MAINTAINING JUDICIAL INDEPENDENCE IN A SMALL JURISDICTION

by the Hon Mr Justice Schofield, Chief Justice, Gibraltar

I should preface this paper by saying that my experience in small jurisdictions is limited to the Cayman Islands and Gibraltar both of which are British Overseas Territories each with a population of about 30,000. However some of the problems which I shall discuss in the paper affect judges who are posted to a small town within a large jurisdiction. My experience is that the Cayman Islands and Gibraltar are jurisdictions where judges are not subjected to any direct interference in relation to the cases before them. There are stresses and strains particularly in maintaining the appearance or perception of independence but there are none of the problems of direct interference such as I encountered in my previous jurisdiction of Kenya. I should add that, unless the context suggests otherwise, when I speak of "judges" I include those professional judges who preside in a court of law whether they be called judges or magistrates.

Appointments

In both Gibraltar and the Cayman Islands judges are appointed by the Governor who is himself appointed from the United Kingdom by Her Majesty the Queen. In Gibraltar the appointment of Chief Justice and the Judges of Appeal are made on instructions given by Her Majesty through the Secretary of State for Foreign and Commonwealth Affairs. In the Cayman Islands the appointment of the Chief Justice and the Judges of Appeal are made with the approval of the Secretary of State. Magistrates in both jurisdictions are appointed by the Governor acting at his own discretion. In practice the Governor will consult the Chief Justice before making any judicial appointment.

former clients if they are to sit as a judge. It is the exceptional individual who emerges as both willing and able to perform the functions of a judge in technical and personal terms. If that exceptional individual does emerge then he must be the favoured candidate. However, that bias in favour of a local appointee should not lead to the appointment of an unsuitable candidate.

The tendency in some jurisdictions is to recruit almost wholly or substantially from overseas. There now seems to have grown a practice of advertising judicial posts and conducting an open competition, the Governor appointing a board to interview those who are short-listed. This is to be commended whether there are local candidates or not. It is vitally necessary that only the best candidates are recruited for judicial positions. Furthermore, an open recruitment system lends credibility to an appointment and stems possible criticism that an appointment is made other than on merit.

To what extent should the Governor consult locally on appointments? The Governor is, of course, the head of the executive but is removed from local politics. It will be natural for him to want to pass across the other members of his executive the name of a potential appointee particularly if the potential appointee is or should be known to the members of the executive, if only to ascertain if there is anything known about him which ought to be known. But the members of the executive are elected politicians who in a small jurisdiction will be all too familiar with a local candidate. It is not like a large jurisdiction where such matters can be dealt with impersonally; in a small jurisdiction matters tend to become personalised.

My view is that it is right and proper for the Governor to inform the other members of the executive about a prospective appointment, but that he should not go so far as to formally consult. The dividing line between formal consultation and requesting formal approval is too fine, and in a small

to these grounds in the case of an expatriate judge is where a local candidate for the post has emerged with all the necessary technical and personal attributes. A judge should, furthermore, be entitled to be given reasons for non-renewal of his contract.

I should say, of course, that the instability that the system of contracts for judges brings is not confined to small jurisdictions. The only time I was threatened that renewal of my contract was in jeopardy was in Kenya where I was told by the then Chief Justice that if I persisted in dealing with a particular case in a particular way he would have difficulty recommending a renewal. I ought to add for the record that I informed the Chief Justice that if that was the price I had to pay for a renewal of contract I was not prepared to pay it. However, small jurisdictions are particularly susceptible to the kinds of dangers demonstrated in this section of the paper. Cases take on a local magnitude, often far in excess of their importance. Personal reasons are often attributed to perfectly sound decisions and it is easy for a judge to become labelled, as, say, anti-government on the basis of one or two decisions. I have heard that a few years ago the renewal of contract of a Supreme Court judge in Gibraltar was discussed in the context of a decision he had made which displeased the government. There is nothing to suggest that the Governor's mind would have been influenced by this, but that the conversation took place at all demonstrates how unhealthy the present system of contracts is. I suspect that if judges on contract were asked whether, when renewal time comes around, they ask themselves if they have made any unpopular decisions, many would reply in the affirmative.

It may be that a judge recruited from an overseas territory does not want to commit himself to the jurisdiction until he reaches retirement age. It may be that the recruiting territory does not want to commit itself to an expatriate judge until he reaches retirement age, particularly in a small jurisdiction where some

In my experience in both Gibraltar and the Cayman Islands the Courts are adequately funded within the budgetary constraints of the respective governments. Similarly with staffing. With good will and a sensible approach on both sides the Courts are reasonably adequately manned. There is a provision in the Gibraltar Supreme Court Ordinance which in theory permits the Chief Justice to determine the number of officers he requires to carry out the administration of the Court. In practice the Registrar of the Supreme Court deals with staffing matters directly with the Personnel Department of government, in the same way as government departments. It would only be if the Registry were to become dangerously undermanned that the Chief Justice would enter the staffing arena and wield the statutory provision above-mentioned.

The Registrar and Deputy Registrar of the Supreme Court of Gibraltar, according to section 3 of the Supreme Court Ordinance, are "attached and belong to the court". These officers are of course provided by the government but are appointed by the Governor. They carry out some judicial duties as well as being responsible for the administration of the Court. A few years ago a Registrar was removed on the directions of the then Chief Minister and transferred to the Attorney-General's Chambers. How this came about in the face of the statutory provision I do not know. I can only assume that it was an aberration which would not be repeated today. In Gibraltar members of staff other than the Registrar and Deputy Registrar can be transferred to and from the courts at the will of the administration. In theory this could lead to problems and conflict. There could, for example, in theory be an attempt by a senior member of the administration to influence a listing officer in his allocation of a case, with a refusal resulting in some form of reprisal. In practice the Registries have been permitted to maintain and develop a nucleus of able and senior staff

that judges from jurisdictions which do not provide judicial training have an opportunity to undertake such training. Furthermore training courses give judges from small jurisdictions who are starved of contact with judicial brethren an opportunity to make such contact. The importance of this latter element can probably only be fully appreciated by those of us who are judges in small jurisdictions.

I shall deal with the general social problems encountered by a judge in the next section of the paper, but here I deal with social relations with members of the Bar. One tends to gravitate socially towards people with similar backgrounds. However, in a small jurisdiction there are no Inns of Court to retreat to. One's social life tends to become common knowledge. The Bar, particularly the litigation Bar, is very small. There are those members of the Bar to whom one is naturally attracted; it cannot be ignored that there are sometimes members of the Bar who seek to ingratiate themselves to the judges. Too close a contact with any particular member of the Bar may give a wrong impression to the other members of the Bar and, particularly, to the public. Too close a contact with the Attorney-General or any members of his chambers may also be misconstrued. For this reason a judge in a small jurisdiction has to maintain a reserve which leads to a very lonely existence.

Social Pressures

This latter consideration applies equally to a judge's general social activities. We all need friends and social contact but the chances of meeting a litigant in a social context is multiplied in a small jurisdiction. Anonymity is lost and the burden of maintaining the dignity of the office is often great. It is not good for one's office for one to be perceived to be out of touch with society and there are official gatherings which a judge is expected to attend. On the other hand one does not want to be to readily approachable for fear of attracting the wrong

attempt to rid itself of these "institutional" houses. To leave judges to have to go on the open market for housing, particularly when salaries or allowances can lead him to inferior accommodation in less desirable areas of his jurisdiction, is an unwelcome policy.

Finally I should mention one particular problem in a small jurisdiction in maintaining impartiality on the Bench. Every jurisdiction has its recidivists. Every jurisdiction has its regular litigants who may not have achieved the description "vexatious". In a small jurisdiction such clients appear before the same judge or judges. There is little possibility of such a client appearing before a judge who has not already found against him. It often takes an extreme effort on the part of the judge to deal with such a client impartially. We all do it but all know the amount of effort it takes.

It is in society's best interests that protective barriers be erected behind which a judge will be free to fulfil his judicial functions independently and impartially. But however secure those barriers it is for the individual judge, whether he sits in a small or a large jurisdiction, to maintain his own standards of judicial conduct. As Lord Hope has said:-

> "The responsibility lies with the judiciary to ensure that it is not weakened by the actions of the executive, or by incautious or irresponsible conduct on the part of the judiciary. ... at the end of the day what matters most is the extent to which the judges themselves value and assert their own independence and foster it by their traditions and conduct. The terms and conditions of service provide a framework upon which that independence can be built. But the real substance of independence lies in the hearts and minds of the judges and the way in which from day to day they administer justice." (4)
