Justice sought reconsideration of two decisions of the Parole Board.

In 2014, Mr. El Ouahabi had been sentenced to eight years' imprisonment, having pleaded guilty to the importation of drugs. In the same year, Mr. Marrache had been sentenced to seven years' imprisonment for conspiracy to defraud. In 2016, the Parole Board recommended that they be released on licence. The Minister for Justice asked the Board to reconsider its decision (pursuant to s.54(3) of the Prison Act 2011), which it did, confirming its advice. The Minister then made an application to the court under s.54(5) of the Act requesting that it review the Board's recommendations.

In respect to Mr. Marrache, shortly before the hearing of the application the Minister was supplied with the underlying material upon which the Board had made its decision. As a result of this, he chose to accept the Board's advice on the matter and directed that Mr. Marrache be released on licence. The Minister agreed a consent order with Mr. Marrache's counsel, by which the s.54(5) application would be permanently stayed. The consent order came to the attention of the court on the day of the hearing and the court was not prepared to approve it without explanation and argument. The Minister filed a notice of discontinuance, purportedly under CPR Part 38.

Mr. El Ouahabi raised a preliminary point that the Minister's application was fatally compromised by his failure to plead in his Part 8 claim form any reasons for making the application to the court.

The Board submitted that the title of the action was incorrect, being the style used for judicial review. The Board also submitted that as it was a specialist tribunal particular weight should be given to its decisions and the court should only interfere if it was plainly wrong.

The Minister submitted that the proceedings before the court on a reference should be treated as being in private. Since the hearing was a *de novo* hearing, the court should adopt the same approach to confidentiality as the Board did.

Held, ordering as follows:

(1) In the circumstances, it was appropriate to order that Mr. Marrache's case be adjourned *sine die*. Although the court was doubtful as to the validity of the notice of discontinuance, it had not heard adversarial argument and would not take the point itself. The Minister had been right to have raised concerns about the Board's decision to release Mr. Marrache. The Board appeared to have accepted at face value Mr. Marrache's assertion of his remorse and did not appear to have considered the implications of his proposed move to the United States. In the circumstances, the court could not, of its own motion, order that the matter continue so that the justification for releasing Mr. Marrache could be explored in more detail. Unless and until someone with appropriate standing, such as one of Mr. Marrache's victims, applied to join the current proceedings as an interested party, the case would be adjourned *sine die* (paras. 55–61).

(2) The court would order that Mr. El Ouahabi be released. The factors that the Minister had asked the Board to reconsider included the seriousness of the crime, the time served and the level of risk of reoffending. However, in general, time served was irrelevant. The risk of reoffending was to be balanced against the benefit to the prisoner and the public of his release under supervision. Mr. El Ouahabi had not had a significant role in the criminal network which had employed him to import the drugs. If released in Gibraltar, he was unlikely to meet the more significant Moroccan drug dealers. He had made the most of his time in prison and earned a position of trust there. Balancing the factors, the risk to the public from Mr. El Ouahabi's release was acceptable. The risk of reoffending was outweighed by the benefit to the public of not having to expend taxpayer's money to keep him in prison, and to him by being under supervision in the community and being aided in his rehabilitation (paras. 62–71).

(3) The appropriate title of a reference under s.54(5) should name the Minister as the claimant, as the Minister referred the case to the court pursuant to a statutory power, and the prisoner as the defendant, with the Board as interested party (paras. 20–23).

(4) The Minister's application was not fatally compromised by his failure to plead in his Part 8 claim form any reasons for the application to the court. It was not a breach of natural justice. That would be to misunderstand the nature of the proceedings before the court. The substantive hearing was a hearing *de novo* of the proceedings before the Board and the same procedure would be followed. The rules of evidence did not therefore apply, the witnesses did not take the oath and the court had an inquisitorial function. The proceedings were not adversarial and there was no need for pleadings. As the court was acting inquisitorially it was not bound by anything conceded by the Minister. The court was not limited to the matters raised by the Minister and the need for the Minister to give reasons was therefore much reduced. In any event, a prisoner would normally be well aware of the Minister's objections to the Board's decision because the Minister was obliged to give reasons when referring a case back to the Board under s.54(3). There were sufficient remedies to prevent any abuse by the Minister of his right of referral to the court, namely potential costs sanctions and summary determination of the matter in favour of the prisoner (paras. 25–35).

(5) Hearings of a reference from the Minister should be held in public. There was nothing inherently confidential in the documents provided to the court. The interests of justice did not require the hearing to be in private and in fact positively favoured the hearing of references by the Minister in open court. It was very much in the public interest for the public to know the reasons for decisions as to whether to release a prisoner. It would only exceptionally be in the interests of justice for a hearing determining the liberty of a subject to be held in private. In any event, in the present case it was too late to take this point as the hearing had already occurred (paras. 41–43).

(6) It could not be said that the court should accord significant weight to the Board's decision and should be very reluctant to interfere unless the Board was plainly wrong. It was true that the Board was a specialist tribunal, although it was necessary to be realistic about the degree of expertise that a tribunal in a small jurisdiction like Gibraltar could develop. The issues for the Board, such as the degree of remorse shown by an offender or his risk of reoffending, were issues with which the court was very familiar when sentencing. The court would pay only the usual degree of deference to decisions of the Board (paras. 45–49).

(7) It was doubtful whether public litigation of the present type could be resolved by consent, without the approval of the court. Section 54(7) of the 2011 Act provided that on a s.54(5) application "the Court shall . . . consider the matter on its merits." To approve a consent order without examining the basis on which the order was sought would not involve a consideration of the matter on its merits. It was also arguable that the Minister's notice of discontinuance under CPR Part 38 was ineffective. First, as a technical point, what was discontinued by service of such a notice was a cause of action, not a claim form. A Part 8 claim form was

merely the mechanics whereby the Minister brought a matter before the court and there was arguably nothing to withdraw. Secondly, the only independent power that the Minister had to release prisoners on licence was under s.54(2) to allow release in exceptional cases on compassionate grounds. In all other cases the Minister had to follow the decisions of the Board or the court. His powers were circumscribed: if the Board decided to release a prisoner on licence, the Minister must release the prisoner unless he referred the matter to the court; if the court decided the prisoner should be released, the Minister must release him. Once the Minister referred a case to the court, he was arguably *functus officio*, he could not change his mind and decide that the Board had been right after all (paras. 50–54).

Cases cited:

(1) *Baxendale-Walker* v. *Law Socy.*, [2007] EWCA Civ 233; [2008] 1 W.L.R. 426; [2007] 3 All E.R. 330; [2007] 3 Costs L.R. 475, applied.
(2) *Compson* v. *Financial Servs. Commr.*, 2015 Gib LR 435; on appeal, *sub nom. Weal* v. *Financial Servs. Commr.*, 2016 Gib LR 131, applied.
(3) *Evans* v. *Bartlam*, [1937] A.C. 473; [1937] 2 All E.R. 646, referred to.
(4) *Lavarello* v. *Marrache*, Supreme Ct., Case No. 2011–L–78, October 15th, 2015, unreported, referred to.
(5) *R.* v. *Lopez Castro*, September 22nd, 2015, unreported, referred to.
(6) *R.* v. *Parole Bd.*, 2015 Gib LR 91, considered.
(7) *Scott (or Morgan)* v. *Scott*, [1913] A.C. 417; [1911–13] All E.R. Rep. 1, applied.

Legislation construed:

Civil Procedure Rules (S.I. 1998/3132), r.38.2:

"(1) A claimant may discontinue all or part of a claim at any time.
(2) However—
(a) a claimant must obtain the permission of the court if he wishes to discontinue all or part of a claim in relation to which—
(i) the court has granted an interim injunction; or
(ii) any party has given an undertaking to the court;
(b) where the claimant has received an interim payment in relation to a claim (whether voluntarily or pursuant to an order under Part 25), he may discontinue that claim only if—
(i) the defendant who made the interim payment consents in writing; or
(ii) the court gives permission;
(c) where there is more than one claimant, a claimant may not discontinue unless—
(i) every other claimant consents in writing; or
(ii) the court gives permission."

r.39.2(3)(c) and (g): The relevant terms of these paragraphs are set out at para. 38.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.8: The relevant terms of this section are set out at para. 39.

Prison Act 2011, s.53: The relevant terms of this section are set out at para. 16.
s.54: The relevant terms of this section are set out at para. 16.
s.57: The relevant terms of this section are set out at para. 16.
s.58: The relevant terms of this section are set out at para. 16.
Schedule 1, para. 1: The relevant terms of this paragraph are set out at para. 17.
Schedule 2, paras. 1–2: The relevant terms of these paragraphs are set out at para. 18.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953), Cmd. 8969), 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 . . . Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or . . . where the interests of juveniles or the protection of the private life of the parties so require, or . . . where publicity would prejudice the interests of justice."

F. Fischel, *Q.C.* for the claimant;
C. Gomez for Mr. Ouahabi;
I. Watts for Mr. Marrache;
J. Restano, *Q.C.* and *M. Levy* for the defendant.

1 **JACK, J.:** Mr. Mustapha El Ouahabi and Mr. Isaac Marrache were serving prisoners at H.M. Prison Windmill Hill. These two matters arise out of two references made to the court in respect of them by the Minister for Justice under s.54(5) of the Prison Act 2011. He issued two Part 8 claim forms on November 29th, 2016.

Background and procedural

2 On August 12th, 2014, I sentenced Mr. Mustapha El Ouahabi to eight years' imprisonment. He was the skipper of a rigid inflatable boat which broke down in British-Gibraltarian Territorial Waters in the small hours of March 2nd, 2014. On board were found some 2½ tons of cannabis resin. He pleaded guilty to the importation of the drugs. An appeal to the Court of Appeal against sentence was dismissed (2015 Gib LR *N* [3]).

3 On July 4th, 2014, Grigson, J. sentenced Mr. Isaac Marrache to seven years' imprisonment for conspiracy to defraud. He was one of the partners in the solicitors' firm, Marrache & Co. The three brothers, Isaac, Benjamin and Solomon Marrache, conspired to steal from the firm's client account. The deficiency to clients is in excess of £29m.

4 The cases of both men came before the Parole Board on October 28th, 2016. In each case the Board unanimously agreed to release the men on parole on November 11th, 2016. Again in each case on November 11th, 2016, pursuant to s.54(3) of the Prison Act 2011, the Minister asked the Board to reconsider its recommendation. The Board considered the two referrals at its meeting on November 18th, 2016 but decided to confirm its advice that the men be released. As noted, on November 29th, 2016, the Minister applied to the court under s.54(5) for the court to determine whether the two men should be released. The two matters were listed to be heard together on January 13th, 2017 by me.

5 I held a directions hearing on December 21st, 2016. Mr. Fischel, Q.C. for the Minister submits that the directions hearing should be treated as having been heard in private. As a matter of fact the hearing was held in public. In my judgment, at least on the facts of this case, it is too late to turn a public hearing into an *in camera* hearing, for reasons to which I shall come.

6 At the directions hearing I drew the attention of Mr. Marrache's counsel to two matters possibly relevant to any decision to release him. The first was my judgment in the Marrache art case, *Lavarello* v. *Marrache* (4). This concerned the ownership of a large art collection assembled by the Marrache brothers' father. Mr. Isaac Marrache was one of the defendants to the claim by the liquidators of Marrache & Co. and the trustees in bankruptcy of the individual brothers. The only evidence given on the defendants' behalf was that of Mr. Benjamin Marrache. I did not accept Benjamin Marrache's evidence and found in favour of the liquidators and trustees in bankruptcy. Whether the fact that Mr. Isaac Marrache associated himself with the defence put forward in that action was something on which I indicated I would wish to hear representations.

7 The second was the behaviour of the Marrache brothers in the *R.* v. *Lopez Castro* (5) case. In that matter I sentenced Mr. Lopez Castro to a term of 4½ years' imprisonment for burglary of a jeweller's shop in Main Street. Mr. Lopez Castro had denied the offence but was convicted. At the sentencing hearing, I was handed a sealed envelope containing representations which I was told Mr. Lopez Castro wished to make. Mr. Patrick Canessa, who represented Mr. Lopez Castro, had not read the letter. Mr. Lopez Castro did not speak English but the letter was in English and signed by him. The letter admitted that Mr. Lopez Castro had committed the offence for which he had been found guilty and expressed contrition. This was contrary to the mitigation presented by Mr. Canessa.

8 I passed the letter to Mr. Canessa who discussed it with his client. Mr. Canessa told me that his client did not know the content of the letter which had not been translated to him. He said that the Marrache brothers had started to write similar notes for prisoners which were then produced to

the Magistrates' Court. He said that his client continued to deny the offence of which he had been convicted.

9 The parties agreed that at the final hearing before me, listed for Friday, January 13th, 2017, the court should act inquisitorially and that the strict rules of evidence should not apply. At that stage there was no suggestion that the substantive hearing should take place in private or *in camera*, and the substantive hearing that day was heard in the ordinary way in open court.

10 Shortly before that hearing, on January 12th, 2017, the Minister and Mr. Marrache's lawyers agreed, or purported to agree, a consent order staying permanently the Minister's application with no order for costs. The Minister directed that Mr. Marrache be released on parole and that was done that day. The consent order only reached my attention on the day of the hearing. I was not prepared to approve it without some explanation and argument.

11 Notwithstanding that Mr. Marrache's counsel would have been aware that the order had not been approved, both he and Mr. Marrache absented themselves from the hearing. Mr. Marrache could not be reached on his mobile. When Mr. Watts, appearing on Mr. Marrache's behalf, eventually arrived, I adjourned consideration of the consent order and Mr. Marrache's case generally to Monday, January 16th, 2017.

12 I then proceeded to hear Mr. El Ouahabi's case. I dismissed the preliminary legal point which I discuss below and proceeded to hear the matter on its merits. I then announced my decision to uphold the decision of the Parole Board, so as to permit Mr. El Ouahabi to be released at once. However, in view of the legal issues raised, I indicated that I would give written reasons. These are those reasons.

13 Later that day, shortly before the court office closed, the Minister filed with the court a notice of discontinuance purportedly under Civil Procedure Rules, r.38.2. I discuss the validity of this notice below. Because counsel needed to know whether to attend on Monday, January 16th, 2017, I released them and indicated that I would distribute a written judgment as soon as possible. Because I was away from the Wednesday, I had a draft judgment distributed on the morning of Tuesday, January 17th, 2017, with a view to handing it down at 2 o'clock that day.

14 At that hearing, Mr. Fischel, Q.C. said that he wished to argue that the notice of discontinuance was effective. Mr. Watts initially supported that application. However, I pointed out to him that if I were against him and Mr. Fischel and held that the notice of discontinuance was ineffective, then I would proceed to determine the substantive merits of Mr. Marrache's release on licence. There was therefore a risk that Mr. Marrache would be returned to prison. After taking instructions, Mr. Watts

indicated that he no longer wished to insist on arguing the notice of discontinuance point and was happy that the matter be adjourned *sine die*.

15 Counsel indicated that they wished to make further submissions in writing, so I adjourned the handing down of the judgment to permit that to be done. This judgment incorporates these further submissions.

The legislation

16 The Prison Act 2011 provides, so far as material:

"**Functions of Parole Board.**

53.(1) It shall be the duty of the Parole Board to advise the Minister with respect to—

(a) the release on licence under section 54, and the recall under section 59, of persons whose cases have been referred to the Parole Board by the Minister;

(b) the conditions of such licences and the variation or cancellation of such conditions; and

(c) such other matters as may be prescribed.

(2) The Parole Board shall deal with each case on consideration of any documents given to it by the Superintendent and of any reports it has called for and any information, whether oral or in writing, that it has obtained.

(3) If in any particular case the Parole Board thinks it necessary to interview the person to whom the case relates before reaching a decision, the Parole Board may itself interview such person or request one of its members to interview him, and shall take into account the report of that interview.

(4) The person to whom a case being dealt with by the Parole Board relates shall have the right—

(a) to be legally represented and to make any representations to the Board about his case that he wishes to make; and

(b) to receive information relevant to the case,

under such conditions as may be prescribed.

(5) In deciding whether to advise the Minister to release a prisoner on licence under section 54, the Parole Board shall take into account the matters set out in—

(a) paragraph 1 of Schedule 1, if the person is serving a sentence for a determinate period; and

(b) paragraph 2 of Schedule 1, if the person is serving a term of imprisonment for life or detention during Her Majesty's pleasure.

(6) The Parole Board shall consider each case on its own merits without discrimination on any grounds.

Release on licence.

54.(1) Subject to subsections (2) to (8), the Minister shall act on the advice of the Parole Board and may release on licence—

(a) a person serving a sentence of imprisonment or detention for a determinate period, after such person has served not less than one-third of his sentence, or six months, whichever expires the later;

(b) a person detained during Her Majesty's pleasure;

(c) after consultation with the Chief Justice or trial judge, a person serving a term of imprisonment for life.

(1A) For the purposes of subsection (1)—

(a) a person committed to prison in default of payment of a sum adjudged to be paid by a conviction shall be treated as serving a sentence of imprisonment;

(b) consecutive terms of imprisonment shall be treated as one term.

(2) Notwithstanding anything contained in subsection (1), the Minister may at any time release a person on licence if he is satisfied that exceptional circumstances exist which justify the person's release on compassionate grounds . . .

(3) The Minister may, if he thinks it appropriate in a particular case, upon receipt of advice from the Parole Board that a prisoner be released, ask the Parole Board to reconsider their decision within 14 days, setting out the reasons why he believes the Parole Board should reconsider their decision.

(4) The Parole Board must give a final advice to the Minister within 14 days of the Minister's request under subsection (3).

(5) If the Parole Board's final advice is for release, the Minister may make an application to the Supreme Court within 7 days of receipt by him of the Parole Board's final advice.

(6) The Parole Board and the prisoner shall both be served with the application as interested parties and shall have the right to make representations before the Court.

(7) On an application by the Minister under subsection (5), the Court shall—

(a) consider the matter on its merits;

(b) take into account the matters set out in Schedule 1; and

(c) exercise its own discretion

in considering whether or not to direct the release of the prisoner.

(8) If the Court directs the release of the prisoner, the Minister shall give effect to that direction.

. . .

Licence conditions.

57.(1) Subject to subsection (2), a licence granted under section 54—

(a) must include the standard conditions set out in paragraph 1 of Schedule 2; and

(b) may include—

(i) one or more of the conditions set out in paragraph 2 of Schedule 2;

(ii) any other condition which the Parole Board deems necessary for the purpose of giving effect to the matters it has considered pursuant to Schedule 1.

(2) The licence of a person—

(a) released under section 54; and

(b) who has been given permission by the Government to leave Gibraltar for the purpose of residing permanently outside Gibraltar;

may contain such of the standard conditions as the Minister, in consultation with the Parole Board, considers appropriate.

(3) The Minister may, acting on the advice of the Parole Board, vary or cancel any of the conditions of any licence.

Duty to comply with licence.

58. A person released on licence must comply with such conditions as may be specified in the licence."

Section 59 then makes provision for the recall of prisoners while on licence.

17 Schedule 1 to the Act provides, so far as material:

"**Matters to be taken into consideration by the Parole Board.**

Prisoners serving a sentence for a determinate period.

1(1) In deciding whether or not to advise the Minister to release a prisoner on licence, the Parole Board shall—

(a) consider primarily the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison and whether any such risk is acceptable and this must be balanced against the benefit, both to the public and the prisoner, of early release back into the community under a degree of supervision and which might help rehabilitation and so lessen the risk of re-offending in the future; and

(b) take into account that safeguarding the public may often outweigh the benefits to the prisoner of early release.

(2) Before advising the Minister to release a prisoner on licence, the Parole Board shall consider the following factors and information, where relevant and available, recognising that the weight and relevance attached to particular information may vary according to circumstances—

(a) whether the safety of the public would be placed unacceptably at risk and in assessing such risk the Board shall take into account—

(i) the nature and circumstances of the offence including any information provided in relation to its impact on the victim or victim's family;

(ii) the prisoner's background, including the nature, circumstances and pattern of any previous offending;

(iii) whether the prisoner has made positive and successful efforts to address the attitudes and behavioural problems which led to the commission of the offence;

(iv) the prisoner's attitude and behaviour to other prisoners and staff;

(v) the prisoner's awareness of the impact of the offence, particularly in relation to the victim or victim's family, and the extent of any demonstrable insight into his attitude and behavioural problems;

(vi) behaviour during any temporary release or other outside activities;

(vii) any risk to other persons, including the victim, their family and friends;

(viii) any medical, psychiatric or psychological considerations relevant to risk (particularly where there is a history of mental instability); and

(iv) that a risk of violent or sexual offending is more serious than a risk of other types of offending;

(b) whether the longer period of supervision that the release on licence would provide is likely to reduce the risk of further offences being committed;

(c) whether the person released on licence is likely to comply with the conditions of his licence and the requirements of supervision, taking into account occasions where he has breached trust in the past or in considering re-release any previous breaches of licence conditions;

(d) the suitability of home circumstances;

(e) the relationship with the supervising probation officer;

(f) the attitude of the local community in cases where it may have a detrimental effect upon compliance; and

(g) representations on behalf of the victim in respect of licence conditions."

18 Schedule 2 sets out the conditions which may be attached to the grant of parole under s.57:

"**Licence conditions.**

Standard conditions.

1. A person released on licence shall—

(a) report to the Care Agency upon release;

(b) keep in touch with the probation officer as instructed by him;

(c) receive visits from the probation officer as instructed by him;

(d) permanently reside at an address approved by the probation officer and obtain the prior permission of the probation officer for any stay of one or more nights at a different address;

(e) undertake work only with the approval of the probation officer and obtain his prior approval in relation to any change in the nature of the work;

(f) not travel outside Gibraltar except with the prior written permission of the probation officer;

(g) be of good behaviour, and not behave in a way which undermines the purposes of the release on licence, which are to protect the public, prevent re-offending and promote successful re-integration into the community; and

(h) not commit any offence.

Other conditions.

2. The conditions are those which impose on a person released on licence—

(a) a requirement that he reside at a certain place;

(b) a requirement relating to his making or maintaining contact with a person;

(c) a restriction relating to his making or maintaining contact with a person;

(d) a restriction on his participation in, or undertaking of, an activity;

(e) a requirement that he participate in, or co-operate with, a programme or set of activities designed to further one or more of the following purposes—

(i) the protection of the public,

(ii) the prevention of re-offending, and

(iii) securing the successful re-integration of the prisoner into the community;

(f) not to administer or allow anyone to administer to him any controlled drug unless prescribed to him by a registered medical practitioner;

(g) a restriction on his entering any specified premises licensed to sell alcohol without the prior written permission of the probation officer;

(h) if section 61 applies, a drug testing requirement."

The title of the action

19 Mr. Restano, Q.C., for the Parole Board, submitted that the title of the action was incorrect. It was the style, he said, used for judicial review and the current case was not a judicial review. He accepted that this form of title had been used by the Minister without criticism in the only previous referral to the court: *R.* v. *Parole Bd.* ("*Garcia*") (6); however the issue does not appear to have been raised in that case.

20 It seemed to me that there was force in Mr. Restano's point. Under the Act, it is the Minister who refers the case to the Supreme Court pursuant to a statutory power. The reference is not pursuant to a prerogative power, which is the reason for the sovereign being named as the nominal claimant in an application for judicial review. The Minister should therefore in my judgment bring the claim in his own ministerial right.

21 As regards who should be named as defendant, s.54(6) requires both the Board and the prisoner to be served with the s.54(5) application "as interested parties." That might suggest that a Part 8 claim form should be issued without naming any defendant under CPR r.8.2A. However, the practice is only to issue such Part 8 claim forms with the court's permission: *Civil Court Practice, Civil Procedure*, vol. 1, CPR 8.2A[1], at 32 (2016 ed.), whereas the Minister is entitled to issue as of right. This implies that there should be a defendant named.

22 There are only two potential defendants: the Board or the prisoner. In judicial reviews of decisions of inferior tribunals, the tribunal is the nominal respondent, but it is comparatively rare that the tribunal appears. In the current case, it was appropriate for the Board to appear, because the issues raised are novel. However, in many cases there may be no need for the Board to appear. Obviously it is the prisoner who is most concerned about the case. In my judgment, the prisoner is the more suitable defendant. None of the counsel for the parties demurred when I made this suggestion in argument.

23 In my judgment, the appropriate long title of a reference under s.54(5) should be:

IN THE SUPREME COURT OF GIBRALTAR

[Action no]

IN THE MATTER OF RICHARD ROE, A PRISONER

AND IN THE MATTER OF THE PRISON ACT 2011

Between:

THE MINISTER FOR JUSTICE

Claimant

and

RICHARD ROE

Defendant

and

THE PAROLE BOARD

Interested Party

The preliminary point

24 Mr. Gomez, for Mr. El Ouahabi, supported on this point by Mr. Restano, Q.C., submitted that the Minister's application was fatally compromised by his failure to plead in his Part 8 claim form any reasons for making the application to the court. Without explaining his reasons, there would be a breach of natural justice. Mr. El Ouahabi needed to know why the Minister thought he should be refused release on licence.

25 In my judgment, this is to misunderstand the nature of the proceedings before the court. As discussed at the directions hearing, the substantive hearing is a rehearing *de novo* of the proceedings before the Parole Board. It was agreed that the same procedure should be followed. Thus the rules of evidence do not apply, the witnesses do not take the oath, and the court has an inquisitorial function. The proceedings are not adversarial. Thus there is no need for pleadings (hence a Part 8 claim form is appropriate rather than a Part 7 claim form).

26 The court, of course, needs to observe the rules of natural justice. This is why, in my note made for the directions hearing, I drew Mr. Marrache's advisers to the two additional matters set out above of which they may have been unaware. (In their skeleton argument for the substantive hearing, served before the purported consent order was agreed, they suggested that I could not consider matters beyond those before the Board. That, however, is plainly wrong. On a *de novo* hearing, particularly an inquisitorial hearing, the evidence is given completely afresh and can include new matters. Indeed, Mr. Marrache sought to put fresh evidence from an American immigration attorney and made a witness statement.)

27 It is unusual for the court to exercise its powers in this informal, quasi-judicial, inquisitorial fashion. However, it is not unknown. Wardship proceedings historically were similar, as were some proceedings of the judge in lunacy prior to modern legislation on mental incapacity.

28 Mr. Gomez accepted that, because I was acting inquisitorially, I was not bound by anything conceded by the Minister. That, in my judgment, is fatal to his submission that the Minister has to give reasons for referring a case to the court. While the court will of course give weight to submissions made by the Minister, if the court is not limited to the matters raised by the Minister, the need for the Minister to give reasons is much reduced.

29 Moreover, as Mr. Fischel, Q.C. pointed out in his skeleton argument on behalf of the Minister, in England there is no general requirement for a party in all cases to give reasons for his application. None is required when appealing from the Magistrates' Court to the Crown Court. An appeal before the Crown Court is by way of a complete rehearing with the prosecution on an appeal against conviction having to prove its case from scratch. The bare notice of appeal without substantive grounds is sufficient

to start the process of appeal. Although the current cases are referrals rather than appeals, there is a similarity in that the court is hearing the matter *de novo*.

30 Before the CPR, appeals in England in civil matters from the Master to the judge used to be similar with no requirement for the appellant to give grounds of appeal: see RSC, O.58, r.1(1). The only differences to the position in the Crown Court in a criminal appeal were that the appellant went first and that the judge could "give the weight it deserves to the previous decision of the Master: but he [was] in no way bound by it": *Evans* v. *Bartlam* (3) ([1937] A.C. at 478).

31 In any event, in the normal course, the prisoner will be well aware of the Minister's objections to the Board's decision because the Minister is obliged to give reasons when he refers a case back to the Board under s.54(3).

32 Mr. Gomez, again supported by Mr. Restano, sought to bolster his argument by reference to the additional length of time prisoners might spend in prison if the Minister exercised the full extent of his powers on a regular basis. He pointed to the asynchronicity of remedies available to the prisoner and the Minister respectively. A prisoner could only seek judicial review of a refusal by the Board of his application for release, whereas the Minister could hold the release process up by asking the Board to reconsider its decision and then referring the matter to the court. Reasons were necessary, they both submitted, to ensure that the Minister did not abuse his powers, which affected the liberty of subject.

33 I disagree. A prisoner who is refused release on licence has a judicial remedy: he can apply for judicial review. If that does not succeed, he will have another attempt in due course to persuade the Board to release him. By contrast, judicial review would be an unsatisfactory remedy for the Minister, because the prisoner would have been released before any determination had been made. If the prisoner absconded, the Minister might be left without any remedy. The time periods for applying for the Minister to ask for a reconsideration, for the Board to reconsider and for the Minister to refer the matter to the court are about as tight as they can practically be. Once the court is seized of the matter, it will attempt to list the case as soon as possible. (It is unfortunate the current case coincided with the Christmas period, thus causing a slight delay.)

34 If the Minister abuses his right of referral to the court, there are potential costs sanctions. In addition, in such a case the court may proceed very rapidly to determine the matter summarily in favour of a prisoner. These are sufficient remedies in my judgment to prevent abuse. The fear of abuse is in any event purely academic: there is no suggestion in the current cases or the earlier *Garcia* (6) case that the Minister was abusing his powers.

35 Accordingly, I dismiss Mr. Gomez's preliminary point.

Hearings in private or *in camera*

36 In his most recent submissions, Mr. Fischel, Q.C. submits that the proceedings before the court on a reference from the Minister should be treated as being in private. This expression can be misleading. Prior to the introduction of the CPR, there was a distinction between hearings in chambers and hearings *in camera*. The public were excluded from hearings in chambers but what transpired at the hearing could be freely reported by the parties. There was no duty of confidentiality. Hearings *in camera* were different. What occurred at such hearings was subject to a duty of confidentiality. If a party, without the court's permission, told third parties what occurred, then that party was guilty of contempt of court.

37 After the introduction of the CPR, hearings (particularly interlocutory hearings), both in England and in Gibraltar, often continued to be held in chambers. These hearings became public hearings to which the public in principle had a right of access: CPR r.39.2(1) (subject to space being available: CPR r.39.2(2)). Mr. Fischel points out that the practice of this court has changed, so that interlocutory hearings are now held in court rather than in judges' individual chambers. He submits that the directions hearing on December 21st, 2016 would, under this old practice, have been held in chambers. In my judgment that is true but irrelevant. Even if the directions hearing had been in chambers, it would still have been a public hearing under CPR r.39.2(1).

38 Mr. Fischel further submitted that, since the hearing before me was a *de novo* hearing, I should adopt the same approach to confidentiality of the proceedings as the Parole Board does. In other words, the hearing before me should be in private, *i.e. in camera* in the technical sense. The starting point in considering this submission is of course that proceedings before the court are in public unless there is some special reason for them not to be: *Scott* v. *Scott* (7). CPR r.39.2(3) lists a number of circumstances in which a hearing or any part of a hearing may be held in private. The only potentially relevant exceptions are r.39.2(3)(c), where the hearing "involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality" or r.39.2(3)(g) "the court considers [it] to be necessary, in the interests of justice."

39 These provisions have to be read against s.8 of the Constitution 2007, which gives effect to art. 6 of the European Convention on Human Rights and which so far as material provides:

> "(9) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any

other authority, including the announcement of the decision of the court or other authority, shall be held in public.

(10) Nothing in subsection (9) shall prevent the court or other authority from excluding from the proceedings (except the announcement of the decision of the court or other authority) persons other than the parties thereto and their legal representatives to such extent as the court or other authority—

(a) may by law be empowered to do so and may consider necessary or expedient either in circumstances where publicity would prejudice the interest of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of minors as prescribed by law or the protection of the private lives of persons concerned in the proceedings; or

(b) may by law be empowered or required to do so in the interests of defence, public safety or public order."

40 Whether s.8(9) gives the court a discretion to refuse to hear a case in private where the parties agree that it should be is a question for another day. In the current case, no one suggested that the hearing on January 13th, 2017 be held in private or *in camera*; it was held in open court. Equally I have heard no argument on whether s.8(10) requires the court to make its judgments public, regardless of whether this would result in matters being made publicly known which might otherwise fall within CPR r.39.2(3). My preliminary view is that it does not, but again I do not need to determine this.

41 The real questions in my judgment are whether any of the information in the materials before me is confidential and whether the interests of justice require the matters before me to be confidential. In my judgment, nothing I have seen is confidential in the relevant sense. True it is that documents submitted to the Parole Board are confidential to the Board. There is, however, nothing inherently confidential about the *information* contained in the documents I have seen.

42 Likewise the "interests of justice" head needs to be construed narrowly. The classic example of such a case is an action to protect a trade secret, the disclosure of which in open court would destroy the value of the intellectual property. In the current case, there is an exceptionally great public interest in the public knowing the reasons for prisoners being released or not being released. The interests of justice positively favour the hearing of references by the Minister in open court. On a reference, the court determines whether a man or woman should remain in prison or be released. It will only be in exceptional circumstances that it would be in the interests of justice for a hearing determining the liberty of a subject to be held behind closed doors.

43 Accordingly, in my judgment hearings of a reference by the Minister should be heard in public. In any event, it is far too late for Mr. Fischel (supported by Mr. Watts) to take this point. The hearing has happened.

Deference

44 Mr. Restano, Q.C. laid especial emphasis on the proposition that the Parole Board was a specialist tribunal and that the court should therefore place heavy weight on the Parole Board's decision. It should be very reluctant to interfere, he submitted, unless the Board was plainly wrong. Mr. Gomez supported that submission. The submission somewhat overlapped with the submission that grounds of the application should be given. This is because Mr. Restano's submission on deference would mean that the rehearing before the court was much more similar to an appeal by way of review (where grounds of appeal would be needed) than a hearing *de novo*.

45 In *Compson* v. *Financial Servs. Commr.* (2) (appeal dismissed, *sub nom. Weal* v. *Financial Servs. Commr.* (2016 Gib LR 131)), I was dealing with appeals against decisions of the FSC to ban Mrs. Compson from the financial services industry and place severe restrictions on Mr. Weal's participation in that industry. I held (2015 Gib LR 435, at paras. 56–59):

> "56 This leads to a second point as to the degree of respect to be afforded to the Chief Executive's decision. Sir Peter Caruana, Q.C. [for the FSC] relied on two cases for the proposition that particular deference should be paid by an appeal court to decisions of specialist tribunals: *Council for the Regulation of Health Care Professionals* v. *General Medical Council* [([2005] 1 W.L.R. 717)] and *Meadow* v. *General Medical Council* [([2007] Q.B. 462)].
>
> 57 The extent to which especially high deference should be paid to a specialist tribunal, or a person such as the Chief Executive, depends, in my judgment, on the extent to which the issue for determination turns on questions requiring detailed expertise. In the *General Medical Council* cases, the fitness to practice panel which makes the determination has at least one medical member and is thus 'in general better able than the courts to assess evidence of professional practice': *Meadow* ([2007] Q.B. 462, at para. 120).
>
> 58 In the current case, the substantive issues for determination, for example the appropriateness or otherwise of the valuation reports, are matters well within the knowledge and experience of the court. In some cases, it is possible to imagine that the Chief Executive has specialist knowledge available to her which would mean that greater deference should be paid to her decision. An example discussed in argument was where a difficult issue of actuarial science might arise. In the current case, however, there is no reason in my judgment for

> the court to extend to the Chief Executive's decisions any more than the usual deference given to first-instance decision makers.
>
> 59 The position is different in relation to the sanctions imposed by the Chief Executive. The FSC and its Chief Executive are likely to be better placed than the court to determine what measures are necessary in order to protect the good reputation of Gibraltar, to protect consumers and to reduce financial crime, as well as the other regulatory objectives of the FSC as set out in s.7(2) of the Financial Services Commission Act 2007. The court, in my judgment, should be reluctant to interfere with a sanction imposed by the Chief Executive, unless it is clearly wrong or the Chief Executive has taken irrelevant considerations into account."

46 It is true that the Parole Board is a specialist tribunal. Section 52 of the Prison Act 2011 provides for the Board to have on it at least one probation officer and one barrister or solicitor of at least seven years' standing. Members are appointed for a three-year renewable term. There are provisions to protect the Board's independence from government.

47 However the issues for the Parole Board are ones which are very familiar to this court when sentencing criminals. Issues such as the degree of remorse shown by a defendant or his risk of reoffending are daily fare for the criminal courts.

48 Moreover, in the two instant cases, the specialist members of the Board did not fully participate. Ms. Gillian Guzman, Q.C., the lawyer member, was absent on both October 28th, 2016 and November 18th, 2016. Ms. Jessica Perez, the probation officer member, prepared the probation report on Mr. El Ouahabi and thus could sit only on Mr. Marrache's case. It is also necessary to be realistic about the degree of expertise which a tribunal in a small jurisdiction like Gibraltar can build up. Whereas in England and Wales the Parole Board determines many thousands of cases a year, here it is nearer a score.

49 Accordingly, in my judgment, only the usual degree of deference should be paid to the decisions of the Parole Board.

Consent order and discontinuance

50 As noted above, on January 12th, 2017, the Minister and Mr. Marrache's legal advisers agreed a consent order. It seemed and still seems doubtful to me that public litigation of the current sort can be resolved by consent, without the approval of the court. Section 54(7) of the 2011 Act provides that on a s.54(5) application "the Court *shall* . . . consider the matter on its merits." [Emphasis supplied.] Approving a consent order without examining the basis on which the order is sought would not involve a consideration of the matter on its merits.

51 At the hearing on January 13th, 2017, Mr. Fischel, Q.C. said that the Minister had received two important documents. It was after seeing these that the Minister changed his mind and decided to accept the Parole Board's recommendation. He did not put the documents in evidence but they seemed to relate to Mr. Marrache's American immigration status. In fact, it has subsequently been clarified that the documentation was that which Mr. Marrache had submitted to the court but that was not explained on January 13th. Since Mr. Marrache could not be contacted, I adjourned consideration of the consent order to January 15th, 2017, when the issues as to the documentation which had caused the Minister to change his mind would have been clarified.

52 On the afternoon of January 13th, as I have noted, the Minister's advisers lodged a purported notice of discontinuance under CPR Part 38. Again it is doubtful whether the Minister can do so. This is for two reasons. The first is a technical point. As noted at *Civil Court Practice, Civil Procedure*, vol. 1, CPR 38.1[1], at 1072 (2016 ed.), what is discontinued by service of such a notice is a cause of action, not a claim form. Because the current proceedings are of a public law nature, the Minister, when he makes a s.54(5) reference, is not asserting that he has a cause of action against the Parole Board or against the prisoner. The Part 8 claim form is merely the mechanics whereby he brings the matter before the court. There is therefore arguably nothing to withdraw.

53 The second is a substantive point. The only independent power the Minister has to release prisoners on licence is that given in s.54(2) to allow release in "exceptional circumstances . . . on compassionate grounds." In all other cases, the Minister is obliged to follow the decisions of the Board or the court. His powers are circumscribed: if the Board decides to release a prisoner on licence, the Minster *must* do so, unless he asks the Board to reconsider its decision; if the Board stands by its decision on a reconsideration, the Minister *must* release the prisoner, unless he refers the matter to the court; if the court decides the prisoner should be released, the Minister *must* release him. Once the Minister refers a case to the court, he is arguably *functus officio*, in other words he cannot change his mind and decide that the Parole Board was right after all. The matter is simply out of his hands at that stage.

54 Accordingly it is arguable that the notice of discontinuance is wholly ineffective.

Mr. Marrache

55 This leaves the question what do with the current application concerning Mr. Marrache. Although I am doubtful about the validity of the notice of discontinuance, I have not heard adversarial argument and it would be wrong for me to take the point myself. Mr. Watts, as I have

noted, after taking instructions on January 17th, indicated that he was content for the court not to make a final determination of this issue.

56 The Minister was undoubtedly right to raise concerns about the Parole Board's decision to release Mr. Marrache. First, the Board appeared to accept at face value Mr. Marrache's assertion that he was remorseful. There is no evidence in their minutes that they subjected that assertion to any close examination. The Marrache brothers made extensive and repeated attempts to derail the criminal proceedings against them, unprecedented in Gibraltar or, I suspect, anywhere else in the common law world. Those attempts only ended on November 11th, 2015, when the Privy Council refused permission to appeal against the dismissal of their appeals to the Court of Appeal of Gibraltar.

57 The probation officer's report to the Board said:

> "Since he was arrested for those offences in 2010 Mr. Marrache says he has had much reflection into the causes for his actions. He is deeply remorseful for his persistently having abused the trust of his clients. He recognises that the consequences have been considerable for the victims and himself. I also understand that the defendant's actions also had adverse consequence for other employees of the Law Firm."

58 Well, the Board had the advantage of hearing Mr. Marrache express his contrition and remorse, whereas neither I nor the Minister are in that position. Nonetheless there is no sign that the Board expressed any scepticism whatsoever as to the extent to which the words mouthed by Mr. Marrache were said truthfully. They do not appear to have asked the obvious questions: When did Mr. Marrache start to feel remorse (rather than regret at having been caught)? Why did he start to feel remorse, given that he clearly did not during the repeated attempts to derail the criminal trial? What changed after November 11th, 2015, when his last attempt to escape guilt failed? It may be that Mr. Marrache had a good explanation for these matters but there is no indication on the papers of the Board having explored those issues with him.

59 Secondly, Mr. Marrache told the Parole Board that he intended to travel to live in New York where he had been offered employment as a consultant to a New York law firm. When asked by the Board if his conviction "would affect him when applying for the green card, he replied that in [the] USA this is not considered as a crime, this offence does not exist there." Despite it being an obvious nonsense that seven years for conspiracy to defraud would be considered no crime in America (even if it has another name), the Board do not seem have considered the implications. On one reading of Mr. Marrache's testimony to them, he was proposing to tell the American immigration authorities that he had no convictions. Moreover, it is difficult to believe he could obtain work from

any respectable law firm in New York if his employer knew of his gross dishonesty.

60 I have now seen the documents which caused the Minister to change his view of the Parole Board's decision. Because I may need to determine Mr. Marrache's case on its merits, I will not say anything which may prejudge that. However, on at least one interpretation of Mr. Marrache's evidence to the Parole Board, this convicted fraudster was brazenly proposing to lie to the American immigration authorities and to lie to the law firm who were to employ him. It may be that this is a wrong interpretation and that Mr. Marrache intended nothing of the sort. There is nothing in the additional documentation which is determinative of this issue. The issue would ultimately depend on my hearing Mr. Marrache's account of his American plans and my acceptance or rejection of his explanation.

61 I cannot of my own motion order that the matter continue so that the justification for releasing Mr. Marrache can be explored in more detail. It may be that someone with appropriate standing, such as one of Mr. Marrache's many victims, could apply to join the current proceedings as an interested party in order to challenge the Minister's decision to discontinue the current reference. (Whether it would also be necessary to seek judicial review of the Minister's decision to release Mr. Marrache is a potentially difficult question. If the Minister could not serve a valid notice of discontinuance, then arguably Mr. Marrache's release on licence was ineffective, so that he is technically unlawfully at large, but I do not need to determine these issues.) Unless and until someone makes such an application, in my judgment all I can do is order that the case be adjourned *sine die*.

Mr. El Ouahabi

62 The factors which the Minister identified in his letter of November 11th, 2016 as matters which he asked the Parole Board to reconsider were:

> "(a) the seriousness of the crime . . . '[a] huge amount of drugs which would have involved a large network of people . . . the inmate's role in these offences was significant. He was the senior person and had an operational management function even though it was at the lower end of the chain' . . . The Parole Board is asked to reconsider its view that 'his was a minor role';
>
> (b) the time served;
>
> (c) the level of risk of reoffending, in particular as Ms. Perez considers him to be medium risk of reoffending and 'given the amount of drugs that were confiscated inmate El Ouahabi

is unable to say whether he will be approached by drug dealers and reports being scared. Ms. Perez does not see him suitable to be released on licence' . . .

(d) the fact that the prisoner would not be under supervision as he intends (should he be so permitted) to live outside the jurisdiction . . ."

63 Mr. Gomez argued that (b) was irrelevant. Under para. 1(1) of Schedule 1, the sole focus of the Board (and therefore this court) was on the risk of reoffending balanced against the benefit to the prisoner and the community of release under supervision. I agree with him that, in general, time served will be irrelevant to these two countervailing considerations. Time served primarily relates to punishment, rather than para. 1(1) considerations. There may be rare cases where a judge, for example, imposes a longer sentence for public protection. In such a case, the length of time served may be relevant to the risk of reoffending. The current referral is not such a case and I ignore time served.

64 As to (a), it is necessary to remember that the sentencing guidelines which the court applies use expressions like "leading," "significant" and "lesser" as terms of art. Mr. El Ouahabi's role in the importation was as skipper of the vessel. He was thus higher up the hierarchy than his mate and the two lads arrested on the boat and therefore had a "significant role" in the technical sense. Nonetheless looking at the entire ladder of authority in the criminal network which sought to send 2½ tons of cannabis resin to Europe, he was on a low rung, even if not on the bottom rung.

65 As to (c), Ms. Perez, who prepared the probation report, gave evidence to me. She accepted that her assessment that he was of "medium risk" of reoffending could properly be shaded down a little if I accepted that he was remorseful, although she did not formally withdraw the assessment of medium risk. Moreover, her assessment of risk focused largely on what might occur once Mr. El Ouahabi goes back to Morocco. In Gibraltar, in my judgment, it is unlikely that he would be approached by persons from the Moroccan drugs milieu.

66 I heard evidence (not under oath) from Mr. El Ouahabi. He gave evidence through an interpreter, which always makes an appraisal of a witness more difficult. Notwithstanding this difficulty, I considered that his expressions of remorse were genuine. He was visibly emotional when explaining how he came to commit the offence. He was living in poverty, working as a painter in the summer and a hawker of fish in the winter. There is nothing to gainsay his assertion that this was a first offence for him and that he bitterly regretted having committed this offence. All he stood to gain from sailing the boat to Spain was €1,000.

67 As to (d), Mr. El Ouahabi's cousin gave evidence to me. He is a carpenter and a long-standing resident of Gibraltar. He was willing to house and feed Mr. El Ouahabi for as long as he was required to stay in Gibraltar on licence.

68 There are issues which in an appropriate case will require resolution as to how the Parole Board should approach the decision whether to release prisoners from outside Gibraltar who wish to leave the jurisdiction. In the *Garcia* (6) case, Dudley, C.J. held that it was possible to supervise a prisoner who was released to live abroad. In the current case, the Minister would have liked further guidance on the practical implications of this. Mr. Restano also raised issues about discrimination if, in practice, it was more difficult for a foreigner to obtain release on licence. However, since Mr. El Ouahabi is to remain in Gibraltar, I do not need to resolve these matters.

69 Lastly, I had evidence from three prison officers, principal officers Gaetto, Lockwood and Bensadon. They all made independent statements saying that Mr. El Ouahabi was a model prisoner who had been given a position of trust in the laundry. All attended court to support Mr. El Ouahabi's application for release, although in the event their evidence was not contentious. I pay tribute to their public spirit in coming voluntarily to court to help one of the prisoners in their custody.

70 I now have to balance the various factors set out in para. 1(2) of the Schedule to the Act. Mr. El Ouahabi was on the lower rungs of the ladder of authority in the criminal network which employed him to run the drugs. If released in Gibraltar, he is unlikely to meet the drug dealers higher up the ladder in Morocco. He has made the most of his time in prison and earnt a position of trust. Balancing these factors in my judgment I consider that the risk to the public from Mr. El Ouahabi's release is acceptable. The risk of reoffending is outweighed by the benefit (a) to the public of not having to expend taxpayers' money to keep him in prison, and (b) to himself by being under supervision in the community and being aided in his rehabilitation.

71 Accordingly, I will order his release.

One other matter

72 Mr. Restano pointed out that in *Garcia* (6), the Chief Justice had fixed a date under s.60 of the Act as the earliest date for a review of the prisoners' detention. He submitted that it was not for the court to fix such a date. Since I have ordered Mr. El Ouahabi's release, the point does not arise and I shall leave it for determination in a case where it does arise.

Conclusion

73 Accordingly, I directed that Mr. El Ouahabi be released and I direct that Mr. Marrache's case be adjourned *sine die*.

74 As to costs, Mr. Gomez, Mr. Fischel and Mr. Restano were agreed that, in accordance with *Baxendale-Walker* principles (see *Baxendale-Walker* v. *Law Socy.* (1)), there should be no order for costs in respect of Mr. El Ouahabi.

Orders accordingly.