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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered*:	**09/12/2022**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REX

v

PATRICIA WILSON

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Before: Sir Declan Morgan, Treacy LJ Maguire J

_____

Mr O'Donoghue KC with Mr McKenna BL (instructed by Ó Muirigh Solicitors) for the Applicant
Mr Simpson KC with Mr Steer BL (instructed by PPS) for the Prosecution

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TREACY LJ

Introduction

[1] On 15 February 1978 the applicant was convicted after a trial of the offences set out at para [1] of the majority judgment. Her statements, taken in Castlereagh Holding Centre ("Castlereagh") in June 1977, formed the sole platform of the prosecution case against her and the basis of her conviction.

[2] Prior to the interview at which she made her statements she made complaints of ill-treatment to a doctor. She pleaded not guilty but did not raise ill-treatment allegations during her very short trial. She was convicted by a judge sitting alone and without a jury. The judge said he considered sentencing her to life imprisonment but had decided to treat her "leniently." He imposed a sentence of 10 years' imprisonment.

[3] Much later her case was the subject of an application to the Criminal Cases Review Commission ("the CCRC") who investigated the circumstances of her conviction, including her alleged ill-treatment in Castlereagh.

[4] The CCRC investigation uncovered material documentation that was never disclosed to the defence or the court at the time of her trial. It also discovered new facts relating to the conduct of some of the RUC officers responsible for her questioning.

[5] The CCRC believed that the Court of Appeal would regard the new evidence as both affording a ground of appeal and being capable of belief for the purposes of section 25 of the Criminal Appeal (NI) Act 1980.

[6] It did not refer the case to the Court of Appeal however, because it said the fresh evidence related to an issue not raised at trial, and it considered that the Court of Appeal was unlikely to find a reasonable explanation for the failure to raise it.

[7] This is a case, therefore, in which there has been no previous appeal and new evidence has been identified by the CCRC which, in its view, is capable of belief. The applicant now seeks leave to put the new evidence before the court and seeks an extension of time to appeal her convictions.

The issues to be addressed

[8] As already noted, the sole basis of her convictions were the impugned confessions obtained in Castlereagh. There was no evidence to support or corroborate these confessions.

[9] The issues raised in this case include:

- the circumstances surrounding the questioning and detention of this 17 year old juvenile in Castlereagh prior to the making of the impugned confessions;

- the failure of the prosecution to disclose to the defence at trial the documentation uncovered by the CCRC;

- the effect of new evidence relating to the conduct of some of the RUC officers responsible for her questioning;

- the failure to disclose to the defence any information or documents regarding an assault in Castlereagh on another detainee (Patrick Fullerton), also in 1977. Some of the officers implicated in that assault also interviewed the applicant;

- whether, by reason of the accumulation of these features, the applicant was denied a fair trial in breach of the common law and/or article 6 of the ECHR;

- whether there is a good reason why matters of concern now were not raised at the original trial or by earlier exercise of the applicant's appeal rights;

- whether, in light of all the circumstances now known, the court is required or permitted to address the issue of the safety of the applicant's convictions;

- whether the convictions are unsafe.

Arrest, Detention and Questioning

[10] The applicant was arrested at her family home at 06:40hrs on 23 June 1977 under section 10 of the Northern Ireland (Emergency Provisions) Act 1973 ("the EPA") and taken to Castlereagh for questioning.

[11] Prior to her interviews she was seen by a Dr Alexander and made no complaint.

[12] The applicant was 17 when she was arrested and brought to Castlereagh. She had never come to police attention before and had a clear record. The circumstances of her detention included the following:

(i) She did not have any access to a lawyer prior to being interviewed or at any stage during her detention in Castlereagh;

(ii) Although a juvenile, she did not have the support of an appropriate adult at any stage before or during her detention;

(iii) She was held incommunicado throughout her detention prior to making admissions;

(iv) Prior to the impugned statements she was interviewed repeatedly by rotating teams of detectives, sometimes for extended periods of time. The interviews continued until she made admissions.

(v) She complained to the doctor about being physically assaulted, verbally abused and intimidated in the two interviews immediately before the interview at which she commenced making the impugned confessions.

(vi) Dr Henderson made a record of her complaint on her notes and sent a complaint form to RUC Headquarters for investigation. There are no documents to indicate whether it was investigated and, if so, with what result.

(vii) During the interview at which she made admissions she was repeatedly called a liar, told that the police knew she had done it, and became visibly very upset.

(viii) She was only allowed to see her parents after she had made the statements.

(ix) She was only allowed access to her lawyer after she was charged.

[13] The sequence of interviews was as follows:

Day 1 of Questioning – 23 June 1977:

(a) Her *first* interview commenced at 14:00hrs. She was interviewed for 1hr 35mins by DCs Freeborn and Nesbitt. This interview concluded at 15:35hrs.

(b) The *second* interview commenced at 16:.15hrs. She was interviewed for a further hour by DCs Freeborn and Nesbitt. This interview concluded at 17:15hrs.

(c) Her *third* interview commenced at 19:25hrs. She was interviewed by DS Brown and WDC Lowry for 3hrs 5mins. Three other officers recorded as being present (the names are not all legible but they include DC Bohill). This interview concluded at 22:30hrs.

She made no statements of admission during any of these interviews

Day 2 of Questioning – 24 June 1977:

(d) Her *fourth* interview commenced at 10:05hrs. She was interviewed by WDC Lowry and DC Bohill for 2hrs 10mins. This interview concluded at 12:15hrs.

(e) Her *fifth* interview commenced at 13:00hrs. She was interviewed for 35 minutes by WDCs Houston and Kennedy. This interview concluded at 13:35hrs.

(f) Her *sixth* interview commenced at 15:45hrs. She was interviewed by DCs Nesbitt and Freeborn for 1hr 30mins. This interview concluded at 17:15hrs.

(g) At 18:50hrs she was examined by either Dr O'Rawe or Dr Henderson (both are recorded as being present at this examination). She is recorded as complaining of being physically assaulted, verbally abused and intimidated during the previous two interviews.

(h) At 19:30hrs Dr Henderson submitted a record of the applicant's complaint and sent a complaint form to RUC Headquarters. The form was sent on 25 June 1977.

Statement Interviews

(i) Her *seventh* interview commenced at 19:45hrs. It was the fourth interview in a long day of interviews that had started at 10:05hrs that morning. She was interviewed by DS McCoubrey and DC Clements. This interview lasted for 3hrs. WDC Lowry is also recorded as being present from 20:30hrs. During this interview she initially denied any involvement in the Christies bombing. Later she made statements of admission to it. DS McCoubrey is recorded as writing out her statement concluding at 21:15hrs. WDC Lowry is recorded as writing out another statement relating to the Turks bombing at 21:45hrs and concluding at 22:30hrs. She signed both statements.

Day 3 of Questioning – 25 June 1977

(j) The record of interviews indicates that the applicant was next interviewed on 25 June 1977 from "11pm to 12.45pm". As the CCRC pointed out this must be an error of date or timing. Either the interview took place on 24 June at the recorded time or on 25 June from 11.00am to 12.45pm. The interview lasted 1hr 45mins and is recorded as being with WDC Lowry alone.

(k) At 19:45hrs she was seen by her parents for the first time since her arrest. She saw them for 15 minutes.

(l) At 20:00hrs she was taken to the "medical room" to be examined by Dr Henderson. She is recorded as refusing to be examined.

(m) At 20:30hrs she was transferred to Townhall St Police Station.

(n) At 20:40hrs she was charged with the Turks bombing.

Day 4 – 26 June 1977

(o) On 26 June 1977 at 11:05hrs she was seen by her solicitor, P J McGrory, for the first time since her arrest.

(p) On the same day she was visited again by her parents at 17:45hrs.

(q) On 27 June at 10:35hrs she left custody to attend court.

[14] As appears from the above summary, the applicant had been held in Castlereagh for three days unaccompanied and unrepresented. She did not see her parents until after she had signed her confessions. She did not see her solicitor until after her transfer to another police station and after she had been charged.

[15] For ease of reference I have set out in tabular form the sequence of interviews with a note of those recorded as the interviewing officers. This is attached as an appendix to this judgment.

Medical Examination

[16] After interview 6 on 24 June she was seen by a doctor. It was noted that she made no complaints about interview 4 which was her first interview on that date. However, the doctor's note in relation to interview 5 on the 24 June states:

> "Made stand up and then pushed twice against the wall by a policewoman. This policewoman also slapped her across the shoulders with her open hand. No further assault. Allowed to sit later during the interview."

And in relation to Interview 6 on 24 June he states:

> "... questioned by 2 policemen. One pushed her about the room while the other shouted at her. Felt frightened. Did not cry. Not threatened. Called names e.g. 'bitch, tramp.' Allowed to sit down later."

By the time of the medical examination, she is recorded as:

> "Not agitated. Not sweating. Does not want treatment. Feels perfectly well."

[17] There is the note of a complaint (Form 17/2) made to Castlereagh at 19:30hrs on 24 June 1977 by Dr Henderson. It reads "verbal threats and pushed about." The custody summary shows that the complaint Form 17/2 was passed to RUC Headquarters on 25 June 1977. There is no evidence this complaint was investigated as it should have been.

[18] As appears from the above, the applicant made her complaints to the doctor *before* the interview at which she made the statements. She made no complaints about the interviews on the first day of her detention and no complaint about interview 4. The nature of her complaints were serious. Her complaints related to her alleged ill treatment at the two interviews immediately preceding the interview at which she

made admissions. As shall become apparent her account of ill treatment chimes with other materials regarding ill-treatment at Castlereagh at this time.

Records of the Statement Interview (Interview 7)

[19] The custody record indicates that interview 7 on 24 June began 30 minutes after her medical examination. The interview started at 19:45hrs and lasted for three hours. This is the interview in which the confession statements were taken.

[20] The RUC written record of the statement interview states that DS McCoubrey:

> "… told her that we have very good reasons to believe that she could help us with our enquiries. She again said that she didn't know anything about it. I told her that I knew that she was telling lies and I advised her to tell me the truth. She began to cry and said that she didn't know anything about it. I again told her that I knew she was telling lies and again advised her to tell the truth. She was at this stage crying continuously and she said "Look Mister, I was going to tell *you* last night but I am afraid." [NB – DS McCoubrey is not listed as one of the officers who interviewed her the previous evening.]

Later in the interview he states:

> "[she] lapsed into a fit of crying and continued to cry for about 6 or 8 minutes. … When [she] stopped crying I recorded a statement at her dictation in the presence of the Woman Constable."

[21] Despite her obvious distress the interview was not paused. Had a lawyer or an appropriate adult been present it is clear they would or should have intervened. There was no audio or video recording of what was happening, nor was a lawyer, a parent or any appropriate adult allowed access to her at any time prior to her making the impugned confessions.

[22] From the documentary evidence it is clear that the applicant did not make her first statement until she had been in custody at Castlereagh for over 36 hours. Her statement interview followed 6 interviews by rotating teams of RUC officers over a period of 10 hrs 20 mins within that 36 hour detention time.

[23] There is clear evidence in the written records that this young girl became very upset during the statement interview. She denied involvement but was told she was

lying on several occasions and then the questioning continued until she made admissions. The possibility that she changed her position simply to bring the questioning to an end cannot be discounted.

[24] The CCRC observed that "there can be no doubt" that the applicant was subjected to a sequence of interviews that, by their number and length, could be described as 'oppressive' for an unaccompanied and unrepresented young woman, aged 17, "even by the standards of the time." I have no reason to doubt that assessment by a body which has particular expertise in examining miscarriage of justice cases.

[25] Apart from her contacts with the doctor, this juvenile was kept incommunicado during the breaks between bouts of questioning conducted by experienced police officers operating in relays. Officers, some of whom, we now know are linked to serious allegations of ill treatment against other detainees. The applicant was kept in virtual solitary confinement throughout this period. She was denied access to a lawyer throughout her detention and only permitted access to a lawyer after she had made admissions. She did not have the support of an appropriate adult. She was only allowed to see her parents after she made her admissions. She complained to a doctor about ill-treatment during the two interviews which immediately preceded the interview at which she made admissions. No steps were taken on foot of her complaints of ill treatment. On the contrary the interviews resumed a short time after she had seen the doctor.

Culture and Conditions in Castlereagh Holding Centre

(a) Culture

[26] In 1979 the Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland Cmnd.7497 was issued ("the Bennett Report"). The immediate occasion for the appointment of this Inquiry had been the publication of a report by Amnesty International which recommended the establishment of a public inquiry into allegations of mistreatment of those undergoing interrogation in Castlereagh specifically. The government did not accept that recommendation but did establish the Bennett Inquiry to investigate, in private, police practices relating to interrogation and the procedure for dealing with complaints of mistreatment.

[27] Appendix 2 of the Report notes an escalating number of complaints against the RUC from 1975–1978:

	1975	1976	1977	1978
Total number of complaints recorded against members of the RUC	1366	1834	2007	2331
Total number of complaints recorded alleging assault during interview	180	384	671	327
Total number of complaints recorded alleging irregularity of procedure concerning persons in custody, other than assault	Not available	109	39	239
Complaints recorded involving persons arrested under emergency legislation and alleging assault during interview	"	220	443	266
Complaints recorded involving persons arrested under emergency legislation and alleging irregularity of procedure concerning persons in custody, other than assault	"	127	224	145

[28] The number of complaints alleging assault almost doubled to 671 in 1977 – the year of the applicant's detention in Castlereagh.

[29] Strikingly, the Report noted that:

> "… at least since 1974 no disciplinary proceedings had been brought in respect of the interrogation of persons in custody" (para 338).

This may suggest a culture of (at least) tolerating potentially illegal conduct by interrogating officers may have developed inside Castlereagh during these years.

(b) Conditions

[30] A Report from the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment (CPT) dated July 1993 examined the conditions under which those arrested, detained and questioned by the police under

the emergency legislation were held in Castlereagh. The CPT was strongly critical of those conditions. On the basis of their findings the CPT expressed the following conclusion in para 109 of its report:

> "109. Even in the absence of overt acts of ill-treatment, there is no doubt that a stay in a holding centre may be—and is perhaps designed to be—a most disagreeable experience. The material conditions of detention are poor (especially at Castlereagh) and important qualifications are, or at least can be, placed upon certain fundamental rights of persons detained by the police (in particular, the possibilities for contact with the outside world are severely limited throughout the whole period of detention and various restrictions can be placed on the right of access to a lawyer). To this must be added the intensive and potentially prolonged character of the interrogation process. The cumulative effect of these factors is to place persons detained at the holding centres under a considerable degree of psychological pressure. The CPT must state, in this connection, that to impose upon a detainee such a degree of pressure as to break his will would amount, in its opinion, to inhuman treatment."

[31] In *Magee v UK* [2000] 8 BHRC 646 at 657-658 the ECHR specifically examined the conditions of detention of the adult applicant and stated as follows:

> "40. The Court considers that the central issue raised by the applicant's case is his complaint that he had been prevailed upon in a coercive environment to incriminate himself without the benefit of legal advice. It will examine the complaint in that context.
>
> 42. …..
>
> 43. The Court observes that prior to his confession the applicant had been interviewed on five occasions for extended periods punctuated by breaks. He was examined by a doctor on two occasions including immediately before the critical interview at which he began to confess. Apart from his contacts with the doctor, the applicant was kept incommunicado during the breaks between bouts of questioning conducted by experienced police officers operating in relays. It sees no reason to doubt the truth of

> the applicant's submission that he was kept in virtual solitary confinement throughout this period. The Court has examined the findings and recommendations of the [European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment] CPT in respect of the Castlereagh Holding Centre (see para 30, above). It notes that the criticism which the CPT levelled against the Centre has been reflected in other public documents (see para 35, above). *The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent. Having regard to these considerations, the court is of the opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confide in his interrogators …*" [Emphasis added]

[32] I set out the above because this is the context in which the lack of legal safeguards for this juvenile must be viewed.

Legal Standards of the Time – Did the applicant have a right of access to a lawyer in 1977?

[33] The Fisher Report (dated 13 December 1977) inquired into the miscarriage of justice of three persons convicted in England on charges arising out of the death of Maxwell Confait. As a result of confessions they were said to have made two youths then aged 15 (Leighton) and 18 (Lattimore) were charged with murder and a boy aged 14 was charged with arson. In 1972 after an 18 day trial before Chapman J, Leighton was convicted of murder and Lattimore was convicted of manslaughter on the grounds of diminished responsibility and all three were also convicted of arson. In each case the central platform of their prosecution and conviction was admissions they made without the benefit of legal advice. In June 1975 their cases were referred to the Court of Appeal by the Home Office. In October 1975, following the referral, the convictions were quashed. At paragraph 2.19 the Fisher Report refers to the decision of the US Supreme Court in *Miranda v Arizona* 384 US 436 (966) establishing that the constitutional right to the assistance of counsel extended to police interrogation. Unless those rights were waived, evidence of a confession obtained in breach of them would be inadmissible.

[34] As to the position in England and Wales the report stated at para 2.20 that:

> "it is a principle of law that "every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. *This is so even if he is in custody* provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so." If, in breach of this principle, a person who asked to communicate and consult with a solicitor is not allowed to do so, then evidence of a confession may be excluded by the judge at the trial: *R v Allen* [1977] Crim LR 163. The right to consult a solicitor is so important and fundamental a right that I should expect such discretionary exclusion to follow almost automatically in the event of a breach. If there is any doubt whether it will, I should favour a change in the law making exclusion an automatic consequence of a breach of the principle." [Emphasis added]

[35] Therefore, in 1977 there existed in the UK a common law right for detainees in police custody to consult a solicitor. This right is recognised as an "important and fundamental" right and it chimes with fundamental rights recognised in other jurisdictions - eg in the United States (see the *Miranda* case above), and in Europe where the right to legal assistance is an aspect of article 6 ECHR.

[36] So in the UK the fundamental right of access to a solicitor was guaranteed in two ways, first as a native common law right and secondly as an aspect of article 6 of the ECHR.

Did the Emergency Provisions (Northern Ireland) Act 1973 [EPA] remove the right of access to a lawyer in Northern Ireland?

[37] The EPA was introduced in 1973 on foot of the Diplock Report. As noted above, the common law right of detainees to have access to a solicitor was already in force across the UK at this time. There is no doubt that when writing his report Lord Diplock understood the context provided by the common law and the ECHR. Paragraph 12 of his report recognised that article 6 of the European Convention on Human Rights required certain *minimum* requirements for a criminal trial in normal times. He stated:

> "… if decisions as to guilt are to be made by tribunals, however independent or impartial, which are compelled by the emergency to use procedures which do not comply with these minimum requirements, we do not think a tribunal which fulfils this function should be regarded or described as

> an ordinary court of law or as forming part of the regular judicial system …."

And at para 89 he said that:

> "… the reputation of the courts of justice would be sullied if they countenanced convictions obtained by methods which flout universally accepted standards of behaviour."

[38] The objectives of the Diplock Report and the intention of parliament in legislating on foot of his Report included ensuring that the adjustments made to the procedures used in Northern Irish courts to deal with the 'Troubles' should not breach internationally recognised minimum standards of fairness. It was not to obtain convictions in breach of those standards.

[39] The provision of the EPA which dealt with the admissibility of statements from detainees in Diplock courts is section 6.

Section 6 of the EPA

[40] As noted earlier, the intention of parliament in enacting the Diplock recommendations was not to obtain convictions that failed to comply with the universally accepted minimum standards of article 6.

[41] As a result of statutory changes introduced following the Diplock Report section 6(1) of the EPA provided that in criminal proceedings for a scheduled offence a statement made by the accused "may" be given in evidence so far as it is relevant to any matter in issue and is not excluded by the court pursuant to section 6(2). The latter provision provided (using a formulation taken from article 3 of the ECHR) that if prima facie evidence is adduced "that the accused was subjected to torture or inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies them that the statement was not so obtained, exclude the statement ….". The caselaw establishes that once prima facie evidence is adduced the prosecution must satisfy the court beyond reasonable doubt that the statement was not so obtained.

[42] In *R v Corey* [1973] NIJB Lowry LCJ accepted that there was also a discretionary power to exclude a statement apart from the requirement to do so in section 6(2) of the 1973 Act. He agreed with the general proposition that there is always a discretion, unless expressly removed, to exclude any admissible evidence on the ground that (by reason of any given circumstance) its prejudicial effect outweighs its probative value and that to admit the evidence would not be in the interests of justice. He stated that section 6 had materially altered the law as to admissibility and that section 6(2) in

conjunction with 6(1) rendered admissible much that had previously been excluded and he said that "there is no need now to satisfy the judge that a statement is voluntary in the sometimes *technical* sense which that word has acquired in relation to criminal trials."

[43] In *R v O'Halloran* [1979] NI Lowry LCJ stated that it was difficult to envisage "any form" of physical violence in the interrogation of a suspect which, if it occurred, could at the same time leave a court satisfied beyond a reasonable doubt in relation to the issue for decision under section 6." Further, he considered that the "mere" absence of voluntariness at common law is not "by itself" a reason for discretionary exclusion of a statement and said "the absence of voluntariness in the European Convention sense is prima facie relevant to degrading treatment and therefore … not primarily concerned with the exercise of discretion."

[44] In *R v Watson* [1995] Carswell LJ gave guidance on the approach to the exercise of the discretion to exclude an admission. The discretion, to be exercised judicially, was he said "a broad one." The court declined to define its bounds as this would be "to fetter the discretion." He quoted approvingly Lord Lowry in *R v Mullan* [1988] 10 NIJB 36, 41 that "the exercise of the discretion is intended to discourage 'bad or doubtful conduct or trickery or dishonesty in conducting an interview or investigation' acknowledging that these were important areas in which the discretion may operate. Importantly, Carswell LJ said that it is for the trial judge in any case in which the discretion is invoked to consider the evidence and on the basis of his findings of fact to decide whether the admission of the statement "would involve unfairness to the accused or whether it is otherwise appropriate to rule it out in the interests of justice."

[45] The EPA is silent about the rights of detainees in custody. Nowhere in this Act is there any abrogation of the fundamental common law right of access to a lawyer or interference with the minimum rights and protections internationally recognised as being necessary to safeguard the interests of detainees.

[46] As noted in the Fisher Report, the common law position was encapsulated in the Judges' Rules. The 1964 edition of these Rules expressly states that they did not affect the principle(s) …:

> "… (c) that every person *at any stage of an investigation* should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation by the administration of justice by his doing so." [Emphasis added]

[47] In Northern Ireland the 1964 edition of the Judges' Rules came into force on 8 October 1976, three years after the EPA, and 8 months before this applicant was detained in Castlereagh. There is no doubt that she was entitled to the protections afforded by those rules while she was detained. This fact was reinforced by the RUC Code that was in place at the time. As Bennett noted at para 85, the RUC Code provided that:

> "where it is anticipated that statements resulting from interviews with a prisoner will be used in evidence in subsequent criminal proceedings care must be taken to ensure that such statements are taken in compliance with legal requirements and the Judges' Rules."

To similar effect, see para 101 which states:

> "It is prescribed in the Code that, where it is anticipated that statements resulting from interviews will be used in evidence in subsequent criminal proceedings, such statements must be taken in accordance with legal requirements and Judges' Rules. …"

[48] The common law throughout this time conferred a right of access to a lawyer on persons detained in police custody. That right was never removed by statute. It was recognised in the Judges' Rules and in the RUC's own Code. The Code stipulated that where it was anticipated that statements resulting from interviews would be used in evidence, officers '*must take care*' to ensure that the statements were taken 'in compliance with legal requirements and Judges' Rules.'

[49] No such care was taken in the present case. This applicant, then just 17 years old, only saw her solicitor four days after her arrest, after she had been processed through the Castlereagh interrogation system, and after confession statements were secured from her. The entire process was conducted in breach of the Judges' Rules and in breach of the common law right of access to a lawyer encoded in those Rules and in the RUC's own Code.

[50] The Bennett Report examined police procedures and practice in Northern Ireland relating to the interrogation of persons suspected of scheduled offences and specifically addressed the question of access to solicitors by such suspects. At para 123 it states:

> "In practice, solicitors are not admitted to see terrorist suspects before they are charged. We have been left in no doubt about this by the evidence which we have received

> from solicitors, former prisoners, other members of the public and the RUC themselves …"

[51] The RUC reason for the refusal of access was stated to be:

> "... that, since the only advice a solicitor could give to a client was not to admit anything, access to a solicitor could only frustrate the obtaining of a confession in cases in which the prisoner would have been willing sooner or later to make one." [see Bennett para 272]

[52] I note that Lawton LJ in *R v Lemsatef* [1977] 2 AC 835 at page 840 said:

> "this court wishes to stress that it is not a good reason for refusing to allow a suspect, under arrest and detention, to see his solicitor, that he has not yet made any oral or written admission." [see *Bennett* at para 271]

[53] The fundamental right of access to consult a solicitor pre-dated and did not depend upon a statutory footing. The RUC policy of wholesale denial of access to suspects detained in interrogation Centres such as Castlereagh did not result from a change in the common law, the Judges' Rules, the RUC Code or from the introduction of a statutory restriction on that right. On the contrary, it resulted from the unpublished and unacknowledged adoption by the RUC of a fixed and unlawful policy in relation to access. The RUC unilaterally forbade the exercise of the right, not parliament. This was so even if special circumstances existed such as the suspect being a minor or otherwise vulnerable.

[54] In the applicant's case her fundamental right of access to a solicitor was forbidden by the police. It was denied by a deliberate and wholly unlawful fixed policy, to exclude all lawyers as a matter of routine irrespective of the individual personal circumstances of a particular detainee and in violation of the common law. That this was done in the case of a 17 year old girl held in the oppressive conditions of Castlereagh, being questioned about offences which carried the possibility of life imprisonment, makes the breach even more egregious. It is indeed telling that she only got access to her lawyer (and her parents) *after* she had made her admissions.

Were there other safeguards the applicant could have had?

[55] In 1977 there was no right in place for a detainee to have a solicitor present during interview but, as a matter of law, the police had a discretion to permit that safeguard if it was necessary in the interests of justice. However, the RUC adopted an

unlawful and fixed policy forbidding the presence of solicitors during interviews irrespective of special circumstances such as the detainee being young and immature.

[56] In *Russell & Ors* [1996] NI 310 the Divisional Court (Hutton LCJ, Campbell and Kerr JJ) were considering two questions (i) whether suspects arrested under emergency legislation were entitled to have their solicitor present during interview and (ii) whether the approach of the police to a request for a solicitor to be present at the arrest of terrorist suspects was governed by a fixed policy of refusal. Hutton LCJ said at p 359:

> "Having regard to the experiences of the solicitors for the applicants deposed to in the affidavits sworn by them, I consider that prior to January 1996 the approach of the police to a request for a solicitor to be present at the interviews of terrorist suspects could fairly be described as a fixed policy to refuse such requests."

[57] He stated at p 358:

> "I consider that a decision by the Chief Constable to permit the presence of a solicitor would only be made where there were some special circumstances relating to a suspect which would provide a valid reason for an exception to the general course intended by Parliament – *for example, where the suspect was young and immature."* [Emphasis added]

[58] Campbell J at p 363 said:

> "Every case should be considered where either the solicitor makes a request to be present *or the officer in charge of the investigation has reason to believe that there may be some reason, particular to the case, why he ought to allow a person being questioned to have his solicitor present."* [Emphasis added]

[59] In the *Russell* case, there were no such circumstances, but the applicant in the present case was a living example of the type of case where the RUC should have considered allowing her to have a solicitor present. As Campbell J, makes clear, the duty to consider the need for this safeguard rested with the officer in charge of the investigation. It was their duty to consider it in every case, whether a request for a solicitor to be present was made or not. Factors which might trigger the grant of the safeguard included any form of vulnerability in the detainee for example that the suspect was 'young and immature'- just like the applicant in the present case.

[60] In *Russell*, Kerr J at p 365 said:

> "I agree with Hutton LCJ that before January 1996 the approach of the police to a request for a solicitor to be present at the arrest of terrorist suspects appears to have been governed by a fixed policy of refusal. I consider that the application of an inflexible policy of refusing access cannot be upheld. Parliament has not extended to terrorist suspects the right to have solicitors present at interviews; it has not pronounced, however, that such access is forbidden. In my opinion, each application for access to a solicitor during interview should be considered individually."

[61] In *Russell* the eight applicants were all adults who had been allowed to consult privately with their solicitor before being interviewed but were refused the right to have their solicitors present during interview.

[62] In the present case the applicant was a juvenile girl aged 17 at the time of her interrogation. She had never been arrested before and therefore had never experienced a custodial setting let alone Castlereagh. She received no access to a solicitor even prior to being interviewed. It is clear, having regard to the unlawful fixed policy of the police at the time, that no consideration was given to her special circumstances not even when visibly distressed and crying continuously. By the standards of today this juvenile was denied all the important safeguards later thought necessary to avoid a miscarriage of justice. It is virtually inconceivable that a conviction based solely on the confession of a juvenile obtained without these important safeguards would or could be regarded as safe.

An Appropriate Adult

[63] Since she had attained the age of 17 she was not expressly governed by the applicable policy which only applied to those under 17. However, no consideration whatsoever was given to whether, in her special circumstances, the interests of justice required her to have access to an appropriate adult. Not even when she was visibly upset and crying, which occurred at the interview following her complaint of ill-treatment and prior to making the statements.

[64] It is noteworthy that even detainees under 17 who had an entitlement under the rules to the presence of an appropriate adult were denied their entitlement without legal consequence [see, for example, the extraordinary case of *R v McCaul* whose conviction was upheld by the Court of Appeal at [1980] 9 NIJB and considered again by Morgan LCJ in *R v Brown & Ors* [2013] NI 116 where this minor's unsafe conviction was eventually declared so following the referral by the CCRC].

[65] *McCaul* also serves as an example of the difficulty at the time, even in an apparently strong defence case, of successfully challenging a confession.

[66] Counsel for the applicant referred the court to Code C - Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers issued under the Police and Criminal Evidence (NI) Order 1989:

> "11.15 A juvenile or person who is mentally disordered or otherwise mentally vulnerable or has significant communication difficulties must not be interviewed regarding their involvement or suspected involvement in a criminal offence or offences, or asked to provide or sign a written statement under caution or record of interview, in the absence of the appropriate adult or Registered Intermediary unless paragraphs 11.1 or 11.18 to 11.20 apply. See Note 11C."

[67] The Notes for Guidance, at para 11C provide:

> "Although juveniles or people who are mentally disordered or otherwise mentally vulnerable are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to provide information that may be unreliable, misleading or self-incriminating. Special care should always be taken when questioning such a person, and the appropriate adult should be involved if there is any doubt about a person's age, mental state or capacity. Because of the risk of unreliable evidence it is also important to obtain corroboration of any facts admitted whenever possible. Where the suspect has significant communication difficulties, a Registered Intermediary should be present to facilitate communication during the interview."

Role of the Appropriate Adult

[68] As to the role of an appropriate adult, see the discussion at paragraph D1.66 of Blackstone's Criminal Practice [2022]. The role of the appropriate adult is to safeguard the rights, entitlements and welfare of children and vulnerable persons. Among other things, they are expected to (a) support, advise and assist detainees when they are given or asked to provide information or participate in any procedure; (b) observe whether the police are acting properly and fairly, and to inform an officer of the rank of inspector or above, if they consider that they are not; (c) assist detainees to

communicate with the police while respecting their right to say nothing unless they want to; and (d) help them to understand their rights and ensure that those rights are protected and respected. Appropriate adults have a similar role during police interviews.

[69] Generally, a child or young person or mentally disordered or vulnerable person must not be interviewed by the police or asked to provide a written statement in the absence of an appropriate adult unless delay would be likely to lead to interference with or harm to evidence connected with an offence, interference with or physical harm to other people or serious loss of or damage to property, to alerting other suspects not yet arrested or to hindering the recovery of property obtained in consequence of commission of the offence. If an interview at a police station is necessary for one or more of these reasons it must be authorised by an officer of the rank of superintendent or above.

[70] Since the applicant had attained the age of 17 she was not expressly governed by the applicable policy which only applied to those under 17. However, as in the case of allowing solicitors to be present at interview, the police in law retained a discretion to allow this safeguard if the circumstances required it. There is nothing to suggest that this possibility was even considered in the applicant's case. Certainly, she was not given the benefit of an appropriate adult at any time during her detention. Even in cases where the person was under 17, and the rules applied, the RUC without consequence flouted the rule as shown for example in the case of *R v McCaul* [1980] 9 NIJB.

Common Law Duty of Disclosure

[71] The common law principles governing timely disclosure are contained in the seminal case of *R v Ward* [1993] 1 WLR 619 (Glidewell, Nolan, Steyn LJJ). In that case the appellant, Judith Ward, had had been charged with three counts of causing explosions likely to endanger life and with 12 counts of murder relating to persons killed in one of the explosions. At her trial, the prosecution relied upon confessions and admissions made by her in police interviews together with scientific evidence. As noted in the judgment, to a considerable extent, though not exclusively, the prosecution at her trial was based upon confessions and admissions which the appellant made in interviews. She was convicted on all counts. After conviction she did not apply for leave to appeal against conviction or sentence but in September 1991 the Home Office referred the matter to the Court of Appeal. On appeal against conviction on the ground that the prosecution had failed in their duty to disclose relevant evidence to the defence, the court allowed her appeal in the course of which it set out the relevant principles which we summarise below (see p 641):

> "It is now settled law, in this court at least, that the failure of the prosecution to disclose to the defence evidence which ought to have been disclosed is an 'irregularity in the course of the trial' within the meaning of section 2(1)(c). We refer in this connection to *Reg v Maguire* [1992] QB 936, 957, [which stated]:
>
> > 'The court has now consistently taken the view that a failure to disclose what is known or possessed and which ought to have been disclosed, is an 'irregularity in the course of the trial.' Why there was no disclosure is an irrelevant question, and if it be asked how the irregularity was 'in the course of the trial' it can be answered that the duty of disclosure is a continuing one.'
>
> It follows that if the irregularity is 'material', then for this reason alone the appeal must be allowed unless the proviso applies."

[72] The court noted at p 642 that non-disclosure is a potent source of injustice and even with the benefit of hindsight it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence.

[73] Glidewell LJ said at p 674:

> "An incident of a Defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters … This duty exists whether or not a specific request for disclosure … is made by the defence. Moreover, this duty is continuous; it applies not only in the pre-trial period but also throughout the trial … These propositions were already established in 1974 and decisions such as *R v Leyland Justices, Ex parte Hawthorne* [1979] QB 283, merely serve to reinforce the generality of the legal duty of fair disclosure." [Emphasis added]

[74] In *Ward* the court was invited by counsel on both sides to deal with the case by applying "the standards of 1992" to the original conduct of the prosecution in 1974 in relation to the matter of disclosure to the defence. The implication underlying this

invitation was that standards differed between 1974 and 1992. The Court of Appeal declined that invitation [see p643 letter G].

[75] The court in Ward looked instead at the common law standards of disclosure applicable at the time of Judith Ward's trial in 1974 – which was four years before this applicant's trial. It concluded that in 1974 it was the duty of the prosecution to ensure that all relevant evidence (which meant all evidence which the prosecution had gathered and from which it had made its selection of the evidence to be made) should either be presented during the trial or should be made available to the accused. In effect, therefore, the court held that even in 1974 there was a clear duty on the prosecution to make available to the defence all "unused material" in the sense that that expression has been used in the Attorney General's Guidelines.

[76] The court in *Ward* at p 644 said:

> "We would adopt the words of Lawton LJ in *R v Hennessy* [1978] 68 Crim App R 419, 426 where he stated the Courts must:
>
> > 'keep in mind that *those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence.* We have no reason to think that this duty is neglected; and if it ever should be, the appropriate disciplinary bodies can be expected to take action. The Judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution.' [Emphasis added]
>
> That statement reflects the position in 1974 no less than today. We would emphasise that *'all relevant evidence of help to the accused' is not limited to evidence which would obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.*
>
> We believe that in practice the importance of disclosing unused material has been much more clearly recognised by prosecutors since the publication of the Attorney General's Guidelines.

> [The judgment then quotes with approval the Code of Conduct of the Bar] … reflecting the words of Lawton LJ which we have quoted:
>
> > '… it is [the duty of the prosecution] to ensure that all relevant evidence is either presented by the prosecution or made available to the defence.'"

[77] The court in Ward concluded that the prosecution's obligation to disclose derived from the common law duty and that the prosecution must observe the rules of natural justice to ensure a fair trial. The decision of the court that 'the accused should have the opportunity of considering all the material evidence which the prosecution have gathered' did not depend on the application of the Attorney General's Guidelines. This derived from the common law right of the accused.

[78] As David Corker noted in "Disclosure in Criminal Proceedings", Sweet & Maxwell 1996, at para 3-01, adherence by the prosecution to its common law duty of disclosure is regarded by the courts as a fundamental expression of a defendant's sacrosanct right to a fair trial.

[79] Further judicial recognition of the fundamental nature of the right of a defendant to have timely disclosure of all materials relevant to their defence came in *R v Brown* [1995] 1 Crim App R 191 at p 198 where Stein LJ said:

> "The right of every accused to a fair trial is a basic or a fundamental right. That means that under our unwritten constitution those rights are regarded as deserving of special protection by the courts. However, in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part to his right to a fair trial."

[80] It is clear from the case law that the prosecution has a duty to ensure that all relevant evidence of help to an accused is either led by the prosecution or made available to the defence. The meaning of "all relevant evidence of help to the accused" is spelt out in the passage from *R v Ward* set out above. In the applicant's case the prosecution neither led the evidence nor made it available to the defence.

[81] In *Ward* at p 676 the court noted that there had been an "imperfect understanding of the position" regarding the nature and scope of the prosecution's duty of disclosure in 1974. This imperfect understanding of the common law duty of disclosure is also reflected in the approach of the prosecution in the applicant's trial by its withholding of material documents from the defence. This was based, at least in

part, on their failure to fully appreciate the true scope of the duty of disclosure imposed upon them by the common law.

[82] An imperfect understanding of the common law position is also evident in the two first instance decisions in *R v Coogan* and *R v McMullan* referenced in the judgment of Sir Declan Morgan which are plainly inconsistent with the requirements of the common law as comprehensively set out in the seminal judgment of *R v Ward*. I consider that the decision in Ward is the clearest statement of the applicable principles of the common law, even if not fully appreciated at the time. It is an aspect of the common law right to a fair trial.

[83] As Lord Bingham observed in *H* [2004] UKHL 3, [2004] 2 AC 134 at [14], prosecution disclosure is a requirement of basic fairness:

> "Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made."

Article 6 and the Fair Trial Right to Disclosure

[84] The above cases reflect the common law position on the question of disclosure. The European jurisprudence is equally strong. The right for a defendant to have adequate time and facilities to prepare the defence is also expressly provided by article 6(3)(b) of the European Convention. In *Jespers v Belgium* 27 DR 61 (1981) Case No. 8043/78 the European Commission for Human Rights held that the 'equality of arms' principle imposes on prosecuting and investigating authorities an obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence [see also Lester & Pannick at para 4.6.32].

[85] In Harris, O'Boyle and Warbrick, "Law of the European Convention on Human Rights", at 472 it states:

> "Apart from access to a lawyer, Article 6(3)(b) 'recognises the right of the accused to have at his disposal, for the purpose of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the authorities', including any document that 'concerns acts of which the defendant is accused, the

> credibility of testimony, etc. In any criminal case, the prosecution will have at its disposal the results of the police investigation or, in a civil law system, the case file prepared during the preliminary investigation. This will include both documents and other evidence obtained by questioning or searches backed by the power of the state or by the use of forensic resources which the defence may well lack. The Court has held that Article 6(3)(b) requires that the applicant have 'unrestricted access to the case file and unrestricted use of any notes, including, if necessary, the possibility of obtaining copies of relevant documents.' In this context, the primary purpose of Article 6(3)(b) is to achieve 'equality of arms' between the prosecution and the defence by requiring that the accused be allowed 'the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings. Article 6(1) requires that the prosecution disclose to the defence all material evidence in its possession for or against the accused, and this obligation must apply also under Article 6(3)(b). Access to documents may, however, be restricted for national security reasons. As well as access to documents, an accused in pre-trial detention requires conditions of detention that allow him to concentrate on preparing his defence."

New Documentary Evidence - Material Non-Disclosure

[86] After her third interview on 24 June the applicant was seen by a doctor. It was to this doctor that she complained about ill-treatment at the two interviews which immediately preceded his examination. The complaints that are recorded are unquestionably serious. The doctor's note in relation to interview 2 on the 24 June states:

> "Made stand up and then pushed twice against the wall by a policewoman. This policewoman also slapped her across the shoulders with her open hand. No further assault. Allowed to sit later during the interview."

And in relation to the interview 3 on 24 June states:

> "... questioned by 2 policemen. One pushed her about the room while the other shouted at her. Felt frightened. Did

not cry. Not threatened. Called names e.g. 'bitch, tramp.' Allowed to sit down later."

[87] There is a further document, namely the note of a complaint (Form 17/2) made at 19:30hrs on 24 June 1977 by Dr Henderson, for the purpose of being investigated. It reads "verbal threats and pushed about." The custody summary shows that the complaint Form 17/2 was passed to RUC Headquarters on 25 June 1977. Neither the applicant nor her lawyers were provided with disclosure of these documents, nor were they ever made aware that the doctor had referred this matter for investigation to RUC HQ. Nor were they furnished with the applicant's detention schedule.

[88] These documents are plainly relevant not least because they are contemporaneous and official records regarding her alleged treatment in the two interviews that preceded the interviews in which she made confessions. These records were not disclosed to the defence. The defence never saw either of these documents and never knew that Dr Henderson had escalated matters by forwarding the complaint to RUC Headquarters for the purposes of investigation of the complaint. The first time the applicant became aware of this was when it was unearthed by the CCRC using its investigative powers.

New Evidence regarding the Conduct of Officers

[89] The surviving PPS and PSNI materials enabled the CCRC to identify the officers who questioned the applicant during her detention in Castlereagh. In the course of its review the CCRC utilised its statutory powers to obtain additional material about the officers involved. There were three sources for this material:

(i) Police complaint files;

(ii) Judicial criticism of particular officers; and

(iii) Contemporary newspaper reports.

Complaint Files

[90] Section 9 of the RUC Code of Complaints and Discipline provided, at para 4, that every complaint by a member of the public against a police officer would be recorded at Police Headquarters and investigated under section 13 of the Police (NI) Act 1970. The investigation file was then to be passed to the Office of the Director of Public Prosecutions unless the Chief Constable was satisfied that no criminal offence had been committed.

[91] Whilst there is no record available of any investigation following Dr Henderson's referral to RUC HQ, the CCRC obtained a number of files from the PPSNI relating to complaints made by *other detainees* against the officers who also interviewed the applicant. They include files which contain information which are relevant to the safety of the applicant's convictions. Evidence of a similar type has been admitted in a series of cases by the Court of Appeal in Northern Ireland which have resulted in convictions being quashed as unsafe eg *R v Mulholland* [2006] NICA 22.

[92] CCRC enquiries established that there is no record of the officers who interviewed the applicant being subsequently convicted or disciplined in relation to the ill-treatment of detained persons but three of them, including DS McCoubrey, had "multiple complaints" against them. This was not divulged to the applicant or her lawyers. As noted earlier, despite the escalating number of complaints of ill-treatment of detainees during interviews by the RUC between 1974-1978, "no disciplinary proceedings had been brought in respect of the interrogation of persons in custody" – see Bennett Report at para 338.

[93] The CCRC investigated whether any of the relevant officers had been the subject of judicial criticism in the Northern Ireland Court of Appeal or elsewhere and identified the material set out below.

Officers referred to in relevant cases – Judicial criticism

[94] The case of *R v McCartney & Ors* [2007] NICA 10 was a referral by the CCRC of a conviction based upon confession evidence against two individuals. Mr McCartney (arrested 2 February 1977) alleged the confessions were fabricated and that he was subject to ill-treatment during interviews with DS McCoubrey and DC Bohill. The judge rejected Mr McCartney's evidence at trial and he was convicted.

[95] This conviction was later set aside in the following circumstances. It came to light that a prosecution against another person, 'X', who had been arrested, interrogated and charged at around the same time as Mr McCartney, was abandoned because the prosecution had formed the view that X was assaulted while in custody by the police. The Court of Appeal quashed Mr McCartney's conviction (and another) based on this evidence and noted it *could* have discredited the account given by the officers that there had not been any abuse in this case.

[96] DC Nesbitt is referred to in *R v Brown* and others in the case of Mr McCaul (also a referral by the CCRC). However, the reference to this officer does not appear to be to any allegation of misconduct or in respect of the interviews in which a confession is taken. This conviction was overturned on the basis of his suggestibility and young age which required the presence of an appropriate adult and legal representation. As the

CCRC noted, such material could impact upon the applicant's case given his involvement in Mr McCaul's case and the prevailing culture at Castlereagh.

[97] DC Nesbitt is also referred to in the case of *R v Fitzpatrick & Ors* [2009] NICA 60 (again a referral by the CCRC). Mr Fitzpatrick's submissions in respect of his "confession" statement concerned the lack of an appropriate adult or access to a solicitor. During interrogation and detention, Mr Fitzpatrick was physically abused and subjected to threats and oppressive interviewing techniques. He was too afraid to make a complaint and signed the confession statement to end the abusive behaviour towards him - said to have occurred in his second interview which involved DC Nesbitt. However, since there was no independent evidence verifying this information and at the time the CCRC's view was that it could not refer the case on this basis because there was no independent evidential support.

Contemporary Newspaper Articles

[98] The CCRC referred to contemporary newspaper reports of the trial of five police officers at Newtownards Magistrates' Court charged with the assault during interview of Patrick Fullerton at Castlereagh in November 1977. These officers included DS McCoubrey and DC Bohill. The CCRC sought disclosure of the relevant complaint file and prosecution files but was advised that Mr Fullerton's complaint file and the prosecution file cannot now be found. The report contained in the Belfast Telegraph (on 31 October 1978), quotes the magistrate as making the following remarks in acquitting all the officers:

> "If I could have accepted all the evidence given by Fullerton there could be no difficulty whatsoever but due to the fact that his story contained evasions and lies I found it difficult to accept all that he said ... the guilty escape with the innocent ... I cannot allocate any particular incident to any particular person, and I therefore dismiss the summons but I do not doubt this man (Fullerton) was assaulted."

Impact of the new evidence regarding the conduct of the officers

[99] The new evidence gathered by the CCRC raises questions about the culture of Castlereagh during the relevant time. Questions arise because of the volume of complaints being raised at this time (see, for example, the statistics presented in the Bennet Report reproduced above) and also the similarities in the allegations made. Some of the allegations by these others chime with the applicant's contemporaneous complaint to the doctor who was sufficiently concerned to report her complaint for further investigation to RUC HQ. Further, there is the fact that some of the specific officers she complained about were also mentioned by other complainants, and these

officers have been subject to negative judicial evaluation. The prosecution failed to make any disclosure to the defence about the complaints, investigation or charging of those concerned in the interviews of the applicant. The relevant complaint and prosecution files were not disclosed to the applicant before or during the trial despite the relevance and currency of such material. Plainly this material, which was not known to the applicant at the time of her trial, is relevant to the safety of her conviction.

The Trial

[100] There is little material in respect of what was a very short trial. She was convicted and sentenced on the same date. Whilst there is a written record of the judge's guilty verdict on all counts, there is no record of any judgment being given for these findings notwithstanding the terms of section 5 of the EPA which states:

> "(5) Where the court trying a scheduled offence convicts the accused of that or some other offence, then, without prejudice to their power apart from this subsection to give a judgment, they shall, at the time of conviction or as soon as practicable thereafter, give a judgement stating the reasons for the conviction."

[101] Notable facts that we can glean from the available records about the trial include the following:

(i) The defendant recognised the court in contrast to the common practice of republican suspects at the time which was not to recognise the court and not to engage with the process;

(ii) The defendant pleaded not guilty despite the fact that she had made confession statements to all the charges she faced;

(iii) The defendant did not raise any allegation of ill treatment during her interrogation despite the fact that she had made complaints to the doctor that she had been ill-treated in the two interviews immediately preceding the statement interview;

(iv) The trial had a peremptory character in which the evidence was not challenged by the defence;

(v) The charges were such that a sentence of life imprisonment was one available outcome;

(vi) The trial was very short: she was tried, convicted and sentenced in one sitting;

(vii) At the sentencing stage DS McCoubrey gave evidence in favour of the defendant, focussing on what he represented as her deep 'remorse' during interview;

(viii) The judge said that he considered imposing a life sentence and, but for the evidence of DS McCoubrey, he would have done so;

(ix) The judge imposed a sentence of 10 years imprisonment.

[102] There are important features of the present case that could not or would not have been raised at the time of her trial. As Kerr J observed in *R v Magee* [2001] NI 217 (Carswell LCJ, McCollum LJ and Kerr J):

> "… the applicant's advisers would have been well aware then that to found a case on lack of legal advice and conditions in Castlereagh would have had no chance of success and so did not advance such a ground for the exclusion of the statements."

[103] Likewise the absence of an appropriate adult, even if she had been under 17 and came within the terms of the applicable policy, would have been similarly doomed to failure as in McCaul and Mulholland both cases in which the convictions based on their confessions were much later set aside on appeal. Plainly the applicant would not have been able to raise the issue of non-disclosure of the medical records and detention schedules having regard to the view that then prevailed in relation to the (mistaken) view as to the scope of the common law rule regarding disclosure discussed earlier. Nor could she have complained about the non-disclosure of the multiple complaints against some of her interviewers and the charging of some of those officers for the obvious reason that she did not know about this material until it was unearthed by the CCRC. Mounting a successful challenge to the admission of statements in the absence of evidence of actual injuries was at the time always going to be a fraught course for the reasons set out later. However, if the undisclosed material had been disclosed to the defence prior to the trial, allowing them to make the necessary preparations and further investigations, a different approach might well have been taken. The prosecution failed to disclose the material even though they knew about her complaints of ill treatment, when they knew or ought to have known that members of the interviewing team had multiple complaints against them, when they knew that some of them had been charged with assault and that the sole evidence against this juvenile girl was her admissions obtained from Castlereagh. The failure to disclose also took place in circumstances where the prosecution were aware that she had no legal access whatsoever prior to making her admissions, no appropriate adult and where they would have been aware of the regime in Castlereagh.

Is there a reasonable explanation for her failure to give evidence of her alleged ill treatment at the trial or in an appeal taken at that time?

[104] To answer this question the court must consider the manner in which challenges to admissibility based on allegations of ill treatment were treated in the Diplock courts that dealt with suspects charged under the EPA.

[105] In scheduled non-jury cases reliant on admissions from interrogation centres, such as Castlereagh, the normal sequencing for a voir dire was reversed. In practice an accused had to make their case first. Only after the accused had given evidence-in-chief on the voir dire were the important detention schedules and medical records made available to the defence. If there was no challenge the documents were withheld in their entirety. The prosecution of course had these materials throughout and were in a position to prepare their case accordingly.

[106] The applicant and her lawyers had to advise and decide, without sight of the relevant materials, whether or not she should launch a challenge to the admissibility of her statement all the while knowing that an unsuccessful challenge would almost certainly result in a substantially increased sentence. Such an outcome was all but inevitable or at least likely when, as here, there was no physical evidence of assault. Police officers who had been party to any ill treatment were unlikely to have admitted such discreditable misconduct. Experienced criminal lawyers in the Diplock non-jury courts would have had to give frank advice to their clients about the likely outcomes and the risks of a failed challenge.

[107] The withholding of material documents particularly in her case based solely on admissions from Castlereagh placed her at an avoidable disadvantage. The withholding of the documents conferred an obvious forensic advantage on the prosecution and the RUC. This applicant had withheld from her the medical and custody records in the possession of the police and prosecution relevant to her detention and her treatment whilst detained. The medical record of her examination by the doctor included the contemporaneous detail of her complaints. The prosecution also withheld the documentary record of the action unilaterally taken by the doctor to escalate the matter by way of a complaint to RUC headquarters for investigation. This was a significant step by the doctor. The applicant and her legal advisers were totally unsighted until this was uncovered by the CCRC. They were also unsighted as to the multiple complaints and prosecution of some of the RUC officers who interviewed her and operated out of Castlereagh.

[108] At the time of her trial had she challenged the admissibility of her statements she and her lawyers would not have been given access to the medical records and detention schedule until the conclusion of her evidence-in-chief at which time she would already be under oath and precluded from speaking to her lawyers about her evidence. Only at this stage would the lawyers have known the identities of the doctors who had examined her thus precluding pre-trial investigation and preparation.

[109] The doctor's records are the only contemporaneous records from Castlereagh setting out in detail the nature of the complaint and the interviews to which the complaint related. The fact she knew she had made a complaint did not relieve the prosecution of their common law duty to make timely disclosure of the relevant records. The duty of disclosure of all relevant evidence of help to the accused exists whether or not there is a specific request for disclosure made by the defence, the duty is continuous, and applies in the pre-trial period but also throughout trial. As Glidewell LJ stated in *R v Ward* "'all relevant evidence of help to the accused' is not limited to evidence which would obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material which the prosecution have gathered …". The defence in the applicant's case were never given that opportunity to consider. The common law and article 6 required disclosure to the defence irrespective of whether the defence had yet arrived at and communicated a decision to challenge the admissions. A person whose statements of admission constitute the sole evidence, or central platform, of the prosecution case is entitled as a bare minimum to the medical and custody records. She was entitled to that disclosure at the time of her trial as Lawton LJ explained in *R v Hennessy* [1978] quoted earlier. It was, in fact, "[n]either led by [the prosecution nor] made available to the defence."

[110] Very importantly it has to be borne in mind that choosing the course of challenging the admissibility of statements obtained by the RUC in centres such as Castlereagh was fraught with real dangers. This 17 year old girl would, unlike a jury trial voir dire, have to give evidence first. There was no video or audio recording of the interviews - only the RUC written records. She had been denied the safeguards of legal access and being accompanied by an appropriate adult. The absence of such safeguards, which were unlawfully forbidden by the RUC, created conditions for deniability, lack of transparency and the absence of independent evidence – all of which has to be seen the context of the coercive regime of Castlereagh, the Bennett Report, CPT report and the decision of the ECHR in *Magee v UK*. The cards were stacked against her.

[111] The inequality of arms continued in the prosecution failure to comply with the common law disclosure requirements. Had she challenged her statements she would not have the opportunity of discussing the contents of any relevant material that was disclosed (since she would then be under oath). She would be cross-examined by prosecution counsel who, unlike her legal team, had the forensic advantage of prior

access to the documents central to the issue. Making allegations of ill-treatment, in the absence of physical evidence of abuse or independent/supporting evidence, and in the knowledge that experienced RUC officers, used to giving evidence, were, in practice, likely to be believed was a frightening prospect. The prevailing culture of the time did not look kindly on such challenges. It is egregious that the prosecution failed to disclose the only supporting evidence in the form of the doctors detailed record of her complaint and the written referral by the doctor of the complaint to RUC HQ for the purposes of investigation. Both these documents were potentially of great significance. Had they been furnished the applicant's lawyers could have conducted relevant investigations including with the doctor concerned. Together with the multiple complaints and prosecution of officers involved in her interviews this information would have been relevant evidence of help to the accused but none of it was disclosed.

[112] Further if the applicant, despite the many structural handicaps earlier identified, had taken the course of unsuccessfully challenging the admissibility of her statements she would have paid a heavy price for failure. This is not a mere possibility. The trial judge spelt out publicly at the sentencing stage that, but for the evidence of DS McCoubrey, he would have imposed a life sentence. Had she unsuccessfully made the challenge the unusual intervention of the RUC officer at the sentencing stage is unlikely to have occurred. In that scenario she was in fact facing life imprisonment. The trial judge's public comments merely reinforced what was already well known to any experienced criminal practitioner at that time – the heavy price for a failed challenge. It is highly unlikely that she would not have been advised by her experienced lawyers of the potential consequences of unsuccessfully exercising certain options. Advice that in this case would have been given without access to the undisclosed material. There exists therefore a reasonable and persuasive explanation for her choice not to exercise rights that existed on paper – but were risky in practice.

[113] Material documents relating to her admissions were withheld. Had they been furnished the approach of the defence to the issue of whether to challenge the admissions might have been different. One simply cannot exclude that possibility. As noted in *R v Ward* non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether the undisclosed material "*might* have shifted the balance or opened up a new line of defence."

[114] The right of every accused to a fair trial is a fundamental right. The accused's right to fair disclosure is an inseparable part of his right to a fair trial. The duty to disclose exists whether or not a specific request has been made and whether or not any decision has yet been made to challenge a statement. Any decision to challenge a statement should have been fully informed by the provision of full disclosure. The sole platform of the prosecution case were the applicant's confessions. The withheld documents were plainly relevant evidence of help to the accused. As a matter of basic

fairness the defence were entitled to these documents [see Corker & Parkinson, Disclosure in Criminal Proceedings, 2009, Oxford University Press at para 7.30].

[115] The decision to withhold the documents was taken despite the obvious relevance of the documents to the central issues concerning the statements – admissibility, reliability and whether they were, in the circumstances, capable of sustaining a conviction beyond reasonable doubt. Timely disclosure would almost certainly have set in train further investigations. To take one example – once the name of the Dr(s) were known and the fact that Dr Henderson had taken the unusual step of escalating the matter of alleged ill-treatment to RUC headquarters, the defence would have been alerted to the need to conduct further enquiries. That would have involved consulting with the doctor, taking a detailed statement, finding out if the matter had been investigated and, if so, what the result of the investigation was. Furthermore, the material concerning complaints and prosecutions against her interviewers could have been a potent source of cross-examination as well as lending support to her contemporaneous complaints of ill treatment. The documents and the results of any further investigations would have informed the advice the applicant may have received as well as the difficult tactical judgments and decisions in play. Choosing the course of challenging the admissibility of statements obtained by the RUC in interrogation centres was fraught with real dangers. If she had taken the course of unsuccessfully challenging the admissibility of her statements, she could have paid a heavy price for failure. Before making any such decision she was entitled to full disclosure of all relevant evidence bearing on the issues.

[116] The provision of such important material would have been factored into the delicate decision making process of the defence and may have altered the strategic balance. It cannot be excluded that the provision of the disclosure to which she was entitled might have altered the course of the trial.

[117] Thus, the failure to disclose relevant documents may have impacted on the course and conduct by the defence of the pre-trial and trial process. Fully armed with the material disclosure a challenge might have been mounted. Since that possibility cannot realistically be excluded it is difficult to see how as a matter of principle the failure to mount such a challenge at trial should now count against her. If it were to have that effect, it would confound the unfairness resulting from the material non-disclosure.

[118] The decision by the PPS not to disclose it to her lawyers at the relevant time was not inadvertent. This decision was taken solely by the prosecuting authority despite its obvious relevance to (i) the investigations that the defence may have set in train at the time (ii) the advice that she may have received from her defence lawyers regarding the conduct of the trial (iii) the admissibility of her statements (iv) the reliability of her statements and (v) whether the statements could support a conviction to the criminal

standard. Having regard to the applicable principles earlier set out, the withholding of the material was in breach of the common law disclosure requirements and thus of "an incident of a defendant's right to a fair trial to timely disclosure by the prosecution of all material matters" [per Glidewell LJ in *R v Ward* [1993] 2 All ER 577 at 626g].

Discussion

[119] The leading case on the approach which a court should take in a case where there has been substantial delay between the trial and appeal resulting in a change of law or standards of fairness and procedural safeguards is *R v King* [2000] 2 Cr App R 391. The applicant had been convicted in 1986 of murder. The sole evidence against him was his admissions. Lord Bingham considered the general approach the court should take in such cases:

> "We remind ourselves that our task is to consider whether this conviction is unsafe. If we do so consider it, section 2(1)(a) of the Criminal Appeal Act 1968 obliges us to allow the appeal. We should not (other things being equal) consider a conviction unsafe simply because of a failure to comply with a statute governing police detention, interrogation and investigation, which was not in force at the time. In looking at the safety of the conviction it is relevant to consider whether and to what extent a suspect may have been denied rights which he should have enjoyed under the rules in force at the time and whether and to what extent he may have lacked protections which it was later thought right that he should enjoy. But this Court is concerned, and concerned only, with the safety of the conviction. That is a question to be determined in the light of all the material before it, which will include the record of all the evidence in the case and not just an isolated part. *If, in a case where the only evidence against a defendant was his oral confession which he had later retracted, it appeared that such confession was obtained in breach of the rules prevailing at the time and in circumstances which denied the defendant important safeguards later thought necessary to avoid the risk of a miscarriage of justice, there would be at least prima facie grounds for doubting the safety of the conviction*- a very different thing from concluding that a defendant was necessarily innocent." [Emphasis added]

[120] In *R v Mulholland* [2006] NICA 32 the Court of Appeal concluded that the conviction for membership of a proscribed organisation was unsafe. At the trial the appellant, who had been aged 16 at the time of his detention, had retracted his written

admission and contended that it was involuntary and untrue. He claimed that he had been mistreated whilst in custody, had asked to see a solicitor but this was refused and that he had made admissions because he was frightened. It was submitted at the trial that his admissions should not be admitted in evidence on the grounds that the prosecution had not established their admissibility under section 6(2) of the EPA and on the further ground that the admissions should be excluded in the exercise of the court's discretion. Kerr LCJ noted that the trial judge, Lowry LCJ, in his written judgment did not deal with the fact that the appellant had been interviewed in the absence of an independent person and did not refer to the appellant's assertion that his request to see a solicitor had been refused. The appellant in that case had submitted a notice of appeal but abandoned the appeal without legal advice. The appellant's solicitor lodged a fresh appeal and having received legal advice the appellant abandoned his appeal. This took place in 1977. It was not until October 2000 that the appellant applied to have his case considered by the CCRC and in August 2003 the matter was referred by the CCRC to the Court of Appeal. The CCRC investigation uncovered new evidence which suggested that two of the officers who interviewed the appellant had assaulted another prisoner in April 1978. This was after the date on which the appellant had made admissions to the interviewing officers which had been in October 1976.

[121] In his judgment Kerr LCJ stated as follows:

> ***"Principles to be applied***
>
> [30] There was no dispute between the parties as to the principles to be applied in the review of old convictions. These may be summarised in the following four propositions: -
>
> 1. If there was a material irregularity, the conviction may be set aside even if the evidence of the appellant's guilt is clear but not every irregularity will cause a conviction to be set aside. There is room for the application of a test similar in effect to that of the former proviso, *viz*., whether the irregularity was so serious that a miscarriage of justice has actually occurred - *R v Gordon* [2002] NIJB 50.
>
> 2. The Court of Appeal must be persuaded that the verdict is unsafe but if, having considered the evidence, the court has a significant sense of unease about the correctness of the verdict, it should allow the appeal - *R v Pollock* [2004] NICA 34.

> 3. While the court must apply the statute law in force at time of the trial it must apply current standards of fairness and a current understanding of the common law - *R v King* [2000] Crim LR 835.
>
> 4. If the only evidence against a defendant was his confession which he had later retracted and it appeared that such confession was obtained in breach of the rules prevailing at the time and in circumstances which denied the defendant important safeguards later thought necessary to avoid the risk of a miscarriage of justice, there would be at least *prima facie* grounds for doubting the safety of the conviction – *R v King*."

[122] At para [34] the court referred to the various recommendations of the Royal Commission on Criminal Procedure as summarised:

> 'It is in our view essential that the juvenile should have an adult present other than the police when he is interviewed and it is highly desirable that the adult should be someone in whom the juvenile has confidence, his parent or guardian, or someone else he knows, a social worker or school teacher… The presence is however no substitute for having access to legal advice and the right to that applies equally to a juvenile.'"

[123] At paras [36]-[39] the court noted with apparent approval the submissions of counsel for the respondent who:

> "[36] … accepted that the decision in *R v Gordon* was clear authority for the proposition that one must apply contemporaneous standards and principles of fairness. In his judgment in that case, Carswell LCJ had adopted a passage from the judgment of Lord Bingham in *Regina v Bentley* [1999] CLR 330 as follows:
>
> > 'We must judge the safety of the conviction according to the standards which we would now apply in any other appeal under Section 1 of the 1968 Act … Where, between conviction and appeal, there have been significant changes in the common law (as opposed to changes effected by statute) or in standards of fairness, the approach

indicated requires the court to apply legal rules and procedural criteria which were not and could not reasonably have been applied at the time.'"

[124] Kerr LCJ stated his conclusions as follows:

> "[44] In *R v King*, Lord Bingham stated that breach of the rules prevailing at the time would constitute *prima facie* grounds for concluding that the conviction was unsafe and that absent any countervailing factors that displaced that preliminary conclusion, the conviction must be quashed. We respectfully agree with Lord Bingham's analysis in *King* and apply it to the present case.
>
> [45] At the relevant time, the Judges' Rules provided that normally a child or a young person should be accompanied by an adult unless there were practical reasons why that could not be arranged. This issue was not even addressed in the course of the prosecution of the appellant. It does not appear that the matter was raised by counsel for the appellant. Certainly, there is no evidence that there were practical reasons which superseded the requirement of the Judge's Rules … we must now deal with the issue on the basis that this was a subject that did not exercise any of the participants in the trial and that no attempt was made to engage, much less exercise, the judicial discretion in relation to the breach.
>
> [46] There is no evidence available to explain the failure to abide by the requirement of the Judges' Rules. We are therefore bound to find that there are *prima facie* grounds for doubting the safety of the conviction. We agree … that all the known circumstances must be taken into account but such other circumstances as are known reinforced rather than diminished the sense of unease that we had about the conviction … We have little doubt that if Lowry LCJ had been conscious that the statement had been obtained in contravention of the Judges' Rules and the relevant RUC code, he would have been much more reluctant to regard the confession as efficacious to sustain the charge on which he convicted the appellant."

Conclusion

[125] By reason of the very particular circumstances of her case and the accumulation of features summarised below I do not consider that her convictions, based on the confessions of this 17 year old girl whilst detained at Castlereagh, confessions which formed the sole platform for her prosecution and conviction, can, in all conscience, be regarded as safe. I have a significant sense of unease about her conviction. Her confession was obtained in breach of the rules at the time – in breach of the common law, the Judges' Rules and the RUC Code. Her right to a fair trial was further breached by the failure of the prosecution to comply with its common law duty to furnish all relevant evidence of help to the accused which "is not limited to evidence which would obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material that the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led" [per Glidewell LJ at p644 *R v Ward*]. Full disclosure is one of the most important issues in the criminal justice system and is an indispensable element of the right to a fair trial. To recap she was not furnished with material relevant to any ill treatment she may have suffered or which may have a bearing on the admissibility and reliability of her confession. The prosecution failed to disclose (i) the record of her medical examination and the doctor's contemporaneous record of her complaints of ill treatment; (ii) the document sent by the doctor escalating her complaint for investigation by RUC HQ; (iii) detention schedule and (iv) the complaint and prosecution files regarding the multiple complaints and prosecution of officers who were involved in her interviews. The confession was also obtained in circumstances which denied the juvenile defendant important safeguards now thought necessary to avoid a miscarriage of justice.

[126] As the CCRC observed, "there can be no doubt" that she was subjected to a sequence of interviews that, by their number and length, could be described as "oppressive" for an unaccompanied and unrepresented young woman, "even by the standards of the time." There were no countervailing safeguards to offset the obvious dangers of statements obtained in such circumstances. Further, in the present case the applicant was plainly denied a fair trial at common law and in breach of article 6 ECHR.

[127] My conclusions that the convictions cannot be regarded as safe and my significant sense of unease about them have been arrived at without reliance on her much later accounts to the CCRC or her even later evidence before us. I have confined myself to the contemporaneous documents, the indisputable circumstances surrounding the conditions of her detention and the newly disclosed material including the evidence regarding multiple complaints and even prosecution of some of the interviewing team conducting her interviews.

[128] The constellation of features present in her case include the following facts: she was a juvenile; had never been arrested before; had a clear record; did not have access to a lawyer prior to making statements of admission or at any stage during her

detention in Castlereagh; although a juvenile she did not have the benefit of an appropriate adult at any stage during her detention; she was held incommunicado prior to making admission; prior to the impugned statements she had been interviewed repeatedly by rotating teams of detectives on numerous occasions for extended periods and which continued until she made admissions; her complaint to the doctor about being physically assaulted, verbally abused and intimidated in the two interviews immediately before the interview at which she commenced making the impugned statements; Dr Henderson submitted a record of her complaint, the complaint was sent to RUC Headquarters for investigation, there are no documents to indicate that following Dr Henderson's referral the complaint was investigated and, if so, with what result; failing to disclose material documents regarding her complaints; failing to disclose complaint and prosecution files regarding allegations of ill treatment and prosecution of her interviewing officers and the nature and volume of adverse material concerning the officers involved in the questioning of the applicant.

[129] By the standards of today this juvenile was denied all the important safeguards now thought necessary to avoid a miscarriage of justice. It is beyond question that her fundamental right to a fair trial enshrined in article 6 of the European Convention has been violated. She was denied rights she was entitled to at the time. There were also unlawful failures to consider the exercise of available safeguards considering her youth. It is to my mind inconceivable that the confession of this juvenile, forming the sole basis of her prosecution and conviction, obtained in Castlereagh without any of even the most basic of these safeguards, could be regarded as safe. Accordingly, I would extend time, admit the written material that the CCRC uncovered and allow the appeal.

[130] We are in an unusual situation where the court has not been able to come to a unanimous conclusion but all members of the Court are in agreement that two judgments should issue, one reflecting the majority view and the second recording this, my dissent, and the reasons for it.

APPENDIX 1

Day 1 of Questioning – 23 June 1977

Interview 1	14:00hrs – 15:35hrs (1hr 35mins)	DCs Freeborn and Nesbitt
Interview 2	16:15hrs – 17:15hrs (1hr)	DCs Freeborn and Nesbitt
Interview 3	19:25hrs – 22:30hrs (3hrs 5mins)	DS Brown and WDC Lowry (three other officers are recorded as being present (the names are not legible but they include DC Bohill).

Day 2 of Questioning – 24 June 1977

Interview 4	10:05hrs – 12:15hrs (2hrs 10mins)	WDC Lowry and DC Bohill
Interview 5	13:00hrs – 13:35hrs (35mins)	WDCs Houston and Kennedy
Interview 6	15:45hrs – 17:15hrs (1hr 30mins)	DCs Nesbitt and Freeborn

Statement Interviews

Interview 7	19:45hrs - (3hrs)	DS McCoubrey and DC Clements; WDC Lowry is also recorded as being present from 20.30hrs. DS McCoubrey is recorded as writing out her statement concluding at 21.15hrs. WDC Lowry is recorded as writing out her statement relating to the Turks bombing at 21.45hrs and concluding at 22.30hrs.

Day 3 of Questioning – 25 June 1977

Interview 8	"11pm" to "12.45pm" (As the CCRC pointed out this must be an error of date or timing and either the interview took place on 24 June at that time or on 25 June from 11.00am to 12.45am) (1hr 45mins)	WDC Lowry alone