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Judgment: approved by the Court for handing down | *Delivered:* **05/09/2008**
*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

BELFAST CROWN COURT

THE QUEEN

-v-

MANMOHAN SANDHU

HART J

[1] The defendant is a solicitor charged with several offences relating to his conduct whilst consulting privately with his clients between interviews when his clients were being questioned by the police in Antrim Serious Crime Suite on various dates in 2005 and 2006. His clients were being questioned about the murder of Andrew Cully on 24 March 2004; the attempted murder of Jonathan Hillier on 20 August 2005, and the murder of Jameson Lockhart on 1 July 2005. In each instance evidence of the conversations relied upon was obtained by the police as the result of eavesdropping on the consultations by way of covert electronic surveillance.

[2] The charges are:

Count 1, incitement of other persons to murder Jonathan Hillier.
Count 2, doing an act tending and intended to pervert the course of public justice by communicating to persons unknown the whereabouts of Jonathan Hillier.
Count 3, doing an act tending and intended to pervert the course of public justice by taking steps to prevent police gaining possession of mobile phones which the defendant believed to be potential evidence in the investigation into the attempted murder of Jonathan Hillier.
Count 4, doing an act tending and intended to pervert the course of public justice by making a telephone call to another person requesting that an individual whom the defendant believed police wanted to interview in connection with the murder of Jameson Lockhart, namely Mark Sewell, be taken "offside".

Count 5, doing an act tending and intended to pervert the course of public justice by providing a false account for Christopher Dinsmore to use in interview under caution to explain the presence of gloves seized from his house which had traces of cartridge discharge residue on them.
Count 6, conspiracy to pervert the course of public justice by using his role as a solicitor to keep members of a terrorist organisation informed of the progress of the police investigations into terrorist related offences with a view to interference of the investigations.

[3] The defendant has made two applications to the court. The first is to invite the court to enter a No Bill under s. 2(3) of the Grand Jury (Abolition) Act 1969 in respect of Counts 1, 2, 5 and 6 only. The second application is that should a No Bill be refused in respect of any of those four counts the prosecution on all six counts be stayed on the basis that for the police to eavesdrop on a private legal consultation between solicitor and client in those circumstances means that the defendant cannot receive a fair trial.

[4] I heard arguments on both applications on the same occasion and I am grateful for the comprehensive oral and written submissions advanced by both sides in this case which raises unusual and important issues. The No Bill application was heard first as counsel correctly agreed that this was the appropriate order because the question of a stay only arises if there is sufficient evidence to put the defendant on trial on one or more of the counts. I will therefore deal with the No Bill application first.

[5] Section 2(3) of the Grand Jury (Abolition) Act 1969 provides that:

> "The Judge presiding at the Crown Court shall, in addition to any other powers exercisable by him, have power to order an entry of 'No Bill' in the Crown Book in respect of any indictment presented to that court after the commencement of this Act if he is satisfied that the depositions or, as the case may be, the statements mentioned in sub-section (2)(i), do not disclose a case sufficient to justify putting upon trial for an indictable offence the person against whom the indictment is presented."

In R v McCartan and Skinner [2005] NICC 20 the principles governing the application for a No Bill laid down in R v Adams [1978] 5 NIJB and Re Macklin's Application [1999] NI 106 were summarised as follows.

(i) The trial ought to proceed unless the judge is satisfied that the evidence does not disclose a case sufficient to justify putting the accused on trial.

(ii) The evidence for the Crown must be taken at its best at this stage.

(iii) The court has to decide whether on the evidence adduced a reasonable jury properly directed could find the defendant guilty, and in doing so should apply the test formulated by Lord Parker CJ when considering an application for a direction set out in Practice Note [1962] 1 All ER 448.

[6] The defendant is referred to as "Johnny" Sandhu by his clients during some of the conversations which will be quoted in this judgment. Although some of the charges relate to parts of conversations between the defendant and only one client, Count 6 is an omnibus charge relating to conversations between the defendant and several clients who were being questioned about different crimes. The common feature of the conversations relied upon to support Count 6 is that the defendant is alleged to have been in contact by mobile phone from the consultation room in the police station with other individuals to whom he passed on information about the investigations in respect of which his clients were being questioned at the time in circumstances where, the prosecution allege, the information was plainly being supplied to enable those other persons to thwart the police investigations at that time.

[7] I can conveniently deal with Counts 1 and 2 together. On 20 August 2005 Jonathan Hillier was shot at Stirling Avenue in the West Winds Estate in Newtownards. Hillier was a taxi driver and was driving his taxi immediately before he was shot. He was taken to the Ulster Hospital at Dundonald where he was found to have been shot several times in the back. Michael Massey and Luke Hawkins were his passengers immediately before he was shot. On 23 August 2005 Massey was arrested on suspicion, inter alia, of the attempted murder of Hillier. Massey was interviewed on a number of occasions on 23, 24 and 25 August about the attempted murder of Hillier, and the defendant was present during those interviews in his capacity as Massey's solicitor.

[8] Part of the police enquiries at the time involved their attempting to trace mobile phones belonging to Massey, and on 24 August they seized two mobile phones at Planet Leisure in Greenwell Street, Newtownards which it was thought might belong to Massey. Hawkins was also arrested on 23 August 2005 on similar charges and was questioned on a number of occasions over succeeding days.

[9] Count 1, incitement to murder Hillier, is based upon a number of remarks allegedly made by the defendant in the course of consultations on 24 and 25 August. The first passage relied upon commences at p. 1023 of the transcripts of conversations:

> "Sandhu: Like Mr Hillier might never give evidence.

Hawkins: Uh hmm, he shouldn't have been able to.

Sandhu: At least if he was dead he wouldn't have been able to tell them there was a phone call made from the fucking taxi."

Later during the same consultation at p. 1025 Sandhu is allegedly recorded as saying:

"(Laughs) You gotta have a sense of humour. You see that there, you see and dead men can't talk. If you want to fucking kill someone (inaudible) assassination. How many (inaudible) blindness been mishit by them (inaudible)."

At p. 1031 during a conversation with Massey the following exchange was recorded.

Massey: (inaudible), they chased him, whoever it was chased him.

Sandhu: Hit on the fucking elbow and back that's all how da fuck you gonna die like how da fuck like if you're stuck in the car why didn't they hit him in the car.

Massey: Don't know, fuck.

Sandhu: At least dead men don't talk, this dead man has made two statements to the police basically telling them you'se boys coming up.

Massey: Just like our word against his."

[10] In a further conversation on 25 August at p. 1085 the following exchange between Massey and Hawkins was recorded.

"Sandhu: Now tell me, after you've been charged, right, how the fuck did it go wrong.

Massey: I don't know.

Sandhu: Hmm.

Massey: I don't know how the fuck.

Sandhu: You tell me.

Massey: Fucked up the whole thing so they have, they've sent us down for a few years anyway like.

Sandhu: Hmm.

Massey: (Inaudible) wankers, just try and clip him again (inaudible). The wankers need to try and clip him again so he can't come to court. What would happen if that happened.

Sandhu: I've already told them he's at the Ulster Hospital, already told them that.

Massey: See if they were to get to him, by the time they were going to court, maybe kill it.

Sandhu: Uh huh.

Massey: Would that mean threw out of court.

Sandhu: Uh huh.

Massey: Its getting them boys to overcome that there (inaudible) they will, cause (inaudible) fucking (inaudible).

Sandhu: He's got to be taken out. Hasn't made a statement yet.

Massey: Has he not (Pause). (Inaudible).

Sandhu: That shite is water.

Massey: Aye (inaudible)."

[11] As Mr Irvine (who appears for the defendant with Mr Harvey QC) conceded in his written submissions, Massey was plainly indicating that Hillier should be murdered to prevent him coming to court to give evidence. However he argued that because Masssey was already pre-disposed to this course of action without any encouragement, persuasion urging, or spurring on by the defendant it is clear that Massey was not being incited by the defendant to form this view because it was already Massey's own view.

[12] The response of Mr Kerr QC (who appears for the prosecution with Mr David Russell) was to submit that the passage "He's got to be taken out. Hasn't made a statement yet" shows that both Massey and the defendant had decided that the way to stop Hillier from giving evidence was to have him murdered.

[13] The references from the passage at p. 1086 cannot be divorced from the earlier references set out above, and I am satisfied that when they are taken together there is sufficient evidence that would entitle a tribunal of fact to conclude that not only was Massey contemplating murder as a means of removing Hillier as a witness, but that the defendant was urging that this should be done. I am satisfied that the defendant's words are capable of being interpreted as meaning that he was inciting the murder of Hillier. It is irrelevant whether the solicitation or incitement is effective, see DPP v Armstrong, Andrews [2000] Crim. L.R. 379 and the authorities cited at Archbold 2008 at 34-70. The nature of the crime of incitement is not whether the object contemplated is achieved, but whether a person has incited another to do, or cause to be done, an act or acts which would involve the commission of an offence by the other if they were carried out, and if he incites or believes that the other, if he acted as incited, shall or will do so with the fault required for the offence which is incited. I am satisfied that the passages set out above disclose a case sufficient to justify the defendant being placed on trial on Count 1 and I refuse the application for a No Bill in respect of that count.

[14] Count 2, doing an act tending and intended to pervert the course of public justice by communicating to persons unknown that Hillier was in the Ulster Hospital at the time, depends upon the inference to be drawn from the exchange between the defendant and Massey quoted above, and in particular the statement by the defendant "I've already told them he's at the Ulster Hospital, already told them that". Mr Irvine's first submission was that no inference could be properly drawn from the defendant's remarks that he intended to pervert the course of public justice. However, when this remark is placed in the context of the tenor of the exchange between the defendant and Massey, notably where Massey says "See if they were to get to him, by the time they were going to court, maybe kill it", and the defendant's statement that "He's got to be taken out. Hasn't made a statement yet" I consider the inference could properly be drawn that the defendant and Massey wished to prevent Hillier giving evidence against Massey, and this was to be achieved by his being approached as soon as possible and in any event before he made a statement, so that he would not make a statement. Mr Irvine's alternative submission was that it was already public knowledge that Hillier was in the Ulster Hospital. That may be the case, but that would not necessarily prevent the inference being drawn that the defendant was passing that information to others at that stage to ensure that Hillier would not, for whatever reason, be able to give evidence against his clients. I am

satisfied that there is sufficient evidence to justify the defendant being put on trial on Count 2 and I therefore refuse the application for a No Bill in respect of that count.

[15] Count 5 alleges that the defendant did an act intending to pervert the course of public justice by providing an account for Christopher Dinsmore to use in interview whilst being questioned in relation to the murder of Jameson on 1 July 2005. Whilst Dinsmore was being questioned on 15 November 2005 in relation to this murder one of the matters put to him was the presence of firearms residues on gloves found in his house. Dinsmore was represented by the defendant, and it is alleged that during private consultations between interviews on 15 November 2005 the defendant suggested to Dinsmore an dishonest explanation which Dinsmore could advance to account for the presence of the gloves in his house, namely that they had been left in Dinsmore's house by Jim Gray, who had himself been murdered and therefore could not contradict this. At p. 870 the defendant allegedly said:

> "So, whenever the golf clubs come up, right, who plays golf, Jim Gray. If the gloves become, that's your get out clause."

At p. 871 the defendant expanded on that suggestion.

> "Uh huh and then they have to rely on intelligence, we knew you were involved in this murder, right, yet, direct, indirectly, right, now the guy in Newtownards for the Andrew Cully fucking murder, the gloves became an integral part for that fucker getting charged right. Now they had, he the gloves on, had also, uh, gunshot cartridge residue on that as well, so my viewpoint is, you've lots of friends that come into your fucking flat right and one of the friends that you that regularly played golf was Jim and many a day he came into the house with Gary. No, just say Jim."

At p. 873 the defendant and Dinsmore again discussed the presence of the gloves in the house.

> "Sandhu: So there you are. So, how the fuck do we get gloves lying in a house.
>
> Dinsmore: It's all right, don't even go there mate because do you know why, I don't use them, I don't know what the fuck, I'd actually be very surprised if they're mine."

At p. 874 the defendant again referred to the gloves when he said:

> "Well that's okay but I think your explanation linked to the gloves is this, that Gray on occasion, had come to your house. When was the last time he was at your house, beginning of the year."

Starting at p. 876 the defendant and Dinsmore again discussed how the gloves could be linked to the defendant.

> "Dinsmore: (inaudible). do they not know where it fucking came from, why (inaudible).
>
> Sandhu: Was they in your fucking house.
>
> Dinsmore: Right (inaudible). You'd be wearing them, there bound to have checked for my DNA on them.
>
> Sandhu: (inaudible) well tell me this, if you took from someone's house right, then you obviously have touched them, your DNA, what happens if your fucking DNA turns up on it. So you better not answer Jim Gray's answer until you find out if there's any DNA on it.
>
> Dinsmore: (inaudible) I'll just sit and see.
>
> Sandhu: Or you can say, yeah, Gray's left them there sometimes right and uh, you might have moved them from one drawer to another drawer. Nothing unusual about it but we'll wait and see about that one, you'll have to think about how you deal with that. Dinsey I think you have a hectic lifestyle mate."

At p. 880 there is a further discussion about the presence of the gloves:

> "Dismore: What can I say, found them.
>
> Sandhu: That's what fucking Clarke said, no you're not gonna say that. Clarke fucking said that, no you're not.
>
> Dinsmore: Why.
>
> Sandhu: Just.

> Dinsmore: Why Johnny.
>
> Sandhu: Because it doesn't make sense, you found the gloves and they're lying in your drawer right, bottom line is this."

There are further relevant exchanges at pages 882, 883, and finally at 901 during the course of a later consultation.

[16] Mr Irvine submitted that whilst the defendant and Dinsmore discussed the explanation for the residue on gloves, it was solely Dinsmore's decision to give whatever account he felt appropriate in respect of the residue, and, as Mr Irvine put it, the defendant "was merely articulating an account for Dinsmore". However, I am satisfied that it would be open to the tribunal of fact to conclude from the passages quoted above that what was taking place was not a proper consultation between solicitor and client as to the nature of the allegations and a possible defence, but the defendant was constructing a dishonest explanation for evidence so that his client could advance that dishonest explanation in order to frustrate the police enquiries into this murder. I refuse the application for a No Bill on the fifth count.

[17] Count 6 is a charge of conspiracy to pervert the course of public justice and relates to a number of occasions between the 15 June 2005 and 1 February 2006. As is apparent from the description of the earlier charges the defendant represented a number of clients during this period of time in respect of which his private consultations with his clients were subject to electronic surveillance. The particulars of offence allege that the defendant

> "…conspired with other persons with intent to pervert the course of justice to do acts which had a tendency to pervert the course of public justice, namely to use his role as a solicitor to keep members of a terrorist organisation informed of the progress of the police investigations into terrorist related offences, with a view to interference of said investigations."

[18] The prosecution case is that the defendant frequently made telephone calls during his private consultations with his clients to various individuals, notably a person or persons variously referred to as "Stevie", Stephen, or "the big man". It is alleged that the terms of these conversations show that the defendant was reporting the progress of the interviews and the nature of evidence which had been put to his clients during police interviews. In addition the defendant allegedly made various statements as to steps he had taken which, it is suggested, bear the inference that he was frustrating the police enquiries by various means, for example by ensuring that individuals

whom the police wished to question either as witnesses or suspects were alerted to the police desire to speak to them so that they could evade the police and thereby avoid questioning.

[19] There are a large number of individual remarks which the prosecution rely upon and it is unnecessary at this stage to refer to all of these, three passages are sufficient to illustrate the nature of the allegations made against the accused.

[20] On 4 July 2005 the defendant was consulting with Christopher Dinsmore during which the evidence given by a witness called Sewell was discussed in the following passage to be found at p. 714.

> "Sandhu: Uh-huh that's okay. He's probably getting pissed off. (Appears to be on the phone) Sorry for annoying you so many times, right now, ah in relation to Christopher Dinsmore, right they said they were up at the top of the, ah, they were trying to get Frankie Redmond, right, they can't get him, right, it's just a statement from him basically saying that ah he's seen on the camera at 1032 and 1036 with him and Sewell right so basically they picked him up ah or he they were walking along uhm, aye do you think they'll arrest Frankie Redmond here Christopher.
>
> Dinsmore: I don't know that, that's what I'm saying if he doesn't want to do it, just tell him to leave it.
>
> Sandhu: Ah don't don't let Sewell anywhere near the police station, no, ah Frankie Redmond, bottom line is this, is that ah he can confirm that he was, he was standing on the Newtownards Road at Hamilton's Bakery and then they went behind the Great Eastern, right ah through that entry, Strandtown as well, uh-huh, you just, aye you go with him and you stay with him.
>
> Dinsmore: Tell him if he doesn't want to do it don't do it.
>
> Sandhu: Ah,
>
> Dinsmore: Say that, say that.

> Sandhu: They're, they're seen right don't forget at 1030, 1032, ah, ah he wouldn't give them a time but they're picked up at the BP Garage at 1032, Connswater, ah Connswater they're picked up at 1036, basically confirmed that ah Sewell and Dinsmore, ah the Detective dealing with ah (inaudible) ah there's a Detective already down in Strandtown for the, ah if ah Chrissy says if you don't want to take him, just don't bother.
>
> Dinsmore: Just don't bother right."

[21] The statement by the defendant "… don't let Sewell anywhere near the police station" could reasonably be interpreted as instructing the person to whom the defendant was speaking to ensure that Sewell was kept out of the way of the police so that he could not be questioned.

[22] A second passage at p. 837 from a further consultation between the defendant and Dinsmore on 5 July 2005 is also relied upon by the prosecution.

> "Sandhu: Ahh, haa. You'll not do that, but nevertheless, Stephen would probably kick your balls in for that one.
>
> Dinsmore: For refusing a solicitor?
>
> Sandhu: Umm, hmm. I keep him informed of everything that happens.
>
> Dinsmore: Just as well Johnny.
>
> Sandhu: Umm, hmm. Like you never know what I pick up in the interviews, what I pick up in the interviews. Stopped us losing some guns in Ards recently.
>
> Dinsmore: Did it."

[23] This passage suggests that the defendant was in the habit of informing "Stephen" of all that transpired in the police station, and that he passed on information which would be of use to terrorists which, the defendant claimed, "Stopped us losing some guns in Ards recently". On its face this remark suggests that the defendant was closely identified with, and reporting to, a terrorist organisation, and by passing on to this organisation the

information he had gleaned in interviews he was able to prevent the police retrieving some guns in the recent past.

[24] The final passage to which it is necessary to refer at this stage starts at p. 904 and relates to a conversation between the defendant and Christopher Dinsmore on 15 November 2005 when Dinsmore asked why the police had been unable to arrest a man called Davy McCall.

> "Dinsmore: Why can they not get Davy McCall.
>
> Sandhu: Aye.
>
> Dinsmore: Why can they not get Davy McCall.
>
> Sandhu: Because I told him to go offside.
>
> Dinsmore: You did.
>
> Sandhu: Heh heh.
>
> Dinsmore: First crack.
>
> Sandhu: Heh heh.
>
> Dinsmore: How did you know they were after him as well.
>
> Sandhu: He rang me, he says they're at my mother's right.
>
> Dinsmore: Aye cause they don't know his real address.
>
> Sandhu: Heh heh, then they were at his sister's right.
>
> Dinsmore: Where his sisters.
>
> Sandhu: Somewhere and err and I says you fucking go underground until I see you. Why, why they do (inaudible)."

[25] The references to the defendant telling McCall "to go offside" and "I says you fucking go underground until I see you" support the allegation that the defendant was taking steps to ensure that McCall could not be questioned by the police.

[26] Mr Irvine made four submissions in relation to the totality of the evidence relied upon by the prosecution in relation to Count 6.

(i) There is no evidence in the papers that any of the recipients of this information are members of a terrorist organisation.

(ii) The evidence in the papers does not support the proposition that these persons are members of terrorist organisations and have never been convicted of terrorist membership.

(iii) The whole basis of the alleged conspiracy between Sandhu and these various persons is predicated upon the fact that the activity is carried out with the view to interfering with police investigations.

(iv) Whilst the evidence could clearly be viewed as Sandhu and others informing various persons as to the progress of police interviews there is no evidence that such investigations have in fact been interfered with due to these calls or discussions.

[27] I am satisfied that the passages set out above provide sufficient evidence to support the charge that the defendant was engaged in a conspiracy to pervert the course of justice by passing on information which revealed details of continuing police investigations in terms which indicate that the purpose of doing so was to ensure that individuals would be fully aware of the nature of police enquiries, were aware that the police were seeking to interview them and would evade the police, and, on one occasion, were able to prevent the police recovering weapons. I am satisfied that there is sufficient evidence that could justify the tribunal of fact concluding that the defendant was acting for a criminal purpose in passing this information to others in the terms which he allegedly did, and that that organisation was a terrorist organisation. I therefore refuse a No Bill in relation to count 6.

[28] The defendant must therefore be arraigned on Counts 1, 2, 5 and 6 as well as upon Counts 3 and 4 in respect of which no application for a No Bill has been made by the defence.

[29] The second application is that the proceedings should be stayed on the grounds of abuse of process because the police subjected the private consultations between the defendant and his client to intrusive surveillance. It will be necessary to refer to the relevant provisions of the Regulation of Investigatory Powers Act 2000 (RIPA), but before doing so it is appropriate to consider the nature and extent of legal professional privilege in the context of discussions between solicitor and client in relation to questioning of the accused at a police station because of the great importance of the issues which arise in this case.

[30] The nature and extent of professional legal privilege and any limitations thereof in the context of the alleged commission of a criminal offence by solicitor and/or client in the course of their private consultations have recently been considered by the Divisional Court In the Matter of an Application for Judicial Review by C, A, W, M and McE [2007] NIQB 101 and so it is unnecessary to refer to all of the authorities that were considered by the members of the court on that occasion. Nevertheless it is appropriate to state a number of principles which are firmly established. The first is that legal professional privilege is a fundamental condition on which the administration of justice as a whole rests, as Lord Taylor CJ (with whom the remainder of their lordships agreed) emphasised in R v Derby Magistrates' Court [1996] Cr. App. R. at page 401 where, having considered the relevant authorities, he concluded:

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

[31] The importance of this principle can be seen by the recognition of the common law that there was a general right in an accused person to communicate and consult privately with his solicitor outside the interview room. As Lord Browne-Wilkinson observed in R v Chief Constable of the RUC, ex parte Begley [1997] 4 All ER 833 at p. 837:

> "This development is reflected in the Judges' Rules and Administrative Directions to the Police which were published a Home Office Circular 89/1978 (see Archbold's Criminal Pleading, Evidence in Practice (42nd Edition, 1985 para. 15-46). The text expressly provided that the Rules do not affect certain established principles, which included the principle:
>
> (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 or the administration of justice by his doing so …
>
> This principle was subsequently enshrined in legislation in England and Wales as well as in Northern Ireland …"

[32] It was stated in similar terms by Lord Bingham and Lord Steyn in their dissenting opinions in Cullen v Chief Constable of the RUC [2003] 1 WLR 1763 at [5] and by Lord Millett at [50] where he said:

> "[50] My Lords, access to legal advice and the independence and integrity of the legal profession are cornerstones for free society under the rule of law. They are guarantees against the practice of holding undesirables incommunicado, which is the hallmark of a totalitarian regime. Yet they are of little intrinsic value in themselves. For most people and for most of the time there is no need for them. What matters is that they should be there when needed. Their importance lies in the potential seriousness of the consequences if they are not.
>
> [51] The right of a person detained in custody on suspicion of an offence to have access to a lawyer at any stage of an investigation has long been recognised by our domestic law and is implicit in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Serious consequences may follow the denial of the right."

But that the right may be subject to restrictions for good cause was also emphasised by Lord Millett when he said:

> "But the right, which is not set out expressly in the Convention, may be subject to restrictions for good cause. The question in every case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing: ibid. If it has not, the consistent case law of the Strasbourg Court is that Article 6 is not infringed."

[33] The importance which the common law has attributed to the ability of an accused in police custody to have access to independent legal advice in

private has been embodied in statutory form. Article 59(1) of the Police and Criminal Evidence (NI) Order 1989 (the 1989 Order) provides that:

> "A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time."

[34] A similar provision is to be found in Sch. 8, para. 7 of the Terrorism Act 2000, although both the 1989 Order and the 2000 Act contain provisions which permit the deferral of access to a solicitor in certain circumstances. The right to a private consultation has been recognised by the European Court of Human Rights, notably in Brennan v United Kingdom 34 EHRR 18 at [58], and in Ocalan v Turkey [2003] 37 EHRR 10 at [146].

[35] However, the European Convention jurisprudence recognises that in certain circumstances the right to a free and uninhibited discussion between lawyer and client may be subject to restrictions. In Erdem v Germany [2002] 35 EHRR 383, to which the Lord Chief Justice referred in his judgment in C, this possibility was identified. In that case correspondence between the accused and his lawyer had been monitored by a judge in accordance with the Code of Criminal Procedure and it was claimed that this was a violation of Article 8 of the Convention. However, it was recognised by the Strasbourg Court that a lawyer's correspondence might be legitimately intercepted if there was reasonable cause to believe that the privilege was being abused. In its judgment at [61] the court said:

> "It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged. Indeed in its S v Switzerland judgment of 28 November 1991 the court stressed the importance of the prisoner's right to communicate with counsel out of earshot of the prison authorities. It was considered, in the context of Article 6, that if a lawyer were unable to confer with his client without such surveillance and receive confidential instructions from him his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective. In the Court's view, similar considerations apply to a prisoner's correspondence with the lawyer concerning contemplated or pending proceedings where the need for confidentiality is equally pressing… The reading of a prisoner's mail to and

> from a lawyer … should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as 'reasonable cause' will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privilege channel of communication was being abused."

[36] The reference by the European Court to matters that "are otherwise of a criminal nature" as justifying the authorities in exceptional circumstances from interfering with confidential correspondence which was of a similar status to the right of a defendant to a private communication with his lawyer is significant in the context of the allegations in the present case, because it indicates that the right of private legal consultation between solicitor and client may be interfered with in certain circumstances if that right is being abused for purposes of a criminal nature.

[37] The common law, and domestic statute law, has long recognised that legal professional privilege cannot be invoked where there are communications, "criminal in themselves, or intended to further any criminal purpose". The exposition of this principle is contained in R v Cox and Railton 14 QBD (1884) in the oft-quoted judgment of Stephen J. At page 167 he said:

> "The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rules. A communication in furtherance of a criminal purpose does not 'come into the ordinary scope of professional employment'."

At page 168 Stephen J stated:

> "In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client

> must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object."

[38] The reasoning in Cox and Railton was affirmed by the majority of the House of Lords in R v Central Court ex parte Francis and Francis, [1989] 1 AC, Lord Goff said at p. 396:

> "Now, when I have regard both to the purpose which has long been understood to underline the principle of legal professional privilege, and to the reason why communications passing between a client with a criminal purpose and a solicitor who is innocent of any such purpose are held not to be protected by such privilege, it appears to me to be immaterial to that exception whether it the client himself, or a third party who is using the client as his innocent tool, who has criminal intention."

[39] At page 397 Lord Goff concluded:

> "Fourth, and most important of all, it seems to me that the disclosure of the third party's iniquity must, in the interests of justice, prevail over the privilege of the client, innocent though he may be."

[40] That the rule in Cox and Railton underlies Article 12(2) of the 1989 Order where it is stated that "items held with the intention of furthering a criminal purpose are not items subject to legal privilege" is clear. See Lord Goff in Francis and Francis.

[41] It is of course the case that any intrusion into the ambit of legal professional privilege may have the effect of greatly reducing, if not destroying altogether, the value of legal professional privilege. That was recognised by Stephen J in Cox and Railton at page 175 where he said:

> "We were greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers as that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to

> see whether it ought to be kept. We were earnestly pressed to lay down some rule as to the manner in which this consequence should be avoided. The only thing which we feel authorized to say upon this matter is, that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each particular case. … Of course the power in question ought to be used with the greatest care not to hamper prisoners in making their defence, and not to enable unscrupulous persons to acquire knowledge to which they have no right, and every precaution should be taken against compelling unnecessary disclosures."

[42] It is therefore apparent that the rule in Cox and Railton does not prohibit information being admitted in evidence which consists of communications between solicitor and client which are to further a criminal purpose on the part of either the defendant or his solicitor or, it may be added, both. When one comes to ascertain whether the information obtained and sought to be given in evidence falls within the Cox and Railton exception to the rule of legal professional privilege then, as Stephen J observed, the court must decide for itself on the particular facts of each case. In R (Hallinan Blackburn etc) v Middlesex Crown Court [2005] 1 WLR 1766 at [25] Rose LJ considered how the court could evaluate whether the substance of any conversation relied upon falls within or without the protection of legal professional privilege as explained in Cox and Railton:

> "Where, however, there is evidence of specific agreement to pervert the course of justice, which is freestanding and independent, in the sense that it does not require any judgment to be reached in relation to the issues to be tried, the court may well be in a position to evaluate whether what has occurred falls within or outwith protection of legal professional privilege as explained in R v Cox and Railton 14 QBD 153."

[43] It is central to the prosecution case in the present instance that the defendant was allegedly engaged throughout in a criminal enterprise, and therefore he was not legitimately acting as a solicitor and so no question of professional legal privilege can arise.

[44] I am satisfied that the evidence relied upon by the prosecution is such that, in the absence of any innocent explanation, it would be open to the tribunal of fact to conclude that the statements allegedly made by the defendant were outwith the ambit of legal professional privilege because the discussions between the defendant and his client, and with third parties, were for criminal purposes.

[45] At this stage I must turn to consider the argument advanced by Mr Irvine that the defendant cannot have a fair trial under Article 6 of the European Convention because the electronic eavesdropping carried out by the police to obtain the evidence relied upon in this case was in breach of the Article 8 rights of the defendant's clients and of the defendant himself. This requires me to consider the ambit of the decision of the Divisional Court in Re C and Others. But before doing so it is appropriate to set out the provisions of Section 28 of RIPA as this is relied upon as permitting the directed surveillance which resulted in the evidence relied upon in support of these charges.

> "28-(1) Subject to the following provisions of this Part, the persons designated for the purposes of this section shall each have power to grant authorisations for the carrying out of directed surveillance.
>
> (2) A person shall not grant an authorisation for the carrying out of directed surveillance unless he believes –
>
> (a) that the authorisation is necessary on the grounds falling within sub-section (3); and
>
> (b) that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.
>
> (3) An authorisation is necessary on the grounds falling within this sub-section if it necessary –
>
> (b) for the purpose of preventing or detecting crime or of preventing disorder.

(4) The conduct that is authorised by an authorisation for the carrying out of direct surveillance is any conduct that –

(a) consists in the carrying out of directed surveillance of any such description as is specified in the authorisation; and

(b) is carried out in the circumstances described in the authorisation and for the purposes of the investigation or operation specified or described in the authorisation."

[46] It is convenient to refer at this stage to refer to the other provisions of RIPA which provide for the authorisation of intrusive surveillance, authorisations which have to be approved by a Surveillance Commissioner, before the intrusive surveillance can be carried out. Section 32(2) provides that:

"Neither the Secretary of State nor any senior authorising officer shall grant an authorisation for the carrying out of intrusive surveillance unless he believes –

(a) that the authorisation is necessary on grounds falling within subsection (3); and

(b) that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out .

3. Subject to the following provisions of this section, an authorisation is necessary on grounds falling within this subsection if it is necessary –

(b) for the purpose of preventing or detecting serious crime.

(4) The matters to be taken into account in considering whether the requirements of subsection (2) are satisfied in the case of any authorisation shall include whether the information which it is sought necessary to obtain by the authorised conduct could reasonably be obtained by other means.

> (5) The conduct that is authorised by an authorisation for the carrying out of intrusive surveillance is any conduct that –
>
> (b) is carried out in relation to the residential premises specified or described in the authorisation or in relation to the private vehicle so specified or described."

Section 48(1) defines "residential premises" as meaning –

> "… so much of any premises as is for the time being occupied or used by any person, however temporarily, for residential purposes or otherwise as living accommodation (including hotel or prison accommodation that is occupied or used)."

[47] The first issue in C and Others was whether Section 28 of RIPA could be applied to consultations between legal advisers and clients and the Lord Chief Justice and Campbell LJ concluded that it could be.

[48] The Lord Chief Justice dealt with this aspect of the case at [59] to [61]:

> "[59] RIPA does not repeal the provisions that enshrine the right to confidential legal consultation. In particular circumstances, interference with that right may take place but it is not extinguished. Certain statutory conditions must be fulfilled and the steps outlined in the Code of Practice must be taken before directed surveillance of legal consultations may occur. It may only be authorised by a senior police officer and must be reported to a Surveillance Commissioner. In all other circumstances the right remains intact and unaffected by RIPA.
>
> [60] That the right of an accused person to consult privately with a legal adviser is not absolute was not disputed by the applicants. It was accepted that this right could be abrogated by legislation – indeed, the burden of the applicants' argument was that RIPA was not effective to achieve the modification of the right, not that it could never be changed or affected. Likewise, it was not asserted that the right to a fair trial guaranteed by article 6 of ECHR or the right to respect for a private life

> provided for in article 8 required that in every circumstance the consultation between an accused person and his legal adviser must remain immune from surveillance. That this should be so is not surprising. If serious crime can be detected and prevented by such surveillance, it would be startling to find that this could never be permitted to occur. Therefore, although the fundamental nature of the right must be reflected in any examination of whether it may legitimately be overridden in a particular case, provided sufficient safeguards are in place and the need for surveillance is meticulously established, it is, in my view, indisputable that the right will have to yield to that need.
>
> [61] I have concluded that it was Parliament's intention that section 28 of RIPA could be applied to consultations between legal advisers and clients. I do not consider that application of the maxim *generalia specialibus non derogant* requires that such consultations be deemed exempt from its provisions. It follows that, in my opinion, the argument advanced by Ms Quinlivan in relation to the vires of the Code of Practice must also be rejected."

[49] Campbell LJ concluded at [8] that:

> "Having weighed up the competing arguments I consider that it is necessarily and properly to be implied that it was the intention of the legislature that this fundamental right [that is legal professional privilege] should come within the scope of Part II of RIPA."

[50] The court did not consider it necessary to decide whether there had been a violation of the fair trial provisions of Article 6 of the European Convention in C because:

(a) it was not known whether surveillance of the applicants' consultations with their lawyers in fact took place; and

(b) there was no evidence as to the impact that the possibility of surveillance might have had on the trial of any of the applicants, several of whom had not been charged at all, and one of whom had pleaded guilty.

[51] Therefore the court was not required to consider, nor did it consider, the circumstances which arise in the present case, namely whether it is possible for the defendant to have a fair trial under Article 6. I am satisfied from the authorities to which I have referred that the common law, the European Convention, and s. 28 of RIPA all permit evidence to be adduced in court where that evidence prima facie suggests that either the solicitor or his client or both have been engaged in criminal purposes. If that is the position, then legal professional privilege does not apply. Whether such evidence obtained by way of directed surveillance may be admitted in a particular case depends upon whether the surveillance was lawful under s. 28 and that may well involve the court considering whether the requirements of s. 28(2) were met.

(a) "Was the surveillance necessary" within s. 28(3)(b), that is for the purpose of preventing or detecting crime, and

(b) "proportionate".

If both of these tests are met then the intrusive surveillance would be lawful. Whether the surveillance in the present case was necessary and proportionate will be a matter for the trial process to determine.

[52] I should at this point refer to a further unusual aspect of this case. Some of the consultations which were the subject of directed surveillance were also the subject of authorisations issued for intrusive surveillance either by the Chief Constable or the Deputy Chief Constable of the PSNI by virtue of s. 32. As a result the intrusive surveillance in question was approved by a Surveillance Commissioner before it was carried out. However, Mr Kerr QC now concedes that the intrusive surveillance was not lawful because the consultation rooms which were the subject of the intrusive surveillance were not "residential premises" within s. 26(3)(a) of RIPA because they were not within the definition of residential premises contained in s. 48(1) of RIPA. As Girvan LJ pointed out in C at [31]:

> "The definition of intrusive surveillance in RIPA 2000 is limited. The definition of residential premises refers to premises used, however temporarily, for residential purposes. It could, thus, include a police cell in which a prisoner is temporarily housed. However, the wording of the definition would not appear to include a room in a police station in which a defendant is consulting his solicitor prior to interview or during a break in interview."

[53] Mr Irvine seeks to avoid the consequences of the majority view in C that legal professional privilege may be subject to Section 28 of RIPA by relying on the effectiveness of Article 8 of the European Convention. That there was a breach of Article 8 and the right of privacy of both the client and the defendant in each instance is unquestionable because there was no enhanced safeguard in the shape of an independent judicial involvement into the approval of the surveillance in the form of the Surveillance Commissioner. As Campbell LJ put it at [14] in C:

> "If covert surveillance of an interview between a person under arrest in a police station and his legal adviser takes place it is likely that knowledge of matters subject to legal professional privilege will be obtained. In such circumstances I do not regard the authority of a senior police officer, however detached he may be from the matter under investigation, to provide a sufficient safeguard for the purposes of Article 8."

[54] Mr Irvine's argument is that to admit evidence obtained in breach of Article 6 is to infringe the defendant's right to a fair trial under Article 6. It is well established that a breach of Article 8 may well be relevant when the court has to consider the implications of Article 76 of the 1989 Order, see for example Lord Nolan in R v Khan [1997] AC at pp. 581 and 582. However it is also well established that a breach of Article 8 does not itself give rise to a breach of Article 6. As the European Court of Human Rights pointed out in Khan [31] EHRR 45 at [34] the admission of evidence is primarily a matter for regulation under national law.

> "34. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules, on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law. It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence - for example, unlawfully obtained evidence - may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings

> as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the 'unlawfulness' in question and, where violation of another Convention right is concerned, the nature of the violation found."

[55] In deciding whether or not a trial is fair the importance of the ability of the court to exclude evidence under the provisions of Article 76 of the 1989 Order has been repeatedly emphasised, both by the European Court and by the domestic courts as can be seen from [38] and [39] of the decision of the European Court in Khan:

> "38. The central question in the present case is whether the proceedings as a whole were fair. With specific reference to the admission of the contested tape recording, the Court notes that, as in the SCHENK case, the applicant had ample opportunity to challenge both the authenticity and the use of the recording. He did not challenge its authenticity, but challenged its use at the "*voire dire*" and again before the Court of Appeal and the House of Lords. The Court notes that at each level of jurisdiction the domestic courts assessed the effect of admission of the evidence on the fairness of the trial by reference to [Article 76 of the 1989 Order] and the courts discussed, amongst other matters, the non-statutory basis for the surveillance. The fact that the applicant was at each step unsuccessful makes no difference.
>
> 39. The Court would add that it is clear that, had the domestic courts been of the view that the admission of the evidence would have given rise to substantive unfairness, they would have had a discretion to exclude it under [Article 76 of the 1989 Order]."

[56] That whether the proceedings as a whole are fair, including the way in which the evidence was obtained, is the crucial question in considering whether an accused has had a fair trial under Article 6 was reiterated by the European Court in PG and JH v The United Kingdom (Application No. 44787/98) (unreported decision of 25 December 2001). The importance of Article 76 of the 1989 Order in this context was emphasised by Lord Hobhouse in R v P [2002] AC at 162 where he referred to:

> "… the vital role of [Article 76] as the means by which questions of the use of evidence obtained in breach of Article 8 are to be resolved at criminal trial. The criterion to be applied is the criterion of fairness in Article 6 which is likewise the criterion to be applied by the judge under [Article 76]. Similarly, the European Court of Human Rights decision that any remedy for a breach of Article 8 lies outside the scope of the criminal trial and that Article 13 does not require a remedy for a breach of Article 8 to be given within that trial shows that their Lordships were right to say that a breach of Article 8 did not require the exclusion of evidence. Such an exclusion, if any, would have to come about because of the application of Article 6 and [Article 76]."

[57] It is common case as I understand it that in the present case the evidence was obtained in breach of Article 8, but the prosecution case is that it was not obtained in breach of s. 28 of RIPA, and therefore was not unlawful in that sense. However, I am satisfied that were the trial judge to conclude that the evidence was obtained unlawfully because of a breach of Article 8 and/or in breach of s. 28 of RIPA that does not necessarily mean that the evidence of the conversations is inadmissible because, as Mr Kerr QC pointed out that evidence obtained illegally is nonetheless admissible is well established. See Kurmua v R [1955] AC 197, a rule reaffirmed by Lord Nolan in Khan at page 577-8.

[58] As Lord Woolf CJ observed in R v Mason and Others [2002] 2 Cr. App. R. 38 at page 642 [56]:

> "The language of [Article 76(1)] has been given a generous application by the courts and this has enabled the European Court of Human Rights to regard it as providing a significant protection for an accused person. … The general approach of English courts is not necessarily to exclude evidence because it has been obtained in a way which is contrary to law or contrary to rules contained in Codes of Practice under PACE … Notwithstanding this in the great majority of situations if the evidence would be excluded under common law as being obtained in abuse of process or under Article 6 of the European Convention, it is most unlikely to be held admissible under [Article 76] of PACE."

[59] I therefore conclude that the evidence relied upon by the prosecution may be admissible, even if it was obtained in breach of Article 8 (which is conceded), or even if it was unlawful under s. 28 of RIPA, because the trial judge has the power to decide under Article 76 of the 1989 Order whether evidence so obtained should be excluded.

[60] Finally I should refer to a subsidiary argument advanced by Mr Irvine to the effect that the defendant may be unable to obtain a fair trial because it is alleged that he may be unable to obtain disclosure. I can deal with this submission briefly because I am satisfied that the contrary is the case. The trial judge will plainly have to be satisfied that the authorisations under s. 28 were granted in accordance with the requirements of s. 29(2)(a) and (b) and s. 29(3)(b) of RIPA, and the relevant provisions of the Code of Practice. In those circumstances, disclosure, whether by the prosecution in accordance with the test in R v H or if directed by a judge, may well be necessary, subject to any issue of public interest immunity that may be raised. I am equally satisfied that the trial judge can have regard to the fact that the surveillance was carried out in breach of Article 8 when considering whether or not to exclude the evidence under Article 76. I do not believe that there is any substance in the fear expressed by Mr Irvine over the limitations of disclosure in those circumstances.

[61] I should finally record an argument advanced by Mr Kerr which I do not consider it necessary to resolve at this stage. Although he accepts that the intrusive surveillance was unlawful despite being approved by a Surveillance Commissioner because the room in which the consultation is being carried out was not within the definition of residential premises, he submitted that it would nonetheless be relevant, when the court was considering the bona fides of the police under Article 76, to take into account that even though the Surveillance Commissioner did not have power to improve the intrusive surveillance, nevertheless the fact that the approval of the Surveillance Commissioner was sought and obtained was relevant. Even if an invalid authority was a relevant consideration under Article 76 of the 1989 Order (as to which I express no view), it remains the case that not all of the conversations were in fact covered by such authorisations because they were only in effect between 25 April 2005 and 17 June 2005, and 22 June 2005 and 21 September 2005. However such approvals do not appear to have been in existence for those conversations relied upon between 5 and 7 October 2005, on 15 November 2005 or on 31 January 2006.

[62] I therefore conclude that despite the great importance which the law attaches to the preservation of legal professional privilege in the context of the unhampered ability of a solicitor to have a private consultation with his client in the police station, nonetheless the evidence obtained in the present case by means of directed surveillance, which at the present stage I should approach as being obtained lawfully, is capable of being admitted in evidence

because it discloses a state of affairs which appears to fall outwith the protection of legal professional privilege because it falls within the exception laid down in Cox and Railton and is not covered by the protection of legal professional privilege. These are all matters which can, and in my view should be, determined within the context of the trial process which I am satisfied will enable the trial judge to fully consider the lawfulness of the directed surveillance approved by the Chief Constable or the Deputy Chief Constable by virtue of Article 28 of RIPA. It follows that I am satisfied that the defendant can receive a fair trial, and that, contrary to the submission of the defence, it is inappropriate to stay the proceedings at this stage on the grounds of an abuse of process and I refuse that application also.