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Judgment: approved by the Court for handing down
(subject to editorial corrections)

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

JAMES QUIGLEY

Appellant;

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent.

Before: Nicholson LJ, Campbell LJ and Morgan J

NICHOLSON LJ

Introduction

[1] This is an appeal by way of case stated from the decision of Her Honour Judge Loughran whereby she affirmed the conviction of the appellant on a charge of attempting to cause by threat or menaces or in some other way Thomas Gumley to leave the place where he was resident, contrary to Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Section 1(a) of the Protection of the Person and Property Act (Northern Ireland) 1969. The appellant had been convicted of this offence by a magistrates' court for the Petty Sessions District of Armagh on 17 February 2004 and sentenced to imprisonment for six months suspended for three years. Thomas Gumley gave evidence at the magistrates' court and was cross-examined on behalf of the appellant. His witness statements were read at the county court as a result of a ruling by the judge. She altered his sentence to a fine of £200.

[2] The case was stated under Article 61 of the County Courts (Northern Ireland) Order 1980. By Article 61(2) it is provided that an application under paragraph (1) of Article 61 to the judge to state a case shall be made in writing

by delivering it to the chief clerk within a period of fourteen days commencing on the date on which the decision was given and a copy shall be served on the other party. By Article 61(3) it is provided that within a period of fourteen days commencing on the date on which the chief clerk dispatches to the applicant the case stated (such date to be stamped by the chief clerk ….) the applicant shall transmit the case stated to the Master (Queen's Bench and Appeals) and serve on the respondent a copy of the case stated with the date of transmission endorsed thereon.

[3] Order 32 of the County Court Rules (Northern Ireland) 1981 provides, inter alia:

> County Court Rules (Northern Ireland) 1981
>
> ORDER 32
> PART II
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> *Application of this part*
> 4. This Part shall apply, subject to the provisions of the relevant enactment and of the Rules of the Supreme Court, to any case stated which, under the provisions of any enactment for the time being in force, may be stated for the opinion of the Court of Appeal.
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> Stating of case
> 5. - (1) The Judge may state a case on the application of any party.
> (2) An application for a case stated shall be made in the manner and within the time provided by the relevant statute, and if not so provided, then such an application shall be made in writing by delivering it to the chief clerk within a period of twenty one days commencing on the date on which the decision was given and a copy shall be given to the other party.
> (3) The written application shall set out the precise point of law involved in the decision with which the applicant is dissatisfied.
> (4) Subject to any directions of the Judge in special circumstances, a case stated shall be prepared by the party applying for it and shall be submitted in draft form to the other party or parties for approval within one month from the day on which the Judge directs the case to be stated.

(5) The party to whom the draft case is submitted shall within three weeks from the day on which it is submitted to him return it with his observations thereon to the party who prepared it.

(6) Every case stated shall be divided into paragraphs numbered consecutively and shall concisely state such facts and refer to such documents as may be necessary to enable the Court of Appeal to decide any question raised thereby.

Submission and transmission of case

6. - (1) The party or parties preparing a case stated shall, within two months from the day on which the Judge directs the case to be stated or such longer time as the Judge may allow, submit it to the Judge for approval and settlement.

(2) Any dispute between the parties as to the contents of the case stated shall be determined by the Judge.

(3) The Judge shall within two months from receipt of a case stated approve and settle the case and shall-

(a) sign it and insert the date of such signature;

(b) where more than one party applies for a case stated, direct which applicant is to have carriage; and

(c) transmit the case to the chief clerk.

(4) Subject to paragraph (2), the chief clerk on receiving the signed case stated shall-

(a) endorse thereon the date of receipt; and

(b) transmit to the applicant a signed case with the date of transmission also endorsed.

(5) Where any enactment or any order of the Judge requires a party having carriage of a case stated to fulfil any condition precedent (whether by way of giving security for costs, or of entering into a recognizance for the due prosecution of the case, or otherwise) to the entry of the case stated in the Supreme Court, the chief clerk shall not transmit the case to the applicant until that condition has been fulfilled.

(6) Where any such condition precedent is not fulfilled, or the party preparing the draft case does not submit it to the Judge for approval and settlement, within the time fixed by the enactment or by these Rules or such longer time as the Judge

> may allow, the application shall be deemed to be withdrawn and thereupon, if the case was stated-
> (a) after the determination of the proceedings, that determination shall stand affirmed;
> (b) before the determination of the proceedings, the proceedings, shall stand adjourned until the next succeeding sittings or, with the consent of the parties, to the sittings for such other division as may be convenient.
> (7) Where the party to whom a draft case states has been submitted under Rule 5(5) makes default in complying with that Rule, the party having carriage may proceed in accordance with paragraph (1)".

[4] The application for a case stated was made in writing and delivered to the chief clerk within fourteen days of the date on which the decision was given but in breach of Article 61(2) and Order 32 rule 5(2) a copy was never served on the PSNI or its legal advisers, the Public Prosecution Service (PPS).

The case stated was prepared by the legal advisers to the appellant but in breach of Order 32 rule 5(4) it was never submitted in draft form to the PSNI or PPS for approval. The senior solicitor of the PPS, who is responsible for all appeals by way of case stated from the magistrates' courts and county courts swore an affidavit that she was unaware of the appeal until a short time before the call-over held in the Court of Appeal on 16 December 2005. It was only then that she obtained a copy of the settled case stated.

Two counsel had been instructed on behalf of the PSNI at different stages of the county court hearing. One of them dealt with preliminary points which led to rulings by the judge. The other dealt with the hearing on the merits on another date. The former was not aware that there was to be an appeal by way of case stated. The latter was not aware of the terms of the application for a case stated or of the draft case stated prepared on behalf of the appellant. While he was attending court on other business, the judge showed him a copy of the draft case stated and he made some oral comments. But the judge, of course, was unaware of the failure of the solicitors for the appellant to serve on the PSNI or the PPS a copy of the application for a case stated or of their failure to submit the draft case stated to the PSNI or the PPS for approval.

It is possible that the settled case stated was sent to the PPS as the solicitors for the appellant claim but on the evidence it is unlikely that it was received. Documents of this kind should be sent by special delivery. In any event neither the PSNI nor the PPS was able to make any contribution to the preparation of the case stated.

[5] It was submitted by Mr Valentine on behalf of the respondent that the appellant had not complied with the procedural steps set out for invoking the appellate jurisdiction of the Court of Appeal. He contended that one of the main purposes of the procedural requirements was to ensure that the respondent was aware of the intention to state a case within a short time of the trial hearing so that memories of the points at issue and of the evidence were fresh and a full contribution could be made to the drafting of the case stated. The requirement to serve the settled case stated on the respondent was to apprise the respondent of its content, and to give the respondent time to consider the case and be ready for a hearing of the appeal within a reasonable time. He referred to the decision of the Court of Appeal in Wallace v Quinn [2004] NI 164 on the issue of breach of procedural steps.

[6] On behalf of the appellant it was stated that "we could accept as correct any assertion that there was failure on the part of the appellant's solicitor" [to comply with Article 61.]

It was asserted on behalf of the appellant that counsel instructed by the PPS was aware of the application to state the case and the belief was expressed that he was given a copy of the judge's draft statement in advance of her final draft and statement of the case. The respondent, therefore, had adequate opportunity to make representations to the judge as to the terms of the statement of the case, it was submitted.

We are satisfied that the assertion and statement of belief were incorrect. Counsel for the PPS could not have known what points the appellant wished to argue before the Court of Appeal. At no time was a copy of the judge's draft given to counsel for the respondent.

It was contended that Article 61 must be interpreted so as to enable the court to treat the service of the copy of the requisition as directory and not mandatory and the time-limit waived where there is no prejudice to the respondent. Foyle, Carlingford and Irish Lights Commission v McGillion [2002] NI 86 and Wallace v Quinn were cited. But no attempt was made that we could discern to distinguish the latter case from this case.

Reliance was placed on Article 64 of the 1980 Order which empowers the appellate court to remit the case stated for re-statement or amendment or for a supplemental case to be stated thereon. But we do not consider that this Article was designed to be used in these circumstances and we are not prepared to use it for this purpose.

[7] Wallace v Quinn came before this court as an appeal by way of case stated from the conviction of the appellant by a magistrates' court. The appellant duly served on the clerk of petty sessions a requisition whereby he applied to the magistrate to state a case on a point of law for the opinion of

this court. There was no satisfactory evidence that a copy of the requisition was sent to the respondent. The magistrate furnished a draft case to the appellant's solicitor but the latter did not serve a copy on the respondent. Therefore no representation was made on behalf of the respondent in respect of the content of the draft. The magistrate signed the case and the court office transmitted it to the appellant's solicitor. The solicitor set the appeal down for hearing but did not serve a copy of the case by registered or recorded delivery post on the respondent. The appellant's counsel conceded that he could not establish that the requisition or the completed case was received by the respondent.

[8] Lord Carswell, then Lord Chief Justice, cited the well-know passage from the judgment of Lord Wolff MR in R v Immigration Appeal Tribunal, ex parte Jeycanthan [1999] 3 All ER 231 at p. 235

> "The conventional approach where there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory it is usually assumed it can be safely ignored. If it is categorised as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as being made without jurisdiction and of no effect. This has to be assessed on the consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory." And at pages 238-9:
>
> "I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict

compliance? (The substantial compliance question). Is the non-compliance capable of being waived, and if so, has it or can it and should it be waived in this particular case? (The discretionary question). I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences questions).

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

Lord Carswell continued:

"We respectfully agree with and adopt this approach to the construction of the requirements of Article 146 of the 1981 Order."

[12] We consider that if the requirements of Article 146(2) were applied so rigidly that any failure to observe the time limits meant that the appellant for a case stated was debarred from proceeding with his proposed appeal, this would be disproportionate and would constitute a breach of Article 6(1) of the Convention. It is therefore necessary for us to construe the provision in a way which does not bring about such a result. This may be done by adopting a similar approach to Article 146(2) to that which we accepted as valid in respect of Article 146(9) in Foyle, Carlingford and Irish Lights Commission v McGillion. As we have indicated, we do not consider that to label the time requirement as directory is now the preferred approach, but a similar avenue may be followed by asking what consequence (consistent with the Convention requirements) Parliament may be

> supposed to have intended if the applicant for a case stated failed to observe the time limits. The conclusion which we have reached is that the provision may be regarded as sufficiently complied with if the appellant has served the requisition within a reasonable time. The length of time which may be regarded will depend on the facts of the case, and in particular on the degree of prejudice which the delay in service may have caused to the respondent.
>
> [13] Where an applicant for a case stated has completed failed to serve the requisition, with the consequence that the respondent is unaware until later that a case stated has been sought and prepared and has had no opportunity to make representations on its terms, we find it very difficult to suppose that this can be regarded as substantial compliance, and we consider that it was the legislative intention that almost, if not completely, invariably in such cases the appeal will be barred. This is what occurred in the present case and it was only fortuitous that the respondent even discovered that the appeal was to be listed for hearing. In these circumstances we must conclude that the appellant cannot be regarded on any footing as having complied with Article 146, with the consequence that the time requirement should not be waived and the appeal should be dismissed. We do not consider that such a result would involve any breach of Article 6(1) of the Convention."

The decision in Wallace v Quinn is binding on us. No attempt has been made to distinguish it. Accordingly we do not have jurisdiction to hear this appeal. It cannot be emphasised too strongly that requirements in respect of cases stated should be adhered to. They are simple and straightforward.

[9] We did hear the merits of the appeal and, as a matter of courtesy to the judge, we propose to express our views on the questions stated for the opinion of this court.

Question 1

Was I correct in law in deciding that there was material before the court which satisfied to the requisite standard of proof the provisions of Article

3(1)(ii) of the Criminal Justice (Evidence) (Northern Ireland) Order 1988? The answer to this question is yes.

[10] The relevant portion of the 1988 Order is as follows:-

> "3.- ... a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if
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> (i) the requirements of one of the sub-paragraphs of paragraph (2) are satisfied; or
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> (ii) the requirements of paragraph (3) are satisfied.
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> (2) The requirements mentioned in paragraph (l)(i) are-
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> (a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;
>
> (b) that
>
> (i) the person who made the statement is outside the United Kingdom; and
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> (ii) it is not reasonably practicable to secure his attendance; or
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> (c) that all reasonable steps have been taken to find the person who made the statement, but that he cannot be found.
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> (3) The requirements mentioned in paragraph (l)(ii) are-
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> (a) that the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders; and
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> (b) that the person who made it does not give oral evidence through fear or because he is kept out of the way.
>
> *Principles to be followed by the court*
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> 5. - (1) If, having regard to all the circumstances
>
> (c) the county court on an appeal from a magistrates' court; …is of the opinion that in the interests of justice a statement which is admissible by

virtue of Article 3 or 4 nevertheless ought not to be admitted, it may direct that the statement shall not be admitted.

(2) Without prejudice to the generality of paragraph (I), it shall be the duty of the court to have regard-

(a) to the nature and source of the document containing the statement and to whether or not, having regard to its nature and source and to any other circumstances that appear to the court to he relevant, it is likely that the document is authentic;

(b) to the extent to which the statement appears to supply evidence which would otherwise not be readily available;

(c) to the relevance of the evidence that it appears to supply to any issue which is likely to have to be determined in the proceedings; and

(d) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused or, if there is more than one, to any of them.

Statements in documents that appear to have been prepared for purposes of criminal proceedings or investigations

6. Where a statement which is admissible in criminal proceedings by virtue of Article 3 or 4 appears to the court to have been prepared ... for the purposes-

(a) of pending or contemplated criminal proceedings; or

(b) of a criminal investigation,

the statement shall not be given in evidence in any criminal proceedings without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice; and in considering whether its admission would be in the interests of justice, it shall be the duty of the court to have regard -

(i) to the contents of the statement;

(ii) to any risk, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings, that its admission or exclusion will result in unfairness to the accused ...; and

(iii) to any other circumstances that appear to the court to be relevant."

"SCHEDULE 1
DOCUMENTARY EVIDENCE-
SUPPLEMENTARY

1. Where a statement is admitted as evidence in criminal proceedings by virtue of Part II -

(a) any evidence which, if the person making the statement had been called as a witness, would have been admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings;

(b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as a witness, could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the cross-examining party; and

(c) evidence tending to prove that that person, whether before or after making the statement, made (whether orally or not) some other statement which is inconsistent

with it shall be admissible for the purpose of showing that he has contradicted himself.

2. A statement which is given in evidence by virtue of Part 11 shall not be capable of corroborating evidence given by the person making it.

3. In estimating the weight, if any, to be attached to such a statement regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise."

[11] The judge set out the relevant facts at paragraph 6 and the submissions made to her at paragraphs 7 and 8 of the case stated. She then gave the reasons for her ruling which we set out below:-

> "Before deciding whether to accede to the application to admit Mr Gumley's statements I satisfied myself firstly that the statements had been made to a police officer and secondly that there was evidence before me that Mr Gumley, who had given evidence at the magistrate's court prior to being informed by Sergeant Robinson on 19 October 2004 of the threat, was not willing to give oral evidence through fear. I therefore concluded that the statutory criteria in paragraph 3 (3) of article 3 of the Criminal Justice (Evidence etc) (Northern Ireland) Order 1988 for the admissibility of the statements of Mr Gumley were fulfilled. I then considered the objections on behalf of the defendant as outlined at paragraph 8 above. I concluded that, even if Mr Gumley had not been honest about the reasons for the breakdown in his relationship with Ms Robinson, it did not necessarily follow that all statements by him were untruthful. I accepted that the apparent inconsistency in the account by Mr Gumley of the threat allegedly made against him would have to be taken into account at the appeal hearing in deciding what weight to attach to his statements if those statements were to be admitted in evidence. While there was evidence that Mr Gumley had failed to attend court in respect of proceedings other than those in which Mr Quigley was a defendant I noted that he had attended and had given evidence at the Magistrates Court in the present proceedings. I accepted that the fear

occasioned to Mr Gumley had not been caused by the appellant but I concluded that the legislation applied to fear howsoever caused.

I then applied the criteria in article 6 of the Criminal Justice (Evidence etc) (Northern Ireland) Order 1988. I decided, having regard specifically to the provisions in article 6 (i) and (ii) and taking account under article 6 (iii) of the objections on behalf of the defendant and my conclusions on those objections as outlined in this paragraph, that the statements of Mr Gumley ought to be admitted in the interests of justice."

A. Written submissions in regard to Question 1.

On behalf of the appellant Mr Treacy QC claimed that the statement taken from Mr Gumley on 16 January 2006 was not admissible as it was hearsay. Reliance was placed on R v Belmarsh Magistrates Court ex parte Gilligan [1988] 1 Cr App R 14. In that case the prosecution relied on the evidence of a person who in a written statement linked the applicant to illegal drugs and a further statement made to a Garda that he was unwilling to give evidence as he was in fear of his life. On judicial review it was held that it was necessary for the court to hear oral evidence as to fear.

In the present case the judge heard oral evidence from Constable Brown which included a first-hand account of the fear of Mr Gumley. Apart from what he saw and heard, he recorded in writing what Mr Gumley told him and he got him to sign the statement. By calling the police officer who took the statement the prosecution fulfilled the requirements of Article 3(3): see Neill v North Antrim Magistrates Court [1992] 4 All ER 846, a decision of the House of Lords.

[12] The claim on behalf of the appellant that the evidence of Constable Boyd ought not to have been admitted had no legal basis. He was cross-examined and the weight of his evidence was a matter for the judge. See R v Taylor (1996) NIJB 34.

[13] The contention on behalf of the appellant that the criteria for establishing fear under Article 3(1)(ii) of the 1988 order could not be satisfied on the evidence before the judge had no legal basis. The judge expressly referred to the matters of which complaint was made and took them into account. The fear of the witness does not have to be caused by or on behalf of the defendant, as the judge correctly held: see R v Taylor (1996) NIJB 34.

[14] The judge had, as was pointed out by Mr Valentine on behalf of the PSNI, looked at the witness statements of Mr Gumley critically, making an assessment of the quality of the evidence. She had looked at matters reflecting on the likely reliability of the statements and performed a balancing exercise on whether it was in the interests of justice to admit them or any of them: see In re Allen [1998] NI 47 and R v Quinn [1993] NI 351. She carefully considered the exercise of her discretion and dealt with each submission made on behalf of the appellant.

Oral submissions in regard to Question 1

[15] The only oral submission on behalf of the appellant that requires to be deal with is the argument that there was a breach of Article 6 of the Convention.

[16] Article 6(3)(d) of the Convention provides that everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

[17] The term "witness" has an autonomous meaning under the Convention and includes a person whose statements are produced as evidence before a court, even though the maker is not called at the trial. See Isgro v Italy (1990) A-194 and Asch v Austria (1991) 115 EHRR 597 among other authorities.

[18] In Kostovski v Netherlands (1990) 12 EHRR 434 the court stated at para 39:

> "It has to be recalled at the outset that the admissibility of evidence is primarily a matter for regulation by national law: see Schenik, 12 July 1988 Series A No 140, para 46. Again, as a general rule it is for the national courts to assess the evidence before them: see Barbera, Messegue and Jabardo v Spain (1989) 11 EHRR 360, para 68. In the light of these principles the court sees its task in the present case as being not to express a view as to whether the statements in question were correctly admitted and assessed but rather to ascertain whether the proceedings considered as a whole, including the way in which evidence was taken, were fair. This being the basic issue, and also because the guarantees in Article 6(3) are specific aspects of the right to a fair trial set forth in para (1) the court will consider the applicant's

> complaints from the angle of paragraph (3)(d) and (1) taken together."

[19] The court stated at para 41:

> "In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paras (3)(d) and (1) of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings."

Other decisions which support the proposition stated at para 41 of Kostowski include Unterpertinger v Austria (1991) 13 EHRR 175, Windisch v Austria (1991) 13 EHRR 173 and Barbera, Messergue and Jabardo v Spain (1989) 11 EHRR 360.

[20] In Asch v Austria (1991) 15 EHRR 597 the court said, having echoed the proposition stated in Kostowski:

> "In this instance before the trial court only Officer B recounted the facts of the case as Mrs J L had described them to him on the very day of the incident. It would clearly have been preferable if it had been possible to hear her in person, but the right on which she relied in order to avoid giving evidence cannot be allowed to block the prosecution, the appropriateness of which it is moreover not for the European Court to determine. Subject to the rights of the defence being respected, it was therefore open to the national court to have regard to this statement, in particular in view of the fact that it could consider it to be corroborated by other evidence before it … Furthermore, Mr Asch had the opportunity to discuss Mrs J L's version of events and to put his

> own, first to the police and later to the court …" : see paras 28 and 29 of the judgment.

[21] Emmerson and Ashworth in Human Rights and Criminal Justice summarise these decisions at 15-114 as follows:

> "What appears from these and other decisions is a complex mixture of at least three major factors. First, the court's chief concern is the fairness of the trial as a whole, the defendant's right to `confront' or cross-examine every prosecution witness is important, but not absolute. Or, to express the point differently, reliance on pre-trial witness statements is not contrary to the Convention, so long as the rights of the defence are respected. Secondly the court's judgment on overall fairness is much affected by the significance of the written or reported statements for the prosecution case: it is fairly clear that a trial would be unfair if the conviction rested `solely or mainly' on the disputed statement, but in some decisions the test is expressed in terms more favourable to the defence."

In the case cited in support of a test more favourable to the defence it was held that it would have been possible to afford the defence the opportunity to cross-examine and cast doubt on the credibility of the witness who was an undercover agent: see Ludi v Switzerland 15 EHRR 173 at para 49. As the learned authors point out the decision may be explained by a third factor that the court has regard to the practical possibility of according greater recognition to defence rights then was done at the trial. In other words, there are some cases where the impracticability of producing the witness at the trial might lead the court to adopt a more flexible approach to Article 6(3)(d). But the national court should always look for alternative safeguards: see Emmerson and Ashcroft, op cit at 15-115.

[22] In Windisch the witnesses who did not give evidence through fear remained anonymous which meant that the defence could not even attack their credibility. The court held that this was too great a restriction on the applicant's right to a fair trial. In Saidi v France (1994) 17 EHRR 251 the witnesses did not give evidence through fear. The court observed that the written witness statements constituted the sole basis for the applicant's conviction. Emmerson and Ashcroft comment that the absence of any corroborating evidence weighed heavily with the court (at 15-125).

[23] In Doorson v Netherlands (1996) 22 EHRR 330 the court accepted that the witnesses had been threatened and that there were counter-balancing procedures to compensate sufficiently for the handicaps under which the defence laboured and that there was sufficient other evidence against the defendant to justify the conclusion that there had been no violation.

[24] This is not a case where the prosecution alleged that the witness's fear was induced by the appellant or on his behalf. In such a case it can be argued that the defendant has deprived himself of the opportunity of cross-examining the witness. But it may be difficult to prove beyond reasonable doubt that the witness has been put in fear by or on behalf of the defendant. R v Sellick [2005] 1 WLR 3257, a decision of the Court of Appeal in England and Wales is a case in point and there is a valuable discussion of the Strasbourg jurisprudence. At paragraph 50 they state:

> "What appears from the above authorities are the following propositions. (i) The admissibility of evidence is primarily for the national law. (ii) Evidence must normally be produced at a public hearing and as a general rule article 6(i) and (3)(d) of the Convention require a defendant to be given a proper and adequate opportunity to challenge and question witnesses. (iii) It is not necessarily incompatible with article 6(i) and (3)(d) of the Convention for depositions to be read and that can be so even if there has been no opportunity to question the witness at any stage of the proceedings. Article 6(3)(d) is simply an illustration of matters to be taken into account in considering whether a fair trial has been held. The reasons for the court holding it necessary that statements should be read and the procedures to counterbalance any handicap to the defence will all be relevant to the issue, whether, where statements have been read, the trial was fair. (iv) The quality of the evidence and its inherent reliability, plus the degree of caution exercised in relation to reliance on it, will also be relevant to the question whether the trial was fair."

[25] In the present case the witness had given evidence at the magistrates' court where the appellant had the opportunity to cross-examine him. His evidence, if inconsistent with his witness statement, could have been put forward to the judge in favour of the appellant. He was not anonymous and his credibility was open to attack. As is apparent from paragraph 41 of Kostovski, set out above, the rights protected by Article6(3)(d) will normally

have been respected where the accused has been given an adequate and proper opportunity to challenge and question a witness against him at some stage of the proceedings. Although that would have been sufficient to deal with this point there were further matters which counterbalanced any handicap to the defence in not being able to cross examine the witness at the appeal. The police officer who arrived at the scene shortly after the offence was alleged to have been committed was available for cross-examination and was cross-examined. He gave evidence of an admission by the appellant after caution which corroborated the version given by the witness who was proved to have been threatened after giving evidence at the magistrates' court. The threat came from a terrorist organisation notorious for its brutality. The appellant gave evidence himself and his evidence was not believed by the judge. The judge sought to find a means of bringing the witness to court to no avail.

[26] She stated in her reserved judgment that she had decided not to attach weight to the witness's statement unless it was corroborated. She held that the words used by the appellant to Mr Gumley were in essence confirmed to Constable Boyd and that Constable Boyd corroborated the witness's statement.

<u>Question 2</u>

Should I have required the Crown to produce evidence of steps taken by them to alleviate the fear of Mr Gumley?

[27] There is an obligation on a judge to be satisfied that all reasonable steps have been taken by the police to alleviate the fears of a witness. The judge in this case suggested to the police that they should offer to escort Mr Gumley to court and they told her that they had offered to do so. But the offer had been refused. Mr Gumley's fear did not relate to getting safely to and from the court. His fear was what the IRA would do if he gave evidence against the appellant. Their assaults have left people crippled for life; their assaults have involved shooting in the knees and other parts of the body. People have died as a result of their assaults.

<u>Question 3</u>

Did I correctly apply the test contained within Article 6 of the Criminal Justice (Evidence etc) (Northern Ireland) Order in deciding that the documentary evidence should be admitted?

[28] We have dealt with this in answering Question 1. We are satisfied that the answer is Yes.

Question 4

Was I correct in law to accept the note in the custody record at page 7 of the PACE 12 on the basis of the evidence of Constable Boyd without Sergeant O'Connor being called as a witness.

[29] A number of points were made on behalf of the appellant which are not relevant to this question but go to the weight of Constable Boyd's evidence. The judge dealt with them. It was argued that she should not have looked at p7 of the custody record. But the appellant put in the custody record by identifying it and cross-examining Constable Boyd out of it. The judge did not use page 7 of the custody record as evidence of the truth of its contents and rightly so, because, as she said, Sergeant O'Connor who was the custody sergeant did not give evidence. But Constable Boyd had said that when he and the appellant were at the custody desk in the presence of the custody sergeant the appellant made a remark which he had previously made to Constable Boyd at the scene of the incident. Counsel for the appellant alleged that the custody record did not bear this out. At p7 of the custody record Sergeant O'Connor recorded a remark made by the appellant. This record supported the credibility of Constable Boyd. If a party puts in evidence a document not written by a witness in order to attack the credibility of the witness on a particular point, that party cannot object to other parts of the same document being used to support the credibility of the witness on the same point.

[30] The purpose of the cross-examination was to establish that Constable Boyd was dishonest or gravely mistaken in recounting an admission made by the appellant at the custody desk and the use of the custody record was for that purpose. The existence of a note in the custody record which confirmed that an admission had been made, albeit not in the same terms as recounted by Constable Boyd as the judge pointed out, undermined the attack on his credibility, refuting the contention that he was dishonest or mistaken. It went to his credibility only. The judge made this clear in her reserved judgment.

Question 5

Was I correct in law to infer from all the admissible evidence that the intent required by Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Section 1(a) of the Protection of the Person and Property Act (Northern Ireland) 1969 had been established to the relevant standard?

[31] We can find no fault with the reasoning of the judge on this occasion. No other conclusion could have been drawn from the threat of the appellant than that he intended to cause Mr Gumley to leave his home. Accordingly, the answer is Yes.

[32] We wish to thank counsel for their presentation of their arguments. We wish to commend the judge for the care and skill with which she dealt with the case and for the case stated which was a model of its kind.