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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Brownlee's Application [2013] NIQB 36

IN THE MATTER OF AN APPLICATION BY RAYMOND BROWNLEE FOR JUDICIAL REVIEW

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TREACY J

Introduction

1. The applicant is Raymond Brownlee, a convicted prisoner, presently of HMP Maghaberry. By this application he seeks various reliefs including a declaration that the respondent's decision to make no provision for exceptional circumstances in the payment of fees under the Crown Court Proceedings (Cost) (Amendment) Rules 2011 ("the 2011 Amendment Rules") is unlawful and a declaration that the said Rules operate to constitute a breach of the applicant's right to a fair trial pursuant to Art6 of the ECHR.

Background

2. This is an unusual and exceptional case. The applicant is a convicted prisoner who is due to be sentenced shortly. He may be sentenced in circumstances where, if matters remain as they are, he is exposed to the risk of receiving an indeterminate life sentence without the benefit of legal representation. Alternatively, because of the absence of legal representation, the possibility exists that the proceedings may have to be stayed as an abuse of process.

3. These risks arise notwithstanding the fact that a very experienced Crown Court Judge, who is presiding over the trial, issued a legal aid certificate for a fresh legal team for the sentencing phase to include solicitor, Senior and Junior Counsel. The certificate must have been issued because of the Trial Judge's view of the complexity and seriousness of the pending sentencing hearing.

4. The problem has arisen in this way:

(i) The applicant was charged with one count of false imprisonment, one count of threats to kill, two counts of wounding with intent and one count of common assault.

(ii) Save for the count of common assault to which he pleaded guilty, the applicant contested all the charges and the matter proceeded by way of a five day trial before a jury between 28 May 2012 – 2 June 2012 at the Crown Court sitting at Laganside.

(iii) During the course of the trial the applicant says that he lost faith in his solicitor and Junior and Senior Counsel and that this relationship became "irreconcilably damaged" after the close of the Prosecution's case and just before the closing speeches. At this point the applicant's lawyers came off record and he was therefore unrepresented during His Honour Judge Miller QC's summing up.

(iv) He was convicted of false imprisonment, threats to kill, wounding with intent and common assault.

(v) It is clear that the Judge had allowed the jury to retire to consider their verdict following his summing up and directions and that this procedure was followed because of the advanced stage of the proceedings at which the developments referred to above had occurred and in order to allow the jury, who had so recently heard all the evidence, to deliver a verdict.

(vi) When the guilty verdicts were returned the Trial Judge advised the applicant to obtain representation for sentencing and it was at this point that the applicant's present solicitors came on record. On 2 July 2012 the solicitor firm's fresh certificate of criminal legal aid was extended to include Senior Counsel on the basis of the seriousness and complexities of the case.

5. Notwithstanding or perhaps because of the fact that the presiding Judge was an experienced Judge with a distinguished background in criminal law, he nonetheless concluded that such was the complexity and seriousness of the matter that the applicant was entitled to Senior Counsel, Junior Counsel and solicitor. This order was also made against the background that the Trial Judge knew that he could ordinarily anticipate receiving as much assistance as possible from the Prosecutor as to the relevant sentencing options, the relevant legal provisions and the relevant case law.

6. Particular weight must be attached to the fact that the Judge who had presided over the entire trial so far considered that the interests of justice mandated

that level of representation notwithstanding the existence of the safeguards alluded to in para 5 above.

7. The applicant's solicitor then sought to instruct Counsel in this matter pursuant to the legal aid certificate. She was asked by a number of Counsel to confirm the fees payable for a brief fee under the applicable criminal legal aid scheme in the unusual circumstances that had arisen. After making enquiries with the Legal Services Commission ("the LSC") it was confirmed by way of letter dated 4 September 2012 from Judy McDermott that the fees payable in the case were as per Schedule 1, Part IV, para15 of the Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 as amended by the 2011 Amendment Rules ("the 2011 Amendment Rules").

8. The LSC confirmed that as she was not the solicitor on record for the trial the fees payable were limited to the fixed fee for sentencing. The letter went on to state that "there is no legislative basis by which the Commission may allow a basic fee to a second set of legal representatives in respect of sentence hearings". Accordingly, it was indicated that the fees which would be payable to the representatives were as follows:

- Solicitor - £100
- Led Junior Counsel - £120
- Senior Counsel - £240

9. The offences of which the applicant has been convicted after his trial are so serious and aggravated that the applicant may well be considered a dangerous offender and face an extended or indeterminate sentence. The solicitor has averred that there is a large amount of work involved for Counsel to read themselves into the case to ensure that all relevant facts are ascertained; that this would include full consideration of a significant body of documentation including statements and attendance notes and correspondence from the applicant's previous solicitor; consideration of five days of transcript of evidence and submissions; that the applicant has a large number of convictions that will need to be evaluated in light of the relevant convictions and their likely impact on the sentence; that detailed consultations would be required with both Counsel both of whom would require reasonable preparation. She assumes that this work would be necessary even before the work required specifically for the sentence hearing begins. It is averred that a psychiatric evaluation and report on the applicant has been obtained and that the adduction of evidence from the evaluating psychiatrist will be required at the hearing. Furthermore, a comprehensive pre-sentence report has raised the possibility of the applicant being a dangerous offender and therefore the report will need to be analysed very closely with the Probation Officer perhaps being tendered for cross-examination. She further avers that legal research and argument will need to be undertaken to ensure that the Court can be properly directed as to the law on the highly aggravating features of this case, on the dangerous offender provisions and the emerging law regarding indeterminate sentences. She avers that she believes that

it was for these complex reasons that HHJ Miller QC certified the sentencing phase of the trial as requiring not only solicitor but Junior and Senior Counsel.

10. The applicant's solicitor approached a number of Junior and Senior Counsel. However, when it became clear that the fees of £120 and £240 payable for the sentencing hearing would have to cover the entirety of the work as outlined above, all Counsel said that they would have to decline the work on a professional basis. They cited the size, complexity and gravity of the task involved and the meagre fee as the reason for not being able to undertake the work.

11. As she could not retain Counsel in the conventional manner she then decided to approach the Criminal Committee of the Bar to ascertain if any Counsel could be found to represent the applicant for the fees payable. By letter dated 26 September 2012 she wrote to the Criminal Committee of the Bar. Mark Mulholland QC, on behalf of that Committee, responded by email dated 3 October 2012 stating that the Committee was unanimously of the view that the fees payable did not represent fair remuneration for the nature and sheer extent of the work involved in the case and that it would not therefore be possible to obtain Counsel to act. It was acknowledged during the course of the hearing that this was implied rather than expressly stated in the said email.

12. In further correspondence to Mr Mulholland the solicitor confirmed (following receipt of the response to the pre-action protocol letter) that additional fees may be payable namely:

(i) Drafting of Skeleton Argument – fee of £250 for Senior Counsel and £125 for Junior Counsel (noting that this fee is only payable where a Skeleton Argument has been directed by the Court and that no such direction had been given in this case);

(ii) Consultation Fee - £63 per hour for Senior Counsel, £31 per hour for Junior Counsel;

(iii) Mention Fee for any additional days in Court - £100 for Senior Counsel, £63 for Junior Counsel.

13. By letter dated 26 January 2013 enclosing this additional information Mr Mulholland was asked to indicate whether, in his view, any member of the Senior or Junior Bar would be prepared to accept instructions in this case on that basis. The solicitor concluded her letter by pointing out that the defendant was convicted following a five day trial and confirming that a pre-sentence report indicated that the defendant posed a significant risk of serious harm to others and that psychiatric evidence was expected to be led on his behalf at the plea in mitigation.

14. By letter dated 24 January 2013 Andrew Trimble, the interim Chief Executive of the Bar Council, responded as follows:

> "I am directed by the Chairman of the Bar Council and the Bar Council to respond to your letters of 18 and 22 January 2013 ...
>
> The view of the Council at their meeting in December was that the Council was not minded to join in this matter.
>
> In your letter of 22 January 2013, you suggest that additional fees may be paid and you refer to a fee for a Skeleton Argument, a fee for consultation and a Mention fee which might apply.
>
> The additional fees which you suggest would only apply if the Court had:
>
> (i) Directed that a Skeleton Argument is presented – *none has been directed* in this case to date; and
>
> (ii) For consultation with a lay client – *consultation is not paid at the Court building or on the day of hearing.*
>
> It is likely that to properly prepare, Counsel would be required to visit the prison to conduct a consultation and, in consequence, would mark a fee. Within the scope and circumstances of the matter this will all require additional work. There is no provision for the necessary preparation – *which would be unremunerated.*
>
> In respect of the suggestions that you make, neither of the options constitutes a trial fee and upon accepting the brief there is no basis to believe that either would in fact be paid.
>
> It was the view of the Council that the application fee of itself did not represent adequate or fair remuneration for the work required in the case."

15. As can be seen from the foregoing the problem that has arisen in this case is that the applicant has not been able to find any Counsel to represent him allegedly because of the failure of the regulatory framework and, in particular, the 2011 Amendment Rules to make provision for exceptional or unusual circumstances in the payment of fees.

16. Plainly the Judge superintending the trial considered that the interests of justice required the Defendant to have access to criminal defence services at the level mandated by the certificate issued by him, namely two Counsel and a solicitor. This applicant has been unable to secure that level of representation or indeed any representation. His current solicitor has made it clear that her firm has agreed to continue to act in the capacity of instructing solicitor. The firm has agreed to continue to act on behalf of the applicant for the fees available to it under the 2011 Rules. It has agreed to do this despite the fact that the fees payable, according to them, "do not represent the level of work required. The capacity in which this firm agrees to continue to act is in the capacity of instructing solicitor. If we are able to instruct Junior and Senior Counsel for the sentencing hearing we will continue to act. Our exhaustive attempts to engage Counsel have been set out in my first affidavit". Furthermore, as confirmed by para14 of the same affidavit, "no Advocate from this firm is prepared to act as Counsel on the basis of the remuneration which would be provided to them under the 2011 Rules" and pointed out that the Trial Judge has indicated that it is "essential" that both Junior and Senior Counsel are instructed to represent the accused.

17. On 11 January 2013 the solicitor wrote to Brian Kennedy QC, Chair of the Bar Council Pro Bono Committee, to enquire whether members of that Committee would be willing to represent the applicant in respect of the sentencing hearing. By letter of the same date he advised that the Pro Bono Unit of the Bar Council would not be able to assist the applicant as the Unit did not act in criminal cases. Furthermore, he stated that the Unit could never contemplate any responsibility in the conduct of criminal trials. The full text of that letter is as follows:

> "Thank you for your letter of even date. I understand that you are unable to instruct Senior Counsel in a forthcoming sentencing hearing because the Counsel you have approached have indicated that the level of payment offered under the present Crown Court Cost Rules does not reflect fair or adequate remuneration. You ask whether the Northern Ireland Pro Bono Unit might assist.
>
> The Northern Ireland Pro Bono Unit do not assist in criminal cases and to the best of my knowledge never have. This, we understand, to be within the government's remit and responsibility. Such dispute as any lawyers may have with the Legal Services Commission about fair and adequate remuneration is a matter of politics and government. The Pro Bono Unit is very limited in what it can do to assist with access to justice and only where there is no other possible source of funding or assistance. This is usually in cases of specific public import where an important point of legal precedent is engaged.

> The country would be in a very sorry state if it relied on pro bono lawyers to represent defendants in criminal trials. The Pro Bono Unit could never contemplate any responsibility in the conduct of criminal trials as there simply are no resources for funding the very limited work we do at present.
>
> It is with regret we must inform you that we are unable to assist.
>
> Yours sincerely"

18. At para9 of his second affidavit, Mr Padraig Miceal Cullen, Solicitor of the Department of Justice states that in the circumstances which have arisen in this case, if the position remains that the applicant's solicitor is unable to find alternative Counsel and/or Solicitor Advocates to act on his behalf for the sentencing stage of his case, that it was understood by the Respondent Department that there would be several potential options available to the Trial Judge. The first of these mentioned by Mr Cullen was that representation of the applicant could be undertaken by Counsel or solicitor or both at the request of the Judge as provided for under Art36(2) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981. It appears that this is entirely misconceived since 36(2) (which is set out by Mr Cullen in his affidavit) provides as follows:

> "If, upon the trial before the Crown Court of a person in respect of whom a criminal aid certificate has <u>not</u> been granted, his defence is undertaken by Counsel or solicitor or both at the request of the Judge, the cost thereof may be paid as if a criminal aid certificate had been granted to that person".

The reference to 36(2) is misplaced because it plainly has no application in the present case since a criminal aid certificate has been granted by the Crown Court Judge for Senior and Junior Counsel and solicitor.

19. At para10 of the same affidavit he states that another potential option is that the Crown Court Judge might request the Attorney General for Northern Ireland to appoint an *Amicus Curiae.* Whether or not the AG would agree to such an application the fundamental problem would remain that such an individual would not be acting as the defendant's lawyer and would not vindicate an accused's specific *right* under Art6(3)(c) of the European Convention.

20. Accordingly, the application comes back to whether the absence of any exceptionality provision or other ad hoc mechanism designed to deal with exceptional and unusual cases is defeating practical and effective access to legal

assistance at the level which, in the interests of justice, the presiding Judge has indicated is necessary.

21. The impugned Rules are being reviewed and because of these proceedings the respondent has, I understand, agreed to bring forward the review. However, that is little comfort to this applicant since no provision is being made in his particular case.

The Relevant Statutory Scheme

22. The 2005 and 2011 Rules are made under power created in the 1981 Order. Art36(3) thereof provides that:

> "[The Department of Justice], after consultation with the Lord Chief Justice, the Attorney General and, where appropriate, the [relevant Rules Committee], and with the approval of [the Department of Finance and Personnel], may make rules generally for carrying [Part III of the 1981 Order] into effect and such rules shall in particular prescribe –
>
> …
>
> (d) the rates or scales of payment of any fees, costs or other expenses which are payable under [Part III]."

23. Art37 (as amended) now provides that:

> "The [Department of Justice] in exercising any power to make rules as to the amounts payable under this Part to counsel or a solicitor assigned to give legal aid, and any person by whom any amount so payable is determined in a particular case, shall have regard, among the matters which are relevant, to -
>
> (a) the time and skill which work of the description to which the rules relate requires;
>
> (b) the number and general level of competence of persons undertaking work of that description;
>
> (c) the cost to public funds of any provision made by the rules; and
>
> (d) the need to secure value for money,
>
> but nothing in this Article shall require him to have regard to any fees payable to solicitors and counsel otherwise than under this Part."

24. The 2011 Rules themselves set out a detailed graduated scheme of fees payable for certain work done in certain types of cases. The scheme of the system is to ensure, *inter alia,* that fees can be assessed expeditiously with minimum exercise of judgment or discretion, thus promoting certainty, transparency, accountability and speed of payment.

Discussion

25. The applicant submits that the approach of the respondent in the present case is jeopardising the criminal trial process and the right to a fair trial. In support of this proposition the applicant relied upon the case of R v P [2008] EW MISC 2 [EWCC] where the Court stayed the criminal proceedings because the defendant was unable to retain counsel because of a failure to provide adequate fees in criminal confiscation proceedings. The trial judge, relying upon the decision of the Ontario Court of Appeal in R v Rowbotham & Others [1988] 41 CCC (3b)1at p69 stated:

> "In our view a Trial Judge confronted with an exceptional case where Legal Aid has been refused and who is of the opinion that representation of the accused by Counsel is essential to a fair Trial may, upon being satisfied that the accused lacks the means to employ Counsel, stay the proceedings against the accused until the necessary funding of Counsel is provided."

26. The Trial Judge in R v P concluded as follows:

> "The overriding principle is, in my judgment, that for these serious matters, the Defendant must be able to have a fair trial and in this case I am confident that he cannot, unrepresented by counsel. I, therefore, stay these proceedings as an abuse of the process of the Court."[para 93]

27. It appears that the fixed payment regime contained in the 2011 Amendment Rules is inflexible in a manner which compares unfavourably with the original 2005 Rules which did have an exceptionality provision, albeit a very limited one. The lack of *any* provision in the amended rules to deal with exceptional or unusual cases also contrasts unfavourably with the corresponding provisions in England and Scotland [see Exhibit PMC2 entitled 'Note re Comparable Position of the Remuneration Payable to New Defence Team in Various Jurisdictions'].

28. Our fixed payment scheme, in the context of the sentencing hearing with which we are here concerned, appears wholly inflexible and incapable of accommodating the unusual and exceptional circumstances that have arisen and which prompted the presiding Judge to issue a fresh certificate assigning new

solicitor together with Senior and Junior Counsel in the interests of justice in this case.

29. This jurisdiction appears to compare unfavourably with our UK counterparts, not only in the absence of an exceptionality provision but in other respects. So, for example, in this jurisdiction no matter how much preparation Senior Counsel, Junior Counsel and solicitor must undertake on behalf of this applicant (should they accept instructions) they would not be remunerated for that preparation.

30. Access to justice is recognised as a fundamental right at common law and was recognised as a constitutional right by the House of Lords in Cullen v Chief Constable of the Royal Ulster Constabulary [2003] 1 WLR 1763 at para18. The 'legislation which removes that right is inimical to the rule of law' – see R(G) v Immigration Appeal Tribunal [2004] 1 WLR 2953 at para8. To vindicate this right to justice, access must also be given to legal advice, as was recognised by the House of Lords in R v Shayler [2003] 1 AC 247 at para73. Linked to all these rights is of course the right to a fair trial pursuant to Art6 of the ECHR. Art6 requires that the right to a fair trial be *effectively* protected. Art6(3)(c) provides that:

> "(3) Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

31. The trial judge in the present case has determined that the interests of justice do require the level of assistance he has determined in the legal aid certificate. It would be extraordinary indeed if the legal aid scheme which is designed to deliver the assistance assigned by the judge in fact operated to frustrate the direction of the judge in a criminal case.

32. The Northern Ireland Court of Appeal in Re John Finucane [2012] NICA 12 held that:

> **'A person entitled to legal aid must be able to make his *right to legal aid effective* [emphasis added] by having a new solicitor assigned to him.'**

This language chimes with Art6 which is designed to secure the effective protection of right to a fair trial. This principle of law also extends to counsel if a legal aid certificate includes counsel.

33. In "Law of the European Convention on Human Rights" by Harris, O'Boyle and Warbrick the learned authors, at p315 state:

> **"Art6(3)(c) provides that an accused, who does not defend himself in person is entitled to have legal assistance through his own lawyer or subject to certain conditions, by means of free legal assistance provided by the State. The State thus cannot require an accused to defend himself in person. 'Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially, if need be, is one of the fundamental features of a fair trial'."**

In support of that proposition the learned authors refer to Poitrimol v France 18 EHRR 130 para34 and at p319 they state:

> **"The funding of legal aid is an expensive item for states. In the context of legal aid in civil proceedings, it has been held that it must be provided in accordance with Art6(1) irrespective of the economic cost. [In this connection they refer to Airey 2 EHRR 305] The same approach must apply to criminal cases under Art6(3)(c), so that budgetary considerations should not prevent effective legal assistance for accused persons who otherwise qualify under Art6(3)(c)".**

34. The position has also been considered in a number of Scottish cases where a similar problem with the rules was identified. In a decision of the Privy Council, Buchanan v McLean [2001] SCCR 475 their Lordships considered the Scottish provisions as they applied at that time in the context of the accused's rights under Art6 ECHR. Lord Nicholls of Birkenhead agreed with Lord Hope:

> "1. …As Lord Hope has indicated, there are respects in which these solicitors, remunerated in accordance with the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, (SI 1999 No 491) will not receive reasonable remuneration for the work done by them in this case. This cannot be regarded as a satisfactory state of affairs. But this does not, of itself, afford a sufficient ground for supposing that, if the solicitors continue to act, they may fail properly to discharge their professional responsibilities towards their clients.
>
> 2. Different considerations would arise if the solicitors were to withdraw, and the appellants

were unable to find replacement solicitors because of the inflexibility of the 1999 fixed payment regulations. *But at present this is no more than a speculative possibility.* I will therefore say nothing further about the position which might then arise, especially as the Convention Rights (Compliance) (Scotland) Bill is currently before the Scottish Parliament."

[I interpose that in the present case the applicant is by contrast beyond mere speculative possibility having regard to the steps taken by his solicitor to try and "make his right to legal aid effective].

35. Lord Hope dealt with this at para45:

"45. ... I share the concerns which my noble and learned friends Lord Clyde and Lord Hobhouse have expressed about *the potential for injustice which is inherent in the fixed payment regime*. A scheme which provides for various items of work and the associated outlays to be paid for in stages, for each of which a prescribed amount will be paid as a fixed fee, will not *necessarily* be incompatible with the Convention right to a fair trial. *But the greater the inflexibility the greater is the risk that occasionally, especially in exceptional or unusual cases, the scheme will lead to injustice."*

36. Lord Clyde stated at para68:

"But I do not consider that it would be right to leave the case without making some observations on the present form of the regulations. While I have not been persuaded that they have caused, or on the present information are likely to cause, a contravention of Article 6 in the present case, it seems to me that there is a real likelihood that in another case a serious risk of a contravention may arise. *If the result of the regulations is that no legal representative is available for an accused in a case where the Convention requires that he should be represented, then a breach will occur.* This does not seem to me to be a fanciful possibility. We were informed that cases have occurred where as a result of the regulations no solicitor has been found to act for an accused person.

The case of *Glendinning* in Perth Sheriff Court (February 2001) was quoted to us as an example.
…

70. I see nothing wrong *in principle* in a scheme which proceeds upon a basis of fixed sums for specified work. Moreover, in so far as the approach adopted recognises that different cases will require different amounts of work, and that different cases will have different degrees of profitability, the policy of adopting a basis of a fixed sum may not *in itself* be unreasonable if in its general operation the solicitors engaged in the work covered by the regulations, taking as it were the rough with the smooth, will find the amounts acceptable. And it is right to recognise that the scheme is not altogether rigid. In a rough and ready way account is taken of the extra costs involved in a long trial, reflecting the extra work involved. Moreover the outlays covered by the fixed sums are only the "prescribed outlays" and that phrase may be open to construction so as to allow for outlays, but not fees, which fall outside the scope of the definition. In that connection it is to be remembered that in deciding whether or not the regulations comply with the Convention every effort of construction has to be made in order to avoid such a contravention. Section 3 of the Human Rights Act 1998 requires subordinate legislation to be construed in a way compatible with the Convention "[S]o far as it is possible to do so". That approach may go some way to avoid a contravention, but if it is found to be impossible to find a compliance by any technique of interpretation, the consequence may be an invalidity in the regulations.

71. It appears that the danger has been recognised by the Scottish Executive, in that some provision for a remedy has been incorporated in the current Convention Rights (Compliance) (Scotland) Bill. This allows for the making of regulations to prevent a person being deprived of the right to a fair trial. No draft regulations were shown to us and it remains unclear what solution is to be devised. *The most obvious, but perhaps not the only, risk may arise from the lack of flexibility in the present regulations. No allowance is made for any unusual or exceptional circumstances. The*

> *requirements of fairness in judicial proceedings are rarely, if ever, met by blanket measures of universal application. Universal policies which make no allowance for exceptional cases will not readily meet the standards required for fairness and justice."*

37. Lord Hobhouse stated at para79:

> "79. …*There is much to be said for schemes of legal aid which reduce the bureaucracy involved provided that they do not undermine the principle that the lawyer should receive fair remuneration for the work which he is required to do."*

38. At para80 he went on to say:

> "As has been pointed out, *the critical defect in the 1999 Regulations is their inflexibility*. A more sophisticated code for predefined fixed payments might avoid the pitfalls but the First Schedule to the 1999 Regulations is anything but sophisticated. If the 1999 Regulations are to be retained as the structure, *they need to be amended to incorporate an element of flexibility to give* the Legal Aid Board *the power to avoid breaches of Article 6* of the convention. This is apparently also the view of the Scottish Executive. It has introduced into the Scottish Parliament the Convention Rights (Compliance) (Scotland) Bill to amend certain enactments, including those relating to legal advice and assistance and legal aid, which are or may be incompatible with the convention and to enable further changes in the law where there is or may be incompatibility. Clause 8 of the Bill would amend the 1986 Act, with retrospective effect, so as to enable the fixed payment regime to be amended so as to avoid accused persons being "deprived of the right to a fair trial". This is a welcome development even though the proposed revised regulations have not yet been published even in draft."

39. In another Scottish decision, McGowan v Marshall [2012] SLT (Sh Ct) 109, the Sheriff considered Buchanan v McLean and stayed the criminal case as a result of a similar failure to provide for exceptionality in other criminal legal aid provisions.

> "[15] In my opinion, if the 1999 Regulations were thought to be inflexible giving rise to incompatibility with art.6, then so must be the ABWOR Regulations in which

> there is also no provision for the exceptional case. There is support for this view in HM Advocate v K [2011] HCJAC 61; 2011 S.L.T. 931 (sub nom HM Advocate v CK) 2011 S.C.C.R. 381, to which I was referred by the procurator fiscal depute, where it is stated in 2011 S.L.T., p.935; 2011 S.C.C.R., p.387, para.12 that: "It is wholly reasonable, in our judgment, to have a system of fixed block fees covering certain areas of work, *provided exceptions can be made therefrom so that additions may be made to the fee where the complexity of the case is made out and justifies this.*
> …
>
> [27] In conclusion, *ABWOR does not permit remuneration of the solicitor for the exceptional case. This leads to an incompatibility of ABWOR with the accused's Convention right to a fair trial. He cannot receive a fair trial because there will be no one to represent him* to ensure that his case ….. is properly and adequately advanced before the court. The Lord Advocate cannot in these circumstances continue the prosecution against the accused in breach of his Convention rights. Accordingly, the complaint falls to be dismissed."

40. In the present case the applicant's solicitor has tried to engage Senior and Junior Counsel to no avail. She has contacted the Bar Council who has confirmed that no Counsel would act in the circumstances and the Pro Bono Unit has stated that it would not be able to assist the applicant as the Unit does not act in criminal cases and that it could never contemplate any responsibility in the conduct of criminal trials. The full text of their response is set out at para 17 above.

41. The respondent was, it seems to me, clutching at straws in suggesting as it did at para9 of Mr Cullen's affidavit that reliance could be placed on Art36(2) of the 1981 Order and suggesting as a potential option that the Crown Court Judge might request the Attorney General to appoint an *Amicus Curiae*.

42. I was struck by the fact that during the hearing the respondent indicated that if the proceedings were determined against it, it wanted a separate hearing or the opportunity for a separate hearing on the question of remedy. The possibility was being held out that some ad hoc mechanism might be found, outside the Rules, to make the necessary provision if required as a result of the judgment of this Court.

43. If such a possibility exists it begs the question as to why it has not been utilised before now. I have no doubt that the costs of bringing this judicial review (with the benefit of legal aid) and of defending it, also out of public funds, will have involved the expenditure of significant monies. These costs are likely to dwarf what

the eventual fees that may be paid to the solicitors and Counsel, if any, who are eventually engaged for the difficult and complex task of representing the applicant at his sentencing hearing

44. A person entitled to legal aid must be able to make his right to legal aid effective. In the present case the applicant has been unable to obtain the services of Junior or Senior Counsel who have declined the work on a professional basis citing the size, complexity and gravity of the task involved and the meagre fee available as the reason for not being able to undertake the work. The Bar Council, for example, referred to the fact that Counsel (and indeed solicitor) – apart from fixed fees for some consultations and skeleton arguments if directed (which they haven't been) – will be paid *no* fee for any preparatory work no matter how substantial.

45. But the nature of the preparatory work involved in this case, in the circumstances which have arisen, is likely to be substantial. I have already referred above to the solicitor's averment that there is a large amount of work involved for Counsel to read themselves into this case, not having been previously involved, to ensure that all relevant facts are ascertained. This would include full consideration of a significant body of documentation, consideration of five days of transcript of evidence and submissions, detailed consultations which would be required from both Counsel requiring reasonable preparation. This is work which would be additional to that specifically required for when the sentencing hearing begins. The Court has been told that a psychiatric evaluation and report on the applicant has been obtained and that the adduction of evidence from the evaluating psychiatrist will be required at the hearing. In view of the contents of the pre-sentence report the Court has also been informed that the probation officer may be required for cross-examination. In addition to all of this, the applicant's solicitor has averred that legal research and argument will need to be undertaken to ensure that the applicant's legal representatives can properly direct the Court as to the relevant law on the highly aggravating features of this case, on the dangerous offender provisions and the emerging law regarding indeterminate sentences.

46. It is not in the public interest that the legal aid scheme, as presently formulated or operated, should lead to the rejection of instruction in this case by competent and experienced Counsel supported by the Bar Council itself. Part of the reason for this is because Northern Ireland does not allow payment for preparatory work in these circumstances and, as already observed, has, in any event, no exceptionality provision.

47. It is clear to me that the inflexibility of the impugned aspect of the scheme is preventing the applicant from being able to make his right to legal aid effective. This is a consequence of a blanket measure which makes no allowance for the exceptional and unusual circumstances which have arisen. Whilst there is much to be said for a fixed payment scheme such a scheme must not undermine the principle that lawyers should receive fair remuneration for the work they are required to do. The critical defect here is the inflexibility of the Regulations and the inability of the scheme to

enable adjustments to be made even in exceptional and unusual cases where the failure to do so would lead to injustice.

Conclusion

48. Accordingly, in my view, in order to avoid illegality there must be a modest adjustment to the impugned scheme or some other provision to enable the necessary adjustment to meet the exceptional and unusual circumstances which have arisen and to avoid the injustice which will thereby inevitably result if this is not done.

49. It is not a legitimate argument to deny this safeguard because the decision maker may then be confronted with undeserving applications when its absence will, as here, give rise to a real likelihood of unfairness and Art6 breach.

50. At the end of the day every administrative scheme or system must be evaluated by its ability to deliver the policy and secure the rights which it is designed to deliver. Today the purpose of having a legal aid scheme remains much the same as it was when the scheme was first introduced many years ago. The purpose was described as follows by Dr E.J. Cohn – in 1943 – a time of even greater economic turmoil and austerity than the present day:

> "Legal aid is a service which the modern state owes to its citizens as a matter of principal. It is part of the protection of the citizen's individuality which, in our modern conception of the relationship between the citizen and the State, can be claimed by those citizens who are too weak to protect themselves. Just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression, etc., so it should protect them when legal difficulties arise. Indeed, the case for such protection is stronger than the case for any other form of protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law. That law again is made for the protection of all citizens, poor and rich alike. It is therefore the duty of the State to make its machinery work alike, for the rich and the poor. "Legal Aid for the Poor: A Study in Comparative Law and Reform" (1943) 59 LQR 250, 253 n.8

51. Today of course this policy objective has been further augmented by specific and enforceable legal rights vested in citizens by virtue of, for example, the European Convention and the Human Rights Act. It is imperative that these policies and rights are not eroded or negated by inflexibility in the very administrative mechanism that is designed to deliver them to the citizens of the state.

52. For the reasons summarised above the judicial review is allowed and I will hear the parties as to the appropriate remedy in light of the Court's judgment.