

**HUMAN RIGHTS INSTITUTE
INTERNATIONAL BAR ASSOCIATION**

**Report of the Observer of the Human Rights Institute
of the International Bar Association at the trial of the
Chief Justice of Gibraltar on a motor vehicle offence
November 2001**

**LORD HACKING
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Attachments:

1. MAGISTRATES' COURT SUMMONS DATED 22 SEPTEMBER 2000.
2. DEFENDANT'S SKELETON ARGUMENT AND CHRONOLOGY DATED 15 MARCH 2001.
3. SKELETON ARGUMENT OF THE PROSECUTION [UNDATED].
4. RULING OF STIPENDIARY MAGISTRATE OF AUGUST 2001.
5. RULING OF STIPENDIARY MAGISTRATE OF 15 NOVEMBER 2001.
6. RULING OF STIPENDIARY MAGISTRATE ON COSTS OF 15 NOVEMBER 2001.
7. PRESS RELEASE OF INTERNATIONAL COMMISSION OF JURISTS DATED 10 AUGUST 2001.
8. REPORT OF JUSTICE ROBERT NICHOLSON TRIAL OBSERVER OF THE INTERNATIONAL COMMISSION OF JURISTS [UNDATED].

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Report of the Observer of the Human Rights Institute of the International Bar Association at the trial of the Chief Justice of Gibraltar on a motor vehicle offence

Appointment

1. I was appointed as Observer at the trial of the Chief Justice of Gibraltar by the Human Rights Institute of the International Bar Association on 12th November 2001. My appointment was made over the telephone and at short notice. That part of the trial of the Chief Justice, which I was to attend as Observer, was due to take place on Wednesday 14th November. The only air flight, however, which would get me to Gibraltar in time to attend the Chief Justice's trial was scheduled to leave very early on the next day from London Heathrow Airport. This meant I had to leave Central London at 4.30 a.m. on the morning of 13th November. Since it was not possible for the papers to be got to me until the evening of 12th November and since I had an evening engagement on that evening, I was not able to start reading them until I was on the aeroplane.

My Terms of Reference

2. On my return from Gibraltar and, having given an initial reports over the telephone and by e-mail, to the Secretariat of the Human Rights Institute ("HRI") of the

International Bar Association (“IBA”), it was agreed between the HRI and myself that my written terms of reference should be:-

"To attend the hearing before the Magistrates’ Court in Gibraltar in which the Chief Justice is the accused and to report to the IBA on whether there appears to be any breaches of the Human Rights Conventions relating to the trial or to the prosecution of the Chief Justice thereat or to any matters connected thereto".

Human Rights Instruments and Gibraltar Constitution

3. Prior to attending the trial of the Chief Justice I was able to study a number of important documents which the HRI Secretariat most helpfully included in the package of papers which arrived at my house on the evening of 12th November.

Among these papers were:-

- (i) the United Nations Universal Declaration of Human Rights 1948 ("UN Human Rights Declaration")
- (ii) the European Convention on Human Rights and its Five Protocols 1950 ("European Human Rights Convention")
- (iii) the United Nations International Covenant on Civil and Political Rights 1996 ("UN Civil and Political Rights Covenant ")
- (iv) the Gibraltar Constitution Order 1969 ("the Gibraltar Constitution").

3. In all three of these ‘Human Rights Instruments’ (which is the collective noun that I use when referring to them in this Report) there are four important protections, under the law, to which every citizen of the world is entitled:-

- (i) the right to have a fair and public hearing before an independent and impartial tribunal for the determination of a citizen's civil rights and obligations and of criminal charges made against him or her.¹ In two of these Human Rights Instruments there is the further right for the hearing or trial to take place ‘within a reasonable time’² or ‘without undue delay’³
- (ii) every citizen is entitled to be presumed innocent until proved guilty according to law⁴
- (iii) no citizen shall be held guilty of a penal offence which did not constitute a penal offence, under national or international law, at the time the offence was allegedly committed⁵

¹ Article 10 UN Human Rights Declaration; Article 6 European Human Rights Convention and Article 14 UN Civil and Political Rights Covenant.

² Article 6.1 European Human Rights Convention.

³ Article 14.3(c) UN Civil and Political Rights Covenant.

⁴ Article 11.1 UN Human Rights Declaration; Article 6.2 European Human Rights Convention and Article 14.2 UN Civil and Political Rights Covenant.

⁵ Article 11.2 UN Human Rights Declaration; Article 7.2 European Human Rights Convention and Article 15.1 UN Civil and Political Rights Covenant.

- (iv) the right of privacy in private and family life and in a citizen's home and correspondence⁶.
4. It should, therefore, be recorded that all of these rights are enshrined in sections 7 and 8 of the Gibraltar Constitution. Indeed the enshrinement of these rights in the Gibraltar Constitution closely follows the text for these rights in the European Human Rights Convention. It follows, therefore, that any citizen of Gibraltar has the right to take before the Courts of Gibraltar, under the precisely worded terms of sections 7 and 8 of the Gibraltar Constitution, any complaints or allegations that any of these Human Rights have been breached.

The Observer's Documents

5. As well as supplying me with copies of the Human Rights Instruments and the Gibraltar Constitution, the HRI Secretariat helpfully supplied me with a number of other documents, published by the United Nations, the IBA and others, upon human rights, related subjects and guidelines and commentaries upon the role of Human Rights Trial Observers. Of these the most important was the 'IBA Guidelines for Human Rights Trial Observers'. I was also supplied by the HRI Secretariat with copies of the Press Release of the International Commission of Jurists and of the Report of their Observer, Justice Robert Nicholson. I should, therefore, like to record

⁶ Article 12 UN Human Rights Declaration; Article 8.1 European Human Rights Convention and Article 10 UN Civil and Political Rights Covenant.

my gratitude to the HRI Secretariat, working under a very tight timetable, in providing these documents to me as well as in setting up - very efficiently - my travel arrangements. Prior to attending the Chief Justice's trial I had the opportunity of reading all of these documents. I have also referred to some of them in my Report. I do not think, however, it is necessary for me to list these documents which were, as I again record, most helpfully put into my possession.

6. Upon my arrival at Court on 14th November, the Magistrates' Clerk provided to me copies of the Magistrates' Court Summons of 22nd September 2000, the Defendant's Skeleton Argument and Chronology, the Skeleton Argument of the Prosecution and of the Ruling of the Stipendiary Magistrate of August 2001. After I left Gibraltar, the Magistrate's Clerk kindly sent to me by fax copies of the two Rulings of Stipendiary Magistrate of 15th November 2001. Since these documents have not, so far, been made available to the HRI Secretariat, I am attaching them to this Report together with, as a matter of convenience, copies of the ICJ Press Release and Observer's Report.

The Structure of the Courts of Gibraltar

7. There are four components in the structure of the Courts of Gibraltar. Firstly, there is a Magistrates' Court over which the Stipendiary Magistrate or, alternatively, lay justices preside. This Court deals summarily with all criminal cases and with licensing and similar matters. Secondly there is a Court of First Instance which, on civil matters, functions similarly to the English County Courts. I understand that the Stipendiary Magistrate, sitting as a Judge of First Instance, also presides over this

Court. Thirdly there is the Supreme Court which deals with the more serious criminal and civil cases and with appeals from the Magistrates Court. Currently the Supreme Court has two judges, the Chief Justice and an 'Additional Judge' Mr Justice Pizzarillo. Fourthly there is the Court of Appeal over which the President of that Court presides. Currently the President of the Gibraltar Court of Appeal is a retired English Lord Justice of Appeal, Sir Brian Neill. The Court of Appeal is further constituted with two other Judges, each of whom also being retired English Lord Justices of Appeal, Sir Iain Glidewell and Sir Christopher Staughton. When it is necessary to convene the Gibraltar Court of Appeal the President and his fellow Justices of Appeal come to Gibraltar for the sitting of the Court. Out of this, it is important to identify that the Chief Justice, as head of the Judiciary in Gibraltar, has direct responsibility, under the Governor, for the proper running of the Courts in Gibraltar. The Chief Justice is also an ex officio member of the Gibraltar Court of Appeal and is entitled to participate in its proceedings except when the Court of Appeal is hearing an appeal from one of his decisions in the Supreme Court.⁷

The Constitutional Powers in Gibraltar

8. Under the Gibraltar Constitution, the Executive, Legislature and Judiciary (referred to as the Judicature) have separate functions. In this sense there is a separation of powers. However, as one of the few surviving colonies in the Commonwealth, the Supreme Power for the governance of Gibraltar rests with the Governor acting on behalf of her Majesty. Hence the ultimate responsibility for the functioning of the Executive, the making of laws and the performance of the Gibraltar Courts lies with

⁷ Section 57(2)(b) Gibraltar Constitution.

the Governor. It suffices, therefore, to note that the Legislature is to be found in the Gibraltar House of Assembly, the Executive is to be found in the Gibraltar Council, over which the Governor presides, the Council of Ministers and the Chief Minister - both the Council of Ministers and the Chief Minister being appointed, after appropriate consultations, by the Governor. As a matter of convenience, in this Report, when I refer to the Executive, I am referring collectively to the Gibraltar Council, the Council of Ministers, the Chief Minister and the Governor himself.

The Chief Justice

9. The Chief Justice of Gibraltar is Mr. Derek Schofield. He took up office in 1996. On leaving school he went into the English Magisterial Service. He was called to the English Bar in 1970 and served as a Magistrate and later as a Puisne Judge in Kenya from 1974 to 1987. He was then a Judge in the Cayman Islands until he took up his appointment as Chief Justice of Gibraltar. It appears that Mr Schofield has played an active part in securing reforms in the Gibraltar judicial system - in particular he introduced and implemented the Woolf Reforms. It also appears that Mr Schofield has played an active part in the deliberations upon the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Independence of the Judiciary. The original deliberations for these Guidelines took place in Latimer House in England in June 1998 at a meeting sponsored by the Commonwealth Lawyers Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates and Judges Association and the Commonwealth Parliamentary Association and I note that Mr Schofield was one of the Chief Justices

present in Edinburgh in September 2000 when the Latimer House Guidelines were "commended ... for consideration by the Commonwealth Heads of Government ...".

The Latimer House Guidelines represent a very important Commonwealth commitment, in the functions of the executive, parliament and the judiciary, to

"the essential principles of good governance, fundamental human rights and the rule of law...".⁸

Mr Schofield's participation, therefore, in the deliberations upon the Latimer House Guidelines reflects the importance which he places on the rule of law and human rights.

10. Before turning from these notes on the Chief Justice, I should state that I have pondered for some time whether I should, in this Report, refer to him as "Mr Schofield" or as "Chief Justice". Since the main concern, which brought about my appointment, was that the Chief Justice of Gibraltar (not simply a citizen of Gibraltar) was on trial, I decided that I should refer, throughout this Report, to Mr Schofield as the Chief Justice.

The Trial of the Chief Justice

11. The trial of the Chief Justice for a motor vehicle offence took place before Mr Anthony Dudley, Stipendiary Magistrate in the Magistrates Court of Gibraltar on Thursday 26th, Friday 27th and for part of Saturday 28th July and on 14th November.

⁸ See the First of the Principles of the Latimer House Guidelines: 19th June 1998.

On each day of his trial, the Chief Justice did not personally appear but was represented by Counsel. On the first three days the Chief Justice was represented by Mr Edward Fitzgerald Q.C. of the English Bar and Mr Fabian Picardo of the Gibraltar Bar but on the 14th November the Chief Justice was only represented, but most competently, by Mr Picardo. At all four hearings the prosecution was represented by Mr Patrick Hamlin of the English Bar and Mr Kevin Warwick of the Gibraltar Bar.

12. At the hearings which took place on 26th and 27th July, an Observer, appointed by the International Commission of Jurists, Justice Robert Nicholson from Australia, attended the Chief Justice's trial. Justice Nicholson was not able to stay for the hearing which took place on the morning of Saturday 28th July and there was, therefore, no Observer present for that day of the trial. Nor was any Observer present when the Stipendary Magistrate handed down his first written Ruling in August ("Magistrate's August Ruling"). I was present throughout the trial on Wednesday 14th November but was not present, on the next day, when the Stipendiary Magistrate gave his second Ruling ("Magistrate's November Ruling I"), found the Chief Justice guilty and, having (as I assume) heard submissions from Counsel, gave a further Ruling in writing on costs ("Magistrate November Ruling II").
13. Following his attendance at the trial of the Chief Justice on 26th and 27th July, Justice Nicholson prepared for the International Commission of Jurists ("ICJ") a detailed report which stretches over 9 pages of single line print. In the copy before me of Justice Nicholson's report, there is no date but it appears that Justice Nicholson

submitted his report to the ICJ some time in August 2001. It is also to be noted that, while Justice Nicholson's Report ("ICJ Observer Report") does not (and correctly) yet seem to have been made public, the ICJ issued a press release on 10th August 2001 ("ICJ Press Release"). This Report, none-the less, should be read alongside the ICJ Observer Report and, hopefully be made public at the same time. In the meantime I have drafted this Report to be complete in itself. Thus I cover, although in some cases differently, many of the matters which are covered in Justice Nicholson's Report.

The Role of the Observer

14. As Justice Nicholson rightly held in his report

"The true role of the Observer is to observe"

In doing so, as again Justice Nicholson rightly held, the duty of the Observer is to observe what he perceives to be "positive" or "negative" and so state. I have, therefore, kept myself, as strictly as I could, to the role of Observer of the Chief Justice's trial. Thus I did not have, while I was in Gibraltar or at any other time, any contact with the Chief Justice or his family, the Governor, the Chief Minister of Gibraltar, the Attorney General of Gibraltar or any members of the Gibraltar Council or the Council of Ministers. Nor did I have any contact, save as set out below, with Counsel for the prosecution or the defence. The only contact, therefore, I had while in (and coincidentally travelling to) Gibraltar was:-

- (i) with the Stipendiary Magistrate and the Clerk to the Magistrates Court
 - (ii) with both Counsel together immediately after completion of submissions at the end of the hearing on 14th November
 - (iii) with a Reporter from the Gibraltar Chronicle, Mr Jonathan Sacramento and a lady (whose name I have not got a record of) from a Gibraltar radio station
 - (iv) in a chance meeting at a restaurant on the evening of Tuesday 13th November with Ms Kate Dawson, the Registrar of the Supreme Court of Gibraltar
 - (v) with the Chairman of the Gibraltar Bar Council, Mr Robert Vasquez whom, I met, by chance on the aeroplane flying to Gibraltar and whom I met for a drink at his club on the evening of Tuesday 13th November and over brief lunch which his partner Mr Alfred Vasquez, on Tuesday 14th November.
15. In the case of the Stipendiary Magistrate, Mr Anthony Dudley, I paid a courtesy call to him in his room at the courthouse both prior to the trial, when I explained my proposed presence in his court and sought his agreement to be there, and at the end of the trial when I thanked him for his courtesy towards me. Concerning Mr Brian Cardona, the Clerk to the Magistrates Court, I have had several telephone discussions

with him and met him in the courthouse on 14th November. The telephone discussions with Mr Cardona have all related to the arrangements being made for the trial, my presence in the courtroom and the subsequent matters which have taken place, still relating to the trial, after I left the courthouse at the end of the hearing on Wednesday 14th November.

16. The only conversation which I had with Counsel, at the end of legal submissions, in the courthouse was to clarify the points of argument which each Counsel made during the Preliminary Submissions before the Court (as set out in paragraphs 22 and 23 below). The conversation which I had with the two journalists attending the trial, took place as I was leaving the courthouse on 14th November and just related to my role as the HRI Observer at the trial. Fortuitously the Registrar of the Gibraltar Supreme Court was dining in the same restaurant as I was on the evening of Tuesday 13th November and since the restaurant proprietor learned I was attending the Chief Justice's trial as Observer (news seems to travel very quickly in Gibraltar!) he took it upon himself to introduce me to the Registrar. We had a conversation which could not have lasted more than two minutes and nothing arose in it of relevance to my role as Observer at the trial.

17. Other than introducing myself to him, I had no conversation relating to the Chief Justice's trial with Mr Robert Vasquez, Chairman of the Gibraltar Bar Council, in the aeroplane. In my meeting, however, with him on the evening of Tuesday 13th November, I asked him to explain to me the structure of the Gibraltar Courts and the position held by the Chief Justice in them. I also asked him to give me background

information upon the relationship between the Chief Justice, the Governor and members of the Gibraltar Council and the Council of Ministers. Similar issues arose during my lunch with Mr Robert Vasquez and his partner Mr Alfred Vasquez on the next day. In both conversations Mr Robert Vasquez stated that it was common knowledge in Gibraltar that there were differences between the Chief Justice, the Governor and the Chief Minister and in these differences the Chief Justice, or persons on his behalf, had made allegations that his personal privacy was being infringed and that the Executive was impeding his judicial rights as Chief Justice. In addition to the dispute between the Chief Justice and the Executive over the rights of the Chief Justice in the appointment of magistrates (to which I refer in paragraph 20 below) Mr. Robert Vasquez mentioned the Executive's opposition to the Chief Justice's proposal for the creation of Recorders as are used in the English Judicial system. This dispute was a little time ago and related to funding and the method of nomination and appointment and was the type of difference of opinion which could healthily and properly arise in any jurisdiction between the judiciary and the executive. Moreover no formal notice or complaint, relating to any of these difficulties (including the alleged unlawful surveillance), was ever made to Mr. Vasquez, as Chairman of the Bar Council. In speaking to me Mr Robert Vasquez emphasised that there were very strong views, for and against, held among members of the Gibraltar Bar Association and, therefore, at all times, he, as Chairman of the Bar Council, tried to hold to a position of neutrality on these issues. I am informed that Mr. Vasquez's term of office as Chairman of the Bar Council has been completed and that he has recently stepped down from this office.

Allegations made or on behalf of the Chief Justice

18. A number of allegations have been made by or on behalf of the Chief Justice relating to his relationship with the Governor, the Executive in Gibraltar, particularly with the Chief Minister, and the Attorney General. Most of these allegations were contained in a 'brief' which was put before Justice Nicholson and to which he makes reference in section 3 of his Report.⁹
19. There has also been placed before me notes taken by Dr Karen Brewer of the Commonwealth Magistrates and Judges' Association of a briefing meeting which she held with the Chief Justice's wife, Anne Schofield, sometime between the Court hearings in July and the Court hearing in November. As I understand it, representations have also been made to the HRI Council to the effect that these proceedings against the Chief Justice are politically motivated and have been improperly brought. If true this is a very serious matter and goes to the heart of all Human Rights Instruments - namely that there should always be a free and independent judiciary for the adjudication of all civil and criminal matters in any jurisdiction. Thus an improper attack against a Chief Justice, in the form bringing fallacious proceedings against him, is a matter of the utmost seriousness.
20. Generally the allegations recorded in Justice Nicholson's Report and in the briefing notes prepared by Dr Brewer, are less serious, and in several instances, less specific.

⁹ Pages 2 and 3 of the ICJ Observer Report.

It would appear that there have been some public disagreements between the Chief Justice and the Chief Minister relating to the Chief Justice's rights in the appointment of magistrates (which the Chief Justice held to be in his remit and not in the Executive's), in the introduction into Gibraltar of the Woolf Reforms, in the funding of overseas travel by the Chief Justice, in the funding of a retirement party for the former senior Magistrate and related matters. Another area of contention between the Chief Justice and the Chief Minister concerned the employment of maids by the Chief Justice and his wife where it was alleged that the Chief Justice failed to pay the PAYE and Social Security taxes relating to two maids (hired by the Chief Justice and his wife from Jamaica) when in their employment. In these differences, between the Chief Justice and the Chief Minister, the Chief Minister called, on at least one occasion, for the Chief Justice's resignation. It also appears that there were calls from the Chief Minister or from other quarters in the Executive Council that the Chief Justice should be subject to an investigation under section 60(4) of the Gibraltar Constitution which is the process under which a recommendation can be made to the Judicial Committee of the Privy Council in London for the removal of a Chief Justice on the grounds of his 'inability to discharge the functions of his office' or his 'misbehaviour'. On any view calls for the resignation of the Chief Justice or for an investigation of him under section 60 of the Gibraltar Constitution are matters of the high importance for the Chief Justice and the Colony of Gibraltar.

21. Finally, I should refer to the allegations made by or on behalf of the Chief Justice relating to alleged harassment of himself and his family: the allegations being that his office and home telephone lines have been 'tapped' or 'bugged' and that persons

have been seen on security cameras entering his home without his authority. Such events, if true, would amount to clear breaches of the Chief Justice's right of privacy for himself and his family as enshrined in the Human Right Instruments which I have cited in paragraph 3 of this Report.¹⁰ The fact that he is the Chief Justice makes these allegations all the more serious.

Preliminary Submissions

22. At the beginning of the hearing on 14th November, Mr Patrick Hamlin, appearing for the Crown, made a preliminary submission. In this preliminary submission he noted my presence in the courtroom and, while he made it quite plain that my presence was welcome, he questioned why there had been an Observer from the ICJ at the July hearings, why that Observer was no longer present in Court and why I was appearing as an Observer of the HRI and the IBA. His reference to me was to the "mysterious ... but welcome ... visitor"! I was not asked to comment upon these observations and did not do so. Mr Hamlin then drew attention to the ICJ press release 10th August 2001. Specifically Mr Hamlin drew attention to the ICJ Press Release in which it was stated that:-

"The trial Observer also noted that, consistent with the principle that all citizens are equal before the law, neither prosecution nor defence counsel asserted that the office of the defendant (i.e. Chief Justice) was material to proceedings.

This appears at some variance with the content of the magistrate's ruling which may be construed as suggesting to the

¹⁰ Article 12 UN Human Rights Declaration; Article 8 European Human Rights Convention and Article 17 UN Civil and Political Rights Covenant.

contrary...".¹¹

Mr Hamlin went on to state that the ICJ Observer had not been present on the morning of Saturday 28th July when Leading Counsel for the Defendant, Mr Edward Fitzgerald Q.C., had submitted that the position of the Defendant, as Chief Justice, should be taken into account in the exercise of the Court's power (as argued by the Defence) to stay the proceedings. In making his submissions Mr Hamlin then referred to the last two pages of Ruling of the Stipendiary Magistrate of August 2001 (no date in August appears in my copy of this Ruling). On page 7 of the Magistrate's August Ruling, the Stipendiary Magistrate had noted that one of the submissions of Mr Fitzgerald was:-

"That particular account has to be taken of the Defendant's office as Chief Justice and his exposure to trial for a minor matter and the embarrassment arising therefrom should militate towards the Court exercising its discretion in his favour".¹²

On page 8 the Stipendiary Magistrate went on to hold:-

"The suggestion that holding high office should in any way afford any degree of advantage whatsoever when this Court exercises its discretion is in my view wholly without foundation. I undoubtably subscribe to the view that those in high office should not within the administration of justice system be treated more stringently than an ordinary citizen, but neither should they expect to derive any advantage whatsoever or howsoever by virtue of such office. It follows therefrom that I do not find it of any consequence one way or another that the

¹¹ Second and third paragraphs ICJ Press Release.

¹² Paragraph (vi) page 7 Magistrate's August Ruling.

Defendant is, co-incidently, the Chief Justice."¹³

23. In reply Mr Picardo stated that his client was not seeking any special privileges in this trial by reason of him being the Chief Justice. Mr Picardo then went on to state:-

"Judges should not be treated differently. The Defendant states that he should be equal before the law."¹⁴

In his reply Mr Hamlin questioned Mr Picardo's recollection of the submissions made by Mr Fitzgerald on Saturday 28th July. On his part the Stipendiary Magistrate stated that he did not think too much should be made of this point. As the trial judge it was of no importance to him.

The Charge and the Course of Proceedings

24. The Summons against the Defendant was issued by the Stipendiary Magistrate on 22nd September 2000. It reads as follows:-

"Information has this day been laid before me, the undersigned, by Sergeant A. Viagas that you on the 28th day of July 00, at Gibraltar:

Did use on a road called Winston Churchill Avenue motor vehicle G86471 in respect of which no Test Certificate had been issued. Contrary to regulation 44(a) of the Motor Vehicles Test Regulations."

¹³ Second paragraph page 8 Magistrate's August Ruling.

¹⁴ In handwritten note of HRI Observer.

25. The terms of Regulation 44(a) of the Motor Vehicle Test Regulations 1987 read:-

"Offences

44. A person who uses, or causes or permits to be used, on a road a motor vehicle or trailer -

(a) for which under these regulations a test certificate is required, without being in possession of a valid certificate;

* * *

is guilty of an offence and is liable on summary conviction to a fine of £100".

As I understand it, there are no other penalties for this offence - for example disqualification. It appears, therefore, that the maximum punishment for an offence under this Regulation, is a fine up to £100. Since this was the only offence, for which the Chief Justice stood before the Magistrates Court, the absolute maximum punishment, to which he was exposed, was a fine of £100.

26. The return date for the Summons was set a Monday 4th December 2000. As marked on the Summons this was subsequently adjourned to the 11th January 2001 and then to 29th March 2001. On the latter date both the Defendant and the Crown, through Counsel, had submitted, in writing, Skeleton Arguments. The hearing was then fixed to commence on 26th July 2001 and, upon it not being completed in July, was adjourned part heard to 14th November 2001.

27. In one of my discussions with him, I asked the Clerk to the Justices why a simple motor vehicle case had taken almost a year from the date of the alleged offence to the

date of the first hearing and why, thereafter, there had been a further delay of three months for the adjourned hearing on 14th November 2001. The Justice's Clerk, Mr Brian Cardona, stated that the correspondence between the lawyers acting for the Defendant and for the Crown had initially delayed the issue of the Summons. Thereafter there had been the difficulty of finding sufficient time, in the Court calendar, to take a hearing which was anticipated to take 2 days. The further difficulty had been finding dates which were convenient for Counsel and Queen's Counsel who were coming out from England to appear in this trial. Notwithstanding the substantial delay between the date of the alleged offence of 28th July 2000 and completion of the trial in the Magistrates Court on 14th November 2001, it seems to me that Mr Cardona was offering a reasonable explanation. Now, however, that the Chief Justice has appealed the Rulings of the Stipendiary Magistrate and the prosecution has sought an Order for Case Stated on the Magistrates' Ruling on costs, it is of great importance that the appeal process moves with expedition. It is in the paramount interests of all parties that these proceedings are brought to a full and final end. The recent reports which I have received on the current status of the appellate process (see paragraphs 48-50 below) makes it all the more important that early action is taken to achieve this objective.

The Essential Facts concerning the Trial

28. Under Gibraltar law, as under English law, every motor vehicle has to be licensed and, if over a certain age, the owner of it also has to be in possession of a valid Motor Vehicle Test Certificate known (as in England) as a MOT Certificate. It transpires that the MOT Certificate for the Chief Justice's motor vehicle had expired on 11th

January 2000¹⁵. Therefore, from that date, he was not in possession of a valid MOT Certificate. It also appears that there is a fixed calendar date for the annual renewal in Gibraltar of motor vehicle licences. In the year 2000 this was set at 31st May. However, since new requirements for vehicle licences had been introduced, considerable delays had occurred in the issuing of new vehicle licences. In the circumstances it was announced there would be an 'amnesty' for the obtaining of vehicle licences from 31st May to 31st July 2000.

29. At 8.30am on 28th July 2000 the Chief Justice was stopped by a police officer (PC Parera) in Winston Avenue, Gibraltar and was found not to be in possession of either a valid vehicle licence or a valid MOT Certificate.¹⁶ On this matter the Chief Justice asserts that he had arranged for a MOT test to take place on the 22nd August¹⁷ and, therefore, it was only after that time that he would be able, if his motor vehicle passed the test, to have both a valid vehicle licence and a valid MOT Certificate. The Chief Justice explains his failure to have either a valid vehicle licence and a valid MOT Certificate on the grounds that he was very occupied in bringing in the Woolf Reforms and that his car documents had been mislaid after he had brought them into his Chambers in the courthouse for his staff to deal with them.

¹⁵ See second paragraph on page 2 of Magistrate's August Ruling.

¹⁶ See entry against 28 July 2000 in Chronology set out on page 2 of the Defendant's Skeleton Argument.

¹⁷ See entries against 18 July and 22 August in Chronology set out on pages 2 and 3 of the Defendant's Skeleton Argument.

30. According to the Chronology in the Defendant's Skeleton Argument¹⁶, as drafted by the Chief Justice's Counsel, the Chief Justice immediately, on being stopped by PC Perera, admitted he was not in possession of a valid MOT Certificate. This admission was expressly repeated by the Chief Justice's Counsel at the hearing on 14th November and, as I understand it, it was also a matter which was expressly admitted by his Counsel at the hearings taking place on 26th, 27th and 28th July. Concerning the out of date vehicle licence the evidence is that the Chief Justice claimed that he was within the 'amnesty' (or 'period of grace') which expired on 31st July. Indeed the assertion which the Chief Justice appears to have made to PC Perera is that the 'period of grace' also applied to the out of date MOT Certificate.¹⁶
31. The expectation for any citizen stopped by the police in these circumstances in Gibraltar - be that citizen the Chief Justice or any other citizen - would be for that citizen to admit that he had committed the motor vehicle offence of driving a vehicle without a valid MOT Certificate and to take the consequences - whether the authorities decided to proceed by way of issuing a caution or issuing a Summons. This is different from the issue concerning the invalid vehicle licence. When the Chief Justice was stopped he was still within the 'amnesty' period - although only just - and the expectation here would be that, the amnesty claim having been made, no further steps would be taken by the police for a citizen (without a valid licence) driving or using a motor vehicle within the amnesty period.
32. Events, however, did not take either course. In the first place the Chief Justice was served with a written caution in which it was recorded that he had been "reported for

committing" the offences of not being in possession of either a valid MOT Certificate nor a valid Road Tax certificate¹⁸. Thereafter there was several letters exchanged between, on the one side, Stagnetto & Co., Solicitors acting for the Chief Justice, and, on the other side, the Attorney General and the Commissioner of Police. In this correspondence the Chief Justice's Solicitors side stepped the issue whether or not the Chief Justice was, at the material time, in possession of a valid MOT Certificate but took the technical - if not also slightly baffling - point that there was no requirement on the Chief Justice, having received the written caution, "to accept or reject" it!¹⁹ Thereafter, in the ensuing correspondence, the Commissioner of Police agreed to take "no further action" concerning the invalid motor vehicle licence (thus effectively withdrawing the caution of 17th August relating to it) but insisted that the Chief Justice had still committed an offence on 28th July 2000 by not being in possession of a valid MOT Certificate. On his side the Commissioner of Police repeated that he was prepared to resolve the issue of the invalid MOT Certificate by way of a written caution provided the Chief Justice accepted "[his] guilt in relation to [the MOT Certificate] offence and agrees to be cautioned"²⁰. On their side the Chief Justice's lawyers continued to take the point that the Chief Justice was not required "to accept guilt" concerning the MOT Certificate and "[agree] to be cautioned"²¹.

¹⁸ See letter from Commissioner of Police in entry in Chronology against 17 August 2000 on page 3 Defendant's Skeleton Argument.

¹⁹ See letter from Stagnetto & Co to Attorney-General in entry against 30 August 2000 in Chronology page 3 Defendant's Skeleton Argument.

²⁰ See letter from Commissioner of Police to Stagnetto & Co., in entry in the Chronology against 4 September 2000 pages 4 and 5 Defendant's Skeleton Argument.

²¹ See letter from Stagnetto & Co., to Commissioner of

33. In the impasse which arose in this correspondence, the Commissioner of Police stated that he was regrettably left in the position "with no alternative but to resolve this matter by other means"²². So it was on 22nd September 2000 that the Summons (as described above in paragraph 24) was issued against the Chief Justice.

Legal Submissions at the Trial

33. As set out in the Defendant's Skeleton Argument and as advanced in oral submissions at the trial on 26th, 27th and 28th July and on 14th November, two arguments were presented on behalf of the Chief Justice. In the order that these arguments were taken at trial (although in the opposite order of these arguments in the Skeleton Arguments) the first argument was that the proceedings should be stayed on the grounds that there had been an 'abuse of process' by the Crown in proceeding to prosecute the Chief Justice on the MOT Certificate having earlier, on 17th August, sent him a written caution in respect of this offence. This argument broke down into two parts. First, that the written caution amounted to a promise not to prosecute and secondly, that the caution amounted to a final and unequivocal end of the prosecution process. It was the oral argument on this issue which took the whole of 26th, 27th and the morning of the 28th July in the submissions made by Counsel for the Chief Justice and Counsel for the Crown. As already mentioned

Police in Chronology against entry of 15 September 2000 pages 5 and 6 of Defendant's Skeleton Argument.

²² See letter from Commissioner of Police to Stagnetto & Co., in entry in Chronology against 18 September 2000 page 6 Defendant's Skeleton Argument.

Justice Nicholson was present in Court as the ICJ Observer through the first two days of these oral submissions. It should be noted, therefore, Justice Nicholson concluded that, while he was present as Observer, that:-

"The trial was conducted impeccably in accordance with international standards"²³

and that:-

"The attitude and approach taken by the presiding Judge (the Magistrate) was beyond reproach. He not only was in command of the issues but also went out of his way to examine them intellectually in the course of argument and to accommodate Counsel and further argument into his obviously very crowded schedule of listings

* * *

There was no question that the trial process respected the right of the accused to be presumed innocent until proved guilty according to law"²⁴

In conclusion Justice Nicholson went onto to state:-

"The observations [as contained in his Report] showed that the trial observed was completely and absolutely a fair one. This is the case both in relation to the procedure under which the trial was conducted and the manner in which it was conducted.

* * *

[The Chief Justice] had a hearing beyond reproach on any

²³ First paragraph in Section 11 on page 7 ICJ Observer Report.

²⁴ Second and fourth paragraphs in Section 11 on pages 7 and 8 ICJ Observer Report.

ground that an Observer is required to consider".²⁵

35. As it appears that Justice Nicholson wrote his Report before the Stipendary Magistrate issued his August 2000 Ruling, it falls to me to record, in the Magistrate's August Ruling on the 'abuse of process' argument, that he meticulously recorded the facts and law upon which he based his decision to reject the submissions, made on the part of the Chief Justice, that the proceedings should be stayed. Whether or not the Magistrate was right in coming to this conclusion - the matter is now being appealed - he cannot be faulted on the manner in which, as set out in his August Ruling, he reached it.
36. The second argument, advanced on behalf of the Chief Justice, was that the then Governor of Gibraltar when exercising his powers in bringing into force Regulation 44(a) of the Gibraltar Motor Vehicle Test Regulations 1987 was acting 'ultra vires'. Regulation 44(a) as set out in paragraph 25 above, *created the offence* of a person using, or causing or permitting to be used, a motor vehicle without being in possession of a valid MOT Certificate. The argument, as presented, on behalf of the Chief Justice, was that Gibraltar Road Traffic Ordinance, under which the then Governor of Gibraltar purportedly exercised his powers to bring into force the Motor Vehicles Test Regulations 1987, *only* gave him power to *prescribe penalties* but not to *create offences*. The consequence of this argument was that not only was the Chief Justice entitled to be acquitted for not being in possession of a valid MOT

²⁵ First and fourth paragraphs in Section 16 on page 9 ICJ Observer Report.

Certificate on 28th July 2000, but any person in Gibraltar who had been convicted of any offence 'purportedly created' in the Motor Vehicle Test Regulations 1987, since they came into force, had been wrongly convicted and was entitled to have that conviction annulled.

37. In taking the submissions on the 'ultra vires' issues, during the morning and afternoon of Wednesday 14th November Mr Anthony Dudley, the Stipendiary Magistrate, behaved, in my judgement, in an exemplary manner. He gave full opportunity to Counsel on each side to advance their argument, followed each point that was made and made intelligent observations in which he showed a clear understanding of the issues before him. As with his Ruling of August 2000 it is my judgement that his ruling on the 'ultra vires' issue, which he made in writing on 15th November 2001 after I left Gibraltar, was made in a thorough and exemplary manner. The same can be said of his short written Ruling of the same date on the issue of costs. I would, therefore, share the conclusion of Justice Nicholson that there was not the remotest infringement of Human Rights under the Gibraltar Constitution or the Human Rights Instruments, from end to end, in the conduct of this trial of the Chief Justice. In making this statement I must emphasise that, as an Observer at the trial, it is not for me to comment upon whether or not the Stipendiary Magistrate was right in the Rulings which he made. Since both the Chief Justice and the Crown have lodged appeals, this issues have to be finally and fully decided in the appeal process.

Human Rights and the Prosecution Process

38. There does remain the issue whether the prosecution was properly brought and

whether, in bringing this charge against the Chief Justice, there were any breaches of Human Rights. For this evaluation it is necessary to look at the conduct of both the Chief Justice and the Crown.

Chief Justice's Conduct

39. It has to be stated that the Chief Justice's conduct, relating to this motor vehicle charge, has been deeply puzzling.

- (i) Why did he delay so long over his out of date MOT Certificate and why, knowing it was invalid, did he continue to use his motor vehicle, or permit it to continue to be used, both before and after he was stopped by PC Perera on 28th July?²⁶
- (ii) Is not the requirement for MOT Certificates directed to keep off the roads older vehicles which may be mechanically defective and, by so doing, protect public safety? If the Chief Justice is not prepared to abide by this law why should any other citizen of Gibraltar do so?
- (iii) If the Chief Justice agreed that he had an *invalid* Motor Test Certificate, when stopped on 28th July, why did he not accept the caution procedure, which was twice offered to him, and let matters rest there?

²⁶ There is a reference in the notes prepared by Dr. Karen Brewer of the CMJA of her briefing meeting with the Chief Justice's wife, of the Chief Justice and his wife leaving Gibraltar by car on 31st July 2000.

- (iv) Why did he instruct his lawyers to present the 'abuse of process' argument (and in doing so take up 2 ½ days of the Court's time) when all the time he was admitting that he *did not have a valid MOT Certificate*?
- (v) Why did he instruct his lawyers to present the 'ultra vires' argument which, if correct, would have (or will have) the consequence of obtaining an acquittal for him while leaving every other citizen of Gibraltar, also wrongly convicted under offences created in the Motor Vehicle Test Regulations, without redress?
40. My fundamental concern, in considering the conduct of the Chief Justice, relates *his position as Chief Justice*. As recorded, in the 'Delhi Approved Standards' of the International Bar Association on "Minimum Standards of Judicial Independence" (as adopted by the IBA Conference in New Delhi in October 1982) the right of the judiciary under the Human Rights Instruments to enjoy 'Impartiality and Independence' *places the responsibility* on every judge-

"... always [to] behave in such a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary."²⁷:

In the Code of Judicial Ethics and Conduct being developed under the Latimer House Guidelines I assume this is one of the provisions that has appeared – or will appear –

²⁷ Paragraph 40 of Chapter F 'Standards of Conduct' of the Delhi Approved Standards of the International Bar Association "Minimum Standards of Judiciary and Independence" adopted at the IBA's 19th Biennial Conference held in New Delhi, October 1982.

in it.

41. This is not to suggest that a Chief Justice, as an ordinary citizen, is not entitled to fully defend himself on charges which had been wrongly made against him. For example, in this case, if the Chief Justice *had a valid MOT Certificate* when he was stopped but was accused of not having one, then he would have been fully entitled strenuously to defend himself. When, however, a Chief Justice admits that he was not in possession, as in this case, of a valid MOT Certificate, then he *should surely look to the dignity of his office* before instructing his lawyers to present the 'abuse of process' argument. On any view, seen by the public at large, a Chief Justice, who *seeks to be acquitted* of a motor vehicle offence when all the time *he admits he committed it*, must be damaging the office which he holds! Moreover, it must be taken into account that, in this trial, the Chief Justice was not presenting himself to be simply represented as an ordinary citizen. Notwithstanding the contrary position taken by his Counsel on 14th November, it has to be noted that the Stipendiary Magistrate did record on pages 7 and 8 of his Ruling of August 2001, that it was argued by the Chief Justice's Counsel that the Court, in the exercise of its discretion on the abuse of process argument, should take account of the Chief Justice's position as Chief Justice. It also has to be noted that while the Crown, in all its written submissions, referred to the Chief Justice either as the Defendant or Mr Schofield (naming him in the title to its Skeleton Argument as "Derek Schofield"), the Chief Justice in the Defendant's Skeleton Argument is named in the title as "The Honourable Mr Justice Schofield Chief Justice". It is inconceivable that the Chief Justice was described in this manner in the title to the Defendant's Skeleton

Argument without his express knowledge and approval.

42. Another disturbing aspect of the Chief Justice's decision to contest this motor vehicle charge and to have his defence conducted, in the way in which I have described, is the burden which this case has had, and continues to have, upon the judicial system, over which he presides, and upon the junior Judge in Gibraltar's small 'three judge' judiciary. The fact that the Stipendiary Magistrate has acted, in the view of myself and Justice Nicholson, in an exemplary manner, is a matter for relief and congratulation. In that sense the judicial system in Gibraltar has been tested and exonerated but this cannot take away the damage which, to some degree, has been inflicted, and is still being inflicted, on Gibraltar's judicial system.

43. I am mindful that it is possible that the Chief Justice behaved in the way I have set out in this Report because he felt harassed and perceived the prosecution as a means for his enemies to get at him. In this regard I have already expressed serious concern over the allegations of the privacy of the Chief Justice and his family being breached. There is, however, a difference between a person *feeling* harassed and persecuted and, *actually being* harassed and persecuted. It is on the latter I cannot go in favour of the Chief Justice.

Conduct of the Crown

44. It has to be recognised that, as a matter of public record, that there have been disagreements between the Chief Justice and the Executive and particularly with the Chief Minister. I accept there may be persons in Gibraltar, who may wish ill of the

Chief Justice, and may want to get rid of him. The question, however, is whether there was a *nexus* between calls by (say) the Chief Minister for the resignation of the Chief Justice and the prosecution of him for this motoring offence. More directly was this motoring vehicle charge brought wrongly for political or other improper reasons or was it a proper charge brought about by the Chief Justice's own conduct? It is in this light that the conduct of the Crown must be evaluated.

45. The decisions facing the Crown - although obviously carrying sensitivity because the offending motorist was the Chief Justice - were in essence simple decisions. A motorist, albeit the Chief Justice, had been stopped on a street in Gibraltar with both the vehicle licence and the motor test certificate out of date - the latter being over 6 months out of date. There was no question on this latter issue that that motorist was in breach of the law²⁸. Since, however, an 'amnesty' had been extended to all vehicle owners in Gibraltar for an extension of time to 31st July 2000 for renewing motor

²⁸ In third paragraph of section 9 on page 6 and in the second paragraph of section 10 on page 7 of the ICJ Observer Report there is a suggestion that the Defence had taken the point that the 'amnesty' for vehicle licences extended to MOT Certificates. This point also came up in Dr. Karen Brewer's notes of her briefing meeting with the Chief Justice's wife. However this point was not taken in the Defendant's Skeleton Argument nor mentioned in the Magistrate's August Ruling. In any event, in the view of the HRI Observer, this cannot have been a good point even if it was taken by the Defence. The requirement for MOT Certificates is in a separate regime from the requirement for Vehicle Licences and is a requirement, in the interests of public safety, under which a motorist is meant to have (if his motor vehicle is of a certain vintage) a valid MOT Certification at any time when his motor vehicle is being used. The system under which motorists have to produce a valid MOT Certificate when applying for a Vehicle Licence is merely a means of checking that motorists are complying with MOT Certificate requirements.

vehicle licences *it was not appropriate* to take that matter further other than, perhaps, PC Perera strongly urging the Chief Justice to get his motor vehicle papers promptly in good order and, until they were, not further to use his motor vehicle. It follows; therefore, it was not appropriate for the Commissioner of Police to have issued a caution relating to the out of date road vehicle licence. Other than that error it seems to me that the Attorney General and the Commissioner of Police, in the respective parts which they played in the correspondence with the Chief Justice's Solicitors, were acting properly in seeking the agreement of the Chief Justice over the service of the written caution. That having failed - subject to whether there was power to withdraw the caution and to proceed to prosecute which is a matter still before the Court - I cannot see anything inappropriate in prosecuting the Chief Justice for not being in possession on 28th July with a valid MOT Certificate. On any view the Chief Justice's MOT Certificate had been expired for a long time. Indeed I think it would have been a dereliction of duty for the Crown, upon being unable to reach agreement with the Chief Justice over the caution, not to have proceeded forward by way of prosecution.

46. It, therefore, follows that none of these facts raise any issues concerning infringement of Human Rights under either the Gibraltar Constitution or the Human Rights Instruments. In this regard it is significant, although not conclusive, that no record appears in any of the trial papers before me - I refer principally to the written Skeleton Arguments of both the Defence and the Crown and to the written Rulings of the Stipendiary Magistrate - of any allegation, by Counsel on behalf of the Chief Justice, of any breaches of his Human Rights under either the Gibraltar Constitution

or any of the Human Rights Instruments. Moreover, other than the abuse of power argument, there are no suggestions anywhere in the trial papers of any impropriety by the Crown in prosecuting the Chief Justice.

47. My conclusion, therefore, must be that there are no grounds for holding this prosecution was improperly brought or tainted by political or other improper considerations. It appears that Justice Nicholson basically came to the same decision. Noting the way the Chief Justice's case was being conducted, in the part of the trial which he witnessed, Justice Nicholson held

"... nothing arising in the defence case at trial raised any issue that the prosecution of the Chief Justice on the motor vehicle offence was an abuse of power because it was motivated by or the product of executive harassment of the accused. Whatever the condition of tension between the Executive and the Chief Justice prior to trial, none of that alleged pattern of conduct played any part in the trial or the defence case."²⁹

"None [of the past history between the Chief Justice and the Executive of Gibraltar] played any part in the case brought on his behalf at this trial".³⁰

The Appeals

48. Following the Stipendiary Magistrate's Ruling against the Chief Justice on 14th November on the 'ultra vires' argument (and finding him guilty of this motor traffic offence) the Chief Justice has entered a Notice of Appeal and the Crown has sought an Order of Case Stated upon the decision of the Stipendiary Magistrate to reject the

²⁹ Last paragraph in section 3 on page 3 of the ICJ Observer's Report.

³⁰ Last paragraph in section 16 on page 9 of the ICJ Observer Report.

Crown's application for the Chief Justice to pay the Crown's costs. On the latest report I have received from the Clerk to the Magistrates' Court, the Case Stated had been completed and lodged in the Supreme Court but, since the Defence asked for a complete transcript of all four days of the trial, there have now been further delays. It appears that the Magistrates' Clerk has completed the transcript concerning the 'abuse of power' argument submitted in July and hopes shortly to complete the transcript of the 'ultra vires' argument submitted in November. While the requirement for the Magistrate's Clerk to provide a transcript - including a record of the evidence taken in the July hearings³¹ - may accord to the practice in Gibraltar for criminal appeals under the Gibraltar Criminal Procedure Ordinance, it has to be noticed that there has been imposed on the Magistrate's Clerk the difficult and time consuming exercise to record the four days of detailed legal arguments before the Stipendiary Magistrate. The consequence is not only delay – I am told that pending receipt of the completed transcript the grounds for the Defence's Appeal are not to be lodged – but further burdens on the Courts of Gibraltar over which the Chief Justice himself presides.

49. This is not the only difficulty concerning these Appeals. There are only two judges in the Gibraltar Supreme Court who can take Appeals from the Magistrates Court: the Chief Justice and the Additional Judge in the Supreme Court, Mr Justice Pizzarillo. I understand that Mr Justice Pizzarillo has already shown some reluctance on taking these Appeals and now will be unable to do so for a time unknown - until he has recovered from major heart surgery which he underwent last month in

³¹ According to the ICJ Observer Report the Defence and the Prosecution each called two short witnesses: fourth paragraph in section 9 on page 7 and third paragraph in section 10 on page 7.

London.

50. On the basis that the Chief Justice himself is debarred from taking these Appeals, there are, therefore, serious problems for these Appeals being taken under any reasonable timetable. On one construction of the Gibraltar Constitution the Governor has only power to appoint one Additional Judge and, unless for some reason Mr Justice Pizzarillo steps down and another judge is appointed in his place, these Appeals cannot take place until Mr Justice Pizzarillo is well enough to return to the Bench in Gibraltar. On another construction of the Gibraltar Constitution, the Governor does have power to appoint another Additional Judge to hear these Appeals. It must be hoped, therefore, that the Governor will take this course. As matters stand, at the moment, there could be a delay of up to two years before this matter is resolved or, over two years, if either the Crown or the Defence have the right to take this case for final adjudication before the Gibraltar Court of Appeal.
51. Since some of these delays have been to accommodate the convenience of the Chief Justice and his Counsel, it is not possible to conclude that his human rights have been, in this respect, breached. While, therefore, this matter is out of my remit, I would hope, that the HRI and the IBA could urge upon the Governor and the Chief Justice that every effort should be made to conclude these proceedings. Perhaps the parties could be invited to agree, if the Court of Appeal is willing and able to take this matter, for these Appeals to go directly to the Gibraltar Court of Appeal.

Conclusion

52. It follows from the findings which I have made in this Report that I reach essentially the same conclusions to those reached by Justice Nicholson when he was acting as the ICJ Observer in the earlier part of this trial. As did Justice Nicholson, I find that the Stipendiary Magistrate Mr Anthony Dudley impeccably conducted the trial which I witnessed on 14th November and, in the Rulings which he issued on 15th November 2001, he carefully and thoroughly considered the submissions and law put before him and provided full reasons for his conclusions. I am confident that, should different conclusions be reached in the appellate process, there will be no findings of any impropriety against Mr Dudley in his conduct of this trial. Indeed, it would be extremely surprising if any such allegation was made either by the Crown or by the Defence. Like Justice Nicholson, I also find that there are no grounds for concluding that this prosecution was brought for political reasons or out of some improper influence of the Gibraltar Executive or for any other reasons which could give rise to breaches of Human Rights. As presented by the Defence the argument on 'abuse of power' was entirely a technical legal one. Should a different view be taken on this issue in the appellate process, it is impossible to see how any different view could give rise any finding of impropriety by the Commissioner of Police or any other persons involved in the bringing of this prosecution.

53. I mentioned earlier, in paragraph 20 there have been calls made by the Chief Minister or others for the resignation of the Chief Justice or for him to be investigated under the Gibraltar Constitution for the purpose of having him removed from office. I do not doubt that it must have been most uncomfortable for the Chief Justice to have

been the subject of such calls but nobody who holds a public office, including Chief Justices, is immune from such calls. Furthermore, the Chief Justice did expose himself to such calls by he and his wife employing maids when, as he has had to admit, Social Security and PAYE matters relating to them were not in proper order. In any event calls for Chief Justices to resign or be investigated do not, as such, raise issues of breaches of Human Rights

54. There do remain, however, the very serious allegations relating to unlawful surveillance of the Chief Justice and his family - the telephone lines at his Chambers and home allegedly being 'bugged' or 'tapped' and persons allegedly entering his home without his knowledge or authority. The examination of these matters fell outside the authority of Justice Nicholson and myself as Observers and, in any event, we did not have the resources to carry out any investigation relating to them. I believe, however, if the Chief Justice wishes to press these serious allegations, he should be given the fullest authority and assistance in doing so.

55. The roles of Justice Nicholson and myself as Observers end with our Reports on the trial and prosecution processes. Our Reports, however, do draw attention to the public differences between the Chief Justice and the Gibraltar Executive. Also my Report draws attention to the manner in which the Chief Justice has been conducting himself relating to his trial and the appellate process arising out of it. It further draws attention to the delays in the hearing of the Appeals lodged by the Defence and the Crown. This, in turn, raises issues upon the general administration of justice in Gibraltar and the future of the Chief Justice himself. It seems to me, therefore, that

the IBA and the HRI can and should take on a wider mandate than given to me (and to Justice Nicholson by the ICJ) and call upon the Chief Justice and the Governor to address these serious issues. As matters currently stand in Gibraltar, it must be seen that damage is being inflicted to its judicial system and ultimately, in the interests in the people of Gibraltar, this is unacceptable. At the end of the day it is paramount that the judicial system in Gibraltar is seen to be functioning without excess delay (particularly as it relates to the Chief Justice) and it is paramount, whether it be the present Chief Justice or another, that the Chief Justice enjoys the public confidence of the Governor, the Gibraltar Executive and of the peoples of Gibraltar.

Addendum

56. While I was preparing this Report, I received on 22nd January copies of correspondence exchanged from 9th January to 15th January between the Attorney General and the Chief Justice's Junior Counsel at trial. As I understand it these copy letters were sent to the ICJ by the Chief Justice's wife with the request that they should be put before the HRI as part of the HRI's investigation into human rights relating to the Chief Justice. After I had completed the drafting of this Report, I received yesterday, as I understand sent directly by fax to the HRI by the Chief Justice's wife, a copy of a letter sent to the UK Foreign Secretary by the Chief Justice's wife on 8th February to which were attached copies of the same above set of letters plus one further copy letter of 23rd January from the Chief Justice's Junior Counsel to the Attorney General. I thought it right, therefore, that I should consider these documents before submitting my Report. This I have now done.

57. The copy correspondence with the Attorney General relates to the appellate procedures concerning the respective Appeals of the Chief Justice and the Crown and to the impact that any withdrawal of the Appeals may have upon the Chief Justice's future tenure of office. None of these matters remotely raises any human rights issues which fall to be considered by me. In her letter to the Foreign Secretary Mrs Schofield complains of two Governors (the present Governor and his predecessor, Lord Luce) acting in a way which was 'interfering with' and 'threatening to' the family life of her, her husband and their two children. The conduct of which Mrs Schofield complains is directed to allegations of persistent telephone calls and messages to their home coupled to clear intimations (spoken and unspoken) of wanting to have the Chief Justice 'sacked' or otherwise removed from office. In this letter Mrs Schofield also names both the Chief Minister and the Attorney General as being parties to the wish that the Chief Justice ceases to hold his office.
58. While these latest representations confirm the very unhappy state affairs relating to the Chief Justice in Gibraltar (actively involving two Governors, the Chief Minister and the Attorney General) and that this has been going on for a long time and while it cannot have been comfortable for anybody, I cannot conclude that, in any true sense, human rights issues are involved. I am in no doubt these issues should be addressed, as *was* my recommendation *before* I read Mrs Schofield's letter to the Foreign Secretary (see paragraph 55 above and paragraph 63 below). Indeed it is to be *greatly regretted* that so much time has gone by *without these issues being properly addressed*. As, however, earlier stated the resolution of these matters fall not to the

IBA and the HRI but to the Chief Justice himself, the Governor and Her Majesty acting through the Foreign Secretary. Perhaps something may now be done if my Fifth Recommendation in paragraph 63 is accepted.

Recommendations

59. My first recommendation is that the HRI, hopefully together with the ICJ, should monitor the court proceedings in the appellate process until all legal proceedings, relating to this trial, are fully and finally concluded. In view of the findings of Justice Nicholson and myself I do not see the case for the continued attendance of an Observer from the HRI or the ICJ at the appellate hearings but, if they take place in Gibraltar, I suggest the Chairman of the Gibraltar Bar Council is approached and asked if a member of the Bar Association could undertake a 'watching brief' of the appellate proceedings on behalf of both the IBA and the ICJ and to report back to both bodies.
60. My second recommendation concerns the publication of this Report. Until it has been seen and approved by the Co-Chairs of the HRI this Report must remain an internal IBA Report. Thereafter my recommendation is that it should be made public. When any allegations are made concerning breaches of Human Rights or improprieties in the prosecution or trial process, it is important, I believe, that the Reports of Independent Observers are made public. The question, however, is when. No opinions whatsoever are expressed in this Report upon the legal arguments presented in the trial or upon the merits of the Appeals now being taken to the Gibraltar Supreme Court. In that sense the contents of this Report are quite separate

from the issues to be decided in the appellate process. There are, however, parts of this Report, which expose the Chief Justice to criticism relating the motor offence and the conduct of his case arising out of it. I think it is best, therefore, but subject to one qualification, that this Report should not enter the public domain until the appellate proceedings have come to a full and final end. The one qualification is that, should by any chance any part of the contents of this Report enter into the public domain prior to the end of the judicial process, the IBA and the HRI should forthwith publish this Report in full.

61. My third recommendation is that, if the Chief Justice is continuing to allege that he has been subject to unlawful surveillance, that there should be promptly set up a public inquiry to investigate these allegations and reach findings on them.
62. My fourth recommendation is that, prior to the publication of this Report, the IBA and HRI urge the Chief Justice and the Governor to put forward proposals for the prompt completion of the appellate process.
63. My fifth recommendation is that the IBA and the HRI urge the Chief Justice and the Governor, by whatever means would be fair and appropriate, to address and conclude the matters, to which this Report draws attention and which are damaging to the status of the Office of the Chief Justice and to the rule of law in Gibraltar.
64. My sixth recommendation is that the IBA and the HRI should issue a press release on similar lines to the press release issued by the ICJ on 10th August 2001. I suggest

this press release makes five points:-

- (i) I, as the HRI Observer, found that the trial and the prosecution process conformed, in their entirety, to accepted standards under domestic and international law and, in every way, followed the principles of Human Rights and proper process.
- (ii) The IBA and the HRI intend to publish my Report as soon as the appellate process comes to a full and final end but, until such time, it is not the intention for my Report to enter the public domain.
- (iii) The IBA and the HRI has noted with concern the allegations that the Chief Justice has been subject to unlawful surveillance and, if the Chief Justice is pressing these allegations, that they should be promptly and publicly investigated.
- (iv) It is highly desirable, in the interest of all the parties and in conformity to the Human Rights Instruments, that there is no delay in the appellate process and, to that end, proposals should be promptly put forward for the final disposal of this judicial process.
- (v) It is highly desirable and, in the interests of all parties and the administration of justice in Gibraltar, that the public differences relating to the Chief Justice are addressed and concluded by whatever means are fair

and appropriate.

65. Finally, in the interests of promptly attending to these recommendations, prior to this Report entering the public domain, my sixth recommendation is that copies of this Report, when approved by the HRI Council, are sent strictly 'for their eyes only' to the Chief Justice, the Governor and the Secretary of State for Foreign and Commonwealth Affairs, who has the ultimate responsibility, through the Privy Council, to Her Majesty the Queen for the governance of Gibraltar.

DAVID HACKING

12th February 2002

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