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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL FOR NORTHERN IRELAND

THE QUEEN

v

PHILIP BLANEY

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] The appellant was tried by Coghlin J sitting without a jury at Belfast Crown Court on an indictment containing thirteen counts. At the conclusion of the case for the prosecution the judge acceded to an application of 'no case' in respect of seven of the counts charged. The appellant's trial on the remaining counts proceeded and on 9 January 2003 he was convicted of the following offences: -

1. Manslaughter of Elizabeth O'Neill on 5 June 1999, contrary to common law.
2. Causing an explosion on 5 June 1999 contrary to section 2 of the Explosive Substances Act 1883.
3. A further count of causing an explosion on 5 June 1999 contrary to section 2 of the 1883 Act.
4. Possession of an explosive substance on 5 June 1999 contrary to section 3 (1) (b) of the 1883 Act.
5. Possession of a firearm with intent contrary to article 17 of the Firearms (Northern Ireland) Order 1981.

[2] The appellant appeals against his conviction on all counts.

Factual background

[3] In June 1999 Mary Elizabeth O'Neill lived with her husband, John Joseph O'Neill, at 49 Corcrain Drive, Portadown. The house is in a housing estate known as the Westland estate. Not long after midnight on 5 June 1999, Mr O'Neill went to bed, leaving his wife watching television in the living room of their home. A short time later a bomb was thrown at the house and exploded in the hall causing fatal injuries to Mrs O'Neill. It appears that she died while attempting to remove the bomb from her home.

[4] Shortly after the attack on 49 Corcrain Drive a second bomb attack took place at 137 Westland Road, another house in the Westland estate. The occupants of that house had been wakened at about 12.50 am by a loud explosion and saw that the window was broken. Police and forensic examination of these premises uncovered in the front garden the remains of a pipe bomb similar to the device used at 49 Corcrain Drive. Fortunately, no injuries resulted from the attack on 137 Westland Road.

[5] The evidence against the appellant in relation to these bomb attacks and his possession of the explosive devices used in them consisted solely of admissions he made during interviews by police officers during his detention at Gough Barracks, Armagh between 30 November 1999 and 3 December 1999.

[6] The appellant was arrested at 7.05 am on 30 November 1999 and taken to Gough Barracks where he arrived at 7.40 am. While he was being processed there he stated that he wished to see a solicitor and nominated Gabriel Ingram. Mr Ingram was contacted at 9.00 am approximately. He indicated that he would attend at about 2.00 pm. Three other suspects had been arrested at the same time as the appellant and each of these had also nominated Mr Ingram as the solicitor with whom they wished to consult. The custody sergeant informed the officer in charge of the investigation, Detective Inspector Irwin, of this. The detective inspector, aware that all four prisoners had asked for the same solicitor and that he would not be available until 2 pm, contacted his superior, Detective Chief Superintendent McBurney, to ask for authorisation to start interviews before Mr Ingram arrived. Detective Inspector Irwin could not predict which of the prisoners would be seen first by the solicitor when he arrived and he anticipated that postponing the interviews would mean that at least one of the prisoners would not be available for interview until the evening. The detective inspector therefore balanced the requests from the prisoners to see the solicitor against the need to proceed with the investigation and to ensure that all persons in custody were dealt with expeditiously. He then discussed the matter with Chief Superintendent McBurney who duly authorised the commencement of

interviews pending the arrival of the solicitor. Mr Ingram did not arrive at 2.00 pm and the police again contacted his office and he indicated that he would come at 4.30 pm.

[7] On 30 November 1999 two police officers, Detective Sergeant Lynas and Detective Constable Morton, interviewed the appellant between 10.49 am and 11.52 am; between 12.50 pm and 1.05 pm; and again between 2.57 pm and 3.29 pm. At 4.30 pm the appellant had a consultation with his solicitor. After that Detective Sergeant Lynas and Detective Constable Morton interviewed him again between 4.49 pm and 5.18 pm. At 5.24 pm he had a further consultation with his solicitor. The same two officers interviewed the appellant again between 8.12 pm and 8.45 pm and 9.40 pm and 10.30 pm. The last of these interviews was interrupted so that the appellant's fingerprints could be taken. The appellant made no admissions during any of these interviews.

[8] The final interview of the appellant on 30 November began at 10.58 pm. It ended at 1.08 am on 1 December. In the course of this interview the appellant made admissions about his involvement in the offences for which he was subsequently charged.

[9] Further interviews of the appellant took place on 1, 2 & 3 December 1999. On 1 December he had consultations with his solicitor at 11.52 am; shortly after 10 pm; and again between 10.40 and 10.59 pm. The appellant had asked to see his solicitor at 7.27 pm but the solicitor could not be contacted until 8.30 pm and was not able to attend until 10 pm. A senior officer authorised the continuation of the interviews in the absence of the appellant's solicitor. On 2 December the appellant asked to see his solicitor shortly after 12 noon. Interviews were authorised before the solicitor was able to attend at 2.30 pm. A fourth and final request was made by the accused to consult with his solicitor at 9.03 am on 3 December 1999. Mr Ingram was contacted and indicated that he was going to court and could not attend until 11.30 am. Detective Inspector Irwin again sought and obtained an authorisation from Detective Chief Superintendent McBurney to interview the accused pending the arrival of his solicitor. On this occasion, Mr Ingram did not in fact arrive to consult with the accused until 4.00 pm.

The appeal

The appellant's arguments

[10] For the appellant Mr Treacy QC submitted that the safety of the appellant's convictions had to be assessed in accordance with contemporary standards. It was therefore relevant, he said, that if the appellant had been arrested in October 2000 he would not have been interviewed without his solicitor being present. The convictions could not be regarded as safe given that the appellant was not only interviewed without his solicitor being

present but also was interviewed before he had the opportunity to consult his solicitor.

[11] Mr Treacy's principal submission was that it ought now to be recognised that a suspect under interview should have a right to have his solicitor present at all times. He suggested that, as an inescapable corollary to that, any confession obtained in the course of an interview where the suspect's solicitor was not present must be excluded (1) because it was in breach of the common law; (2) because it ought to be excluded under article 76 of the Police and Criminal Evidence (Northern Ireland) Order 1989 - contemporary standards of fairness demand that a solicitor be present at interview, therefore to admit the confession would be unfair; (3) because it would be a breach of article 6 of the European Convention on Human Rights.

[12] The Chief Constable had announced in September 2000 that those charged with terrorist offences (who prior to that date would generally have been interviewed without their solicitor present) would thenceforth be interviewed in the presence of their legal representative. Mr Treacy argued that this reflected contemporary standards of fairness and that those values would have applied with equal force at the time that the appellant was interviewed. To deny him that elementary entitlement not only breached the requirements of fairness (and thereby rendered the convictions unsafe) but also constituted a breach of article 14 of the Convention. In November 1999 suspects arrested under equivalent legislation in Great Britain would have been permitted access to a solicitor and their legal representatives would be present during interviews. There was no justification for differential treatment of prisoners detained in Northern Ireland.

[13] The arguments that we have set out provided the principal thematic setting for the appellant's case but Mr Treacy also made a number of discrete criticisms of the judge's judgment. In paragraph [15] the judge said: -

> "The Quinn [*Quinn v UK* (Application No. 23496/94)] case bears some similarity to this case in that, in both, the police allowed the suspect to be interviewed before the arrival of a solicitor despite a request for access to the solicitor. However, unlike the *Quinn* case, in this case both sound and video recording facilities were available and it was the accused himself who refused to be interviewed on tape. In this case senior police officers who were familiar with the circumstances of the case, namely, Detective Inspector Irwin and Detective Chief Superintendent McCoubrey gave evidence and were cross-examined as to the circumstances in which authorisations were given

for the accused to be interviewed prior to the arrival of his solicitor despite a request for access to a solicitor. Both officers described in detail the circumstances in which authorisations were given in accordance with paragraph 6.6(*b*)(*ii*) of the Code of Practice revised in July 1996 and issued under the provisions of Section 61 of the Northern Ireland (Emergency Provisions) Act 1991. Both men impressed me as responsible and conscientious officers who gave their evidence in a credible manner and I am satisfied that factors of significance which they considered included the fact that all four accused nominated Mr Ingram as their solicitor and that there was considerable difficulty in accurately predicting the time at which he would attend. Furthermore, the cases of *Murray* [*Murray v UK* [1996] 22 EHRR 29] and *Quinn* both involved courts which drew an adverse inference from the silence of the accused when being questioned by the police prior to being given access to legal advice. In this case, the drawing of such inferences did not arise. The accused had access to his solicitor at 4.26 pm on 30 November 1999 after three interviews during which he had made no admissions of any kind. A further interview then took place during which he made no admissions and he then again saw his solicitor for consultation at 5.24 pm. The accused is alleged to have made admissions during the seventh interview which lasted from 10.56 pm on 30 November until 1.08 am on 1 December. The accused was again interviewed at 10.26 am on 1 December during which interview it is alleged that he again made admissions and this interview was actually terminated at 11.52 am in order to permit the accused to consult with his solicitor. The accused did not give evidence on the voir dire and his solicitor did not make any complaint to the court that interviewing the accused prior to his arrival had resulted in unfairness. In the circumstances, I am satisfied that permitting the accused to be interviewed prior to the arrival of his solicitor, despite his request for access to a solicitor, did not involve any breach of Article 6 of the ECHR."

[14] Mr Treacy submitted that the purported distinction drawn by the trial judge between the present case and *Quinn v UK* was invalid. It was, he claimed, irrelevant that audio and video equipment were not available during the interviews of *Quinn* since he had not alleged ill treatment. The essential point, Mr Treacy said, was that Mr Quinn, like the appellant in the present case, had been denied access to a solicitor while his interviews were taking place. That fundamental safeguard was not substituted by the availability of recording equipment. Similarly, the fact that the commencement of the interviews had been lawfully authorised could not compensate for the failure to ensure that that safeguard was in place. Mr Treacy also criticised the contrast drawn by the learned trial judge between this case and the *Murray* and *Quinn* cases on the basis that an adverse inference was drawn in those cases whereas none arose in the present case. He pointed out that no adverse inference had been drawn under article 3 of the Criminal Evidence (Northern Ireland) Order 1988 in *Murray's* case.

[15] On the particular facts of this case Mr Treacy drew attention to what he described as the "significant vulnerability" of the appellant. A psychologist, Dr Michael Barbour, who gave evidence on behalf of the appellant, had testified to the appellant's limited intellectual and verbal ability; his basic literacy skills were equivalent to those of a seven year old. After listening to the tapes of the police interviews Dr Barbour formed the impression that the officers had been repeatedly attempting to persuade the accused to answer questions and he expressed the view that, in the context of the vulnerabilities of the accused, the presence of a solicitor might have helped. Mrs Tunstall, another psychologist, gave evidence that the accused's "suggestibility" operated to make him believe what the police officer was saying and that the officers had reasons for believing that he had committed the offences.

[16] Mr Treacy referred to the "intensity of the interviews" and suggested that the judge failed to acknowledge the significance of their effect on the appellant. At paragraph 17 of his judgment the judge dealt with this claim in the following way: -

> "Mr Treacy QC also attacked the intensity of the interviewing by the police criticising, in particular, the fifth interview with the accused conducted by Detective Sergeant Lynas and Detective Constable Morton. Mr Treacy characterised this interview as "burdensome and harsh" referring to the Detective Sergeant raising his voice for a protracted period of time and banging the table some 50 times. He also condemned the use by the police officers of phrases such as "you can't sit like that now and say nothing", "now sort yourself out and start telling the truth", "you are going to have to start

> telling the truth about it " etc. as being inconsistent with the accused's right of silence of which he was specifically reminded in the official caution.
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> While I accept that the police questioning of the accused was robust and persistent, I think that it is important to place these criticisms of the fifth interview in context. In the course of cross-examination Mr Treacy QC initially put to Detective Sergeant Lynas that he had shouted at the accused and thumped the table. This was subsequently amended to an allegation of raised voice and repeatedly banging the table. The detective sergeant accepted that voices might have been raised during the interview and that it was possible that he had banged the table. He also agreed with Mr Treacy QC that he didn't normally do either of those things. I had an opportunity to hear and see the audio and silent video recording of this interview and it is clear that the detective sergeant did not thump or bang his fist upon the table. The tapes confirm that Detective Sergeant Lynas did raise his voice and slap the flat of his hand, which was resting on the table, some 45-50 times in emphasis over a period of some three minutes. This sound was picked up by the microphone which is clearly very sensitive since it is capable of detecting whispered remarks."

[17] It was suggested that this passage betrayed an all too casual dismissal of substantial complaints made on the appellant's behalf. Taken in conjunction with the appellant's personal vulnerability, the effect of the police officers' behaviour at this interview, Mr Treacy claimed, was to undermine the appellant's will to resist making admissions. That behaviour would not have occurred, he asserted, if a solicitor had been present.

[18] The appellant had told detectives that he did not wish to be interviewed on tape. They had switched off the audio recording at his request and proceeded with the interviews. Initially it was claimed that this represented a breach of paragraph 4.7 of the Code of Practice issued in connection with the audio recording of police interviews with persons detained under Section 14(1)(*a*) or (*b*) of the Prevention of Terrorism (Temporary Provisions) Act 1989 in that the police had not recorded the reason that the appellant wished to proceed with the interview without it being recorded. It was subsequently accepted that the relevant paragraph does not require police officers to ask the interviewee why he wishes to be interviewed without recording.

The respondent's arguments

[19] For the Crown Mr Lynch QC accepted that, in deciding whether the appellant's statements should have been admitted in evidence, contemporary standards of fairness should be applied. He submitted, however, that this did not mean that the court was obliged to approach this issue as if the statements were being made today. The essential question was whether the admission of the statements, given the circumstances in which they were made, would have an unacceptable impact on the fairness of the appellant's trial.

[20] On the claim that the receipt in evidence of the statements was in breach of article 6 of ECHR, Mr Lynch suggested that no general principle had emerged from the jurisprudence of ECtHR that where interviews of a suspect took place without his legal representative being present, his subsequent trial would be rendered automatically unfair. It was clear, he said, that Parliament intended that, in certain well-defined circumstances, an interview could take place without a solicitor being present. It would therefore be wrong to hold that any evidence obtained in an interview where a solicitor was not present must, by reason of that fact alone, be excluded.

[21] On the matter of the appellant's avowed vulnerability, Mr Lynch submitted that, on proper analysis, the psychological evidence adduced for the appellant amounted to no more than speculation. The judge had, he said, examined this evidence carefully and his conclusion that it should not affect the question whether the statements be admitted was unimpeachable. Likewise the judge had carefully assessed the evidence in relation to the behaviour of the interviewing officers and had correctly concluded that, although the questioning of the appellant was robust, it was not oppressive of him.

The standards to be applied

[22] In *R v Gordon* [2001] NI 50, at pages 66-68, Carswell LCJ reviewed the then relevant authorities on the application of current standards to the admission of a confession and the conduct of a trial that had taken place some 47 years before. He referred to a series of decisions where the English Court of Appeal had affirmed that contemporary standards should be applied in reviewing the safety of a conviction and observed that the High Court of Justiciary in Scotland had also adopted this approach in *Boncza-Tomaszewski v HM Advocate* 2000 SCCR 657. Carswell LCJ noted, however, that in *R v King* [2000] 2 Cr.App.R. 391 Lord Bingham CJ had discussed whether this approach was universally applicable. This prompted Carswell LCJ to suggest that there were "matters which await clarification in future decisions" in this area.

[23] The judgment in *King* is interesting in the present context. In that case the court had been asked to consider what its approach should be in a situation where a crime had been investigated and a suspect interrogated and detained at a time when the statutory framework governing investigation, interrogation and detention was different from that in force when the safety of the conviction was challenged before the Court of Appeal. At page 402, Lord Bingham said: -

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

[24] The relevance of this passage to the present case lies in its explanation that a change in rules and procedures will not alone render a conviction unsafe. Therefore, simply because the rules concerning the attendance of solicitors at interviews of suspects have changed, it does not follow that convictions obtained as a result of confessions made at those interviews will be automatically unsafe. As Lord Bingham said, all the material relevant to

the safety of the conviction must be examined. A change in procedures such as whether solicitors will be permitted to attend interviews does not have a pre-emptive effect on the safety of a conviction made before those rules came into force.

[25] This point was echoed by Lord Woolf in the later case of *R v Hanratty* [2002] 2 Cr App R 30 at paragraph 98 where he said: -

> "For understandable reasons, it is now accepted in judging the question of fairness of a trial, and fairness is what rules of procedure are designed to achieve, we apply current standards irrespective of when the trial took place. But this does not mean that because contemporary rules have not been complied with a trial which took place in the past must be judged on the false assumption it was tried yesterday. Such an approach could achieve injustice because the non-compliance with rules does not necessarily mean that a defendant has been treated unfairly. In order to achieve justice, non-compliance with rules which were not current at the time of the trial may need to be treated differently from rules which were in force at the time of trial."

[26] Of course, the fact that the appellant would have his solicitor present if he were to be interviewed today is pertinent to the debate whether his conviction is safe but it does not determine the outcome of that debate. The relevance of that factor lies in the impact that it may have on the fairness of the appellant's trial and therefore the safety of the conviction but this must be evaluated with all other relevant material. We therefore consider that, while contemporary standards of fairness must be applied in deciding whether the appellant has received a fair trial and whether, in consequence, his conviction may be regarded as safe, the fact that current rules require that he should be accompanied by his solicitor during interview does not, of itself, establish that his trial was unfair or that his conviction is unsafe.

The common law

[27] In *R v Begley and McWilliams* [1997] NI 275 the House of Lords declined the invitation to declare that it was the now inalienable right of every suspect to have his solicitor present during interview by the police. At pages 280/1 Lord Browne-Wilkinson dealt with this argument as follows: -

> "The conclusion is inescapable that it is the clearly expressed will of Parliament that persons arrested

> under Section 14(1) of the [Prevention of Terrorism] 1989 Act should not have the right to have a solicitor present during interview. In these circumstances I would reject the invitation to develop such a right as beyond the power of the House of Lords."

[28] Mr Treacy argued, however, that this decision must be viewed in light of the subsequent patriation of ECHR into the domestic law of the United Kingdom. He suggested that the effect of recent case law in the Strasbourg courts was that article 6 of ECHR required that a legal representative be present during every police interview of a criminal suspect. Since the courts (in common with all public authorities) were required by section 6 of the Human Rights Act 1998 not to act in a way which is incompatible with a Convention right, they were bound to give effect to the appellant's right to have his solicitor present at interview. In the present circumstances the only way in which that right could now be vindicated was by this court's recognition that the appellant's conviction was unsafe.

[29] We do not accept that the automatic consequence of the breach of an accused person's rights under the Convention must be his acquittal but we do not need to expand on that view because we consider that Mr Treacy's argument must fail for the rather more fundamental reason that article 6 does not require that the legal representative of a suspect must always be present in the course of an interview. We propose therefore to turn to a consideration of the recent relevant jurisprudence.

The Strasbourg case-law

[30] Article 6 (1) of ECHR provides: -

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

[31] Article 6(3)(c) provides that everyone charged with a criminal offence shall have the right to defend himself in person or through legal assistance of his own choosing. It has been held that these provisions may apply to pre-trial stages as well as to the actual hearing – see, for instance, *Imbrioscia v. Switzerland* (1993) 17 EHRR 441.

[32] As we have said, Mr Treacy's arguments on the effect of recent decisions of ECtHR and ECmHR resolved to the proposition that article 6 of ECHR required that a legal representative be present during every police interview of a criminal suspect. Mr Lynch contended that no such general principle

emerged from the cases; rather the only consistent theme of those decisions was that each case had to be assessed according to its own particular facts in order to decide whether a breach of article 6 arose.

[33] In *Murray v United Kingdom* [1996] 22 EHRR 36, ECtHR considered the case of a convicted person who had been denied access to his solicitor for forty eight hours while he was interviewed by police. On his subsequent trial the judge drew adverse inferences against the accused under articles 4 and 6 of the Criminal Evidence (Northern Ireland) Order 1988. Article 4 permits the drawing of an adverse inference in certain defined circumstances against an accused person who fails to give evidence. Article 6 permits the drawing of such an inference where an accused person fails to account for his presence at a particular place.

[34] In *Murray* the Government had submitted to ECtHR that actual, as opposed to notional or theoretical, prejudice must be shown by an applicant in order to give rise to a breach of article 6. It was argued that no actual prejudice had occurred in that case. The court dealt with that argument in paragraph 68 of its judgment as follows: -

> "68. It is true, as pointed out by the Government, that when the applicant was able to consult with his solicitor he was advised to continue to remain silent and that during the trial the applicant chose not to give evidence or call witnesses on his behalf. However, it is not for the Court to speculate on what the applicant's reaction, or his lawyer's advice, would have been had access not been denied during this initial period. As matters stand, the applicant was undoubtedly directly affected by the denial of access and the ensuing interference with the rights of the defence."

[35] It is clear, therefore, that, although the court implicitly rejected the suggestion that actual prejudice had to be established, it nevertheless concluded that the applicant had been adversely affected by the denial of access to his solicitor at an early stage. The range of options open to the applicant had been reduced in that he was not given the chance, before committing himself to a particular course, to decide in consultation with his solicitor what lay in his best interests. That deprivation was itself sufficient to allow the court to conclude that the applicant had been directly affected by the denial of access to his solicitor. This was inextricably linked to the drawing of adverse inferences against the applicant. Had he had an earlier opportunity to consult with his solicitor he may well have taken a course that would have prevented an adverse inference being drawn.

[36] It is to be noted that the court recognised that, even where an adverse inference is drawn against an accused person in relation to his reaction to interrogation, access to a solicitor may be restricted for good cause. At paragraph 63 of the judgment the court stated: -

> "National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 (art. 6) will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing."

[37] In *Quinn v United Kingdom* Application No. 23496/94 the applicant was interviewed by police after his arrest and before the arrival of his solicitor. Strong adverse inferences were drawn against the applicant pursuant to article 3 of the 1988 Order. This allows inferences to be drawn where the arrested person fails to mention any fact relied on in his defence in subsequent criminal proceedings. The applicant had refused to answer questions concerning certain fibres and residues found on his clothing. At paragraph 25 of its decision the Commission said: -

> "75. The Commission recalls that without having had access to his solicitor, the applicant was cautioned pursuant to Article 3 of the Order and following his failure to reply to questions, strong adverse inferences were later drawn at his trial. It is therefore of the opinion that the applicant was directly affected by the denial of access to his solicitor and that the rights of the defence were prejudiced in a manner incompatible with Article 6."

[38] Once again the finding that was critical to the conclusion that article 6 had been breached was that the applicant had been adversely affected because he had not seen his solicitor before refusing to answer the crucial questions. His failure to answer those questions led directly to the drawing of the inferences against him. Had he seen his solicitor it would have been explained to him that this consequence could follow his refusal to answer.

There was, therefore, a direct nexus between the lack of consultation with his solicitor and the disadvantage that the Commission concluded he had suffered. The significance of this approach is its implicit acknowledgment that the presence of a solicitor at interview is not a 'stand-alone' right. The refusal to allow a legal representative to be present may give rise to a breach of article 6 but this is not because there is an intrinsic right guaranteed by article 6 that a solicitor must always be present but because of the effect that the absence of a legal representative may have on the fairness of a subsequent trial.

[39] In *Averill v United Kingdom* [2001] 31 EHRR 36 the applicant had referred to evidence of alibi at the time of his arrest on suspicion of murder but at interview refused to answer questions including those relating to forensic evidence taken from his hair and clothes which established that he had been in close contact with a balaclava and a pair of gloves found in the get-away car used by the perpetrators of the crime. The applicant was denied access to legal advice during police interviews. At his trial for murder and attempted murder, the judge drew a 'very strong adverse inference' from the applicant's failure to disclose the details of his defence during the police interviews. ECtHR held that it was of paramount importance for the rights of the defence that an accused had access to a lawyer at the initial stages of police interrogation. The rights of the defence might otherwise be irretrievably prejudiced, particularly as an applicant who chose to remain silent risked an adverse inference being drawn against him. At paragraphs 57 & 58 the court said: -

> "57. The Court recalls that in its *John Murray* judgment it noted that the scheme contained in the 1988 Order was such that it was of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observed that, under the Order, an accused is confronted at the beginning of police interrogation with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at

> the initial stages of police interrogation (p. 55, para 66).
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> 58. Even though the applicant was denied access to a lawyer for a shorter period than was applied to *John Murray*, a refusal to allow an accused under caution to consult a lawyer during the first 24 hours of police questioning must still be considered incompatible with the rights guaranteed to him by Article 6. The situation in which the accused finds himself during that 24-hour period is one where the rights of the defence may well be irretrievably prejudiced on account of the above-mentioned dilemma which the Order presents for the accused. The fact that the applicant maintained his silence after he had seen his solicitor cannot justify the denial. Nor does the Court's conclusion as to the drawing of adverse inferences from the applicant's silence (see paragraphs 48 and 49 above) serve to legitimate the authorities' refusal to provide him with access to a solicitor during the first 24 hours of his interrogation. It suffices to note that the trial judge did in fact invoke the applicant's silence during the first 24 hours of his detention against him. As a matter of fairness, access to a lawyer should have been guaranteed to the applicant before his interrogation began."

[40] Although the court's statement about the need to have access to a lawyer at the initial stages of interrogation is couched in general terms, it is clear from the context of this part of the judgment that this statement relates to the dilemma which the 1988 Order presents to an interviewee and, in particular, the possibility of an adverse inference being drawn. It is significant that, earlier in its judgment, the court referred to the absence of any right under domestic law on the part of terrorist suspects to have access to a lawyer before interview and to the Home Office Circular issued after the decision in *Murray v UK* which advised prosecutors that they could not rely on inferences to be drawn from an accused's failure to answer questions before he had access to legal advice – see paragraphs 34 & 35. Despite the court's deliberations on these matters, at no point in its judgment was it suggested that article 6 guaranteed the automatic right to legal advice before interview or the right to have a solicitor present during interview. The court's consideration of the article 6 implications was firmly rooted in the effect that denial of access to a solicitor had on the fairness of the trial.

[41] In *Magee v United Kingdom* [2001] 31 EHRR 35, the evidence against the applicant consisted solely of oral admissions and a written statement made by him during police questioning. At trial, he contested the admissibility of the statement, claiming that he had suffered substantial physical ill treatment from police officers. Access to a solicitor had been denied for 48 hours pursuant to section 15 of the Northern Ireland (Emergency Provisions) Act 1987. The trial judge rejected the allegations of ill treatment and, on appeal, the Court of Appeal dismissed the appeal, finding that the applicant had not been ill-treated and that his conviction was neither unsafe nor unsatisfactory. The applicant instituted proceedings before ECtHR, claiming that his treatment was in breach of article 6 of the Convention. ECtHR held that the denial of access to a solicitor constituted a violation of article 6(1) in conjunction with article 6(3)(c).

[42] The *Magee* case did not involve the drawing of adverse inferences against the applicant. In paragraph 40 of its judgment ECtHR described as the 'central issue' in the case the applicant's complaint that he had been prevailed upon in a coercive environment to incriminate himself without the benefit of legal advice. The court noted that the applicant made a specific request to see a solicitor on arrival at Castlereagh Police Office, but this was denied and he was questioned from 10.55 am on 16 December 1988 to 12.45 pm on 18 December 1988 — more than 48 hours —without access to legal advice. The court also found that apart from contact with a doctor, the applicant was kept incommunicado during breaks between bouts of questioning conducted by experienced police officers operating in relays. It accepted the applicant's claim that he was kept in virtual solitary confinement throughout this period. In paragraphs 43 & 44 the court expressed its findings in this way: -

> "… The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent. Having regard to these considerations, the Court is of the opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confide in his interrogators. Irrespective of the fact that the domestic court drew no adverse inferences under art 3 of the 1988 Order, it cannot be denied that the art 3 caution administered to the applicant was an element which heightened his vulnerability

> to the relentless rounds of interrogation on the first days of his detention.
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> 44. In the Court's opinion, to deny access to a lawyer for such a long period and in a situation where the rights of the defence were irretrievably prejudiced is—whatever the justification for such denial— incompatible with the rights of the accused under art 6 (see, mutatis mutandis, *Murray v UK* (1996) 22 EHRR 29 at 67 (para 66))."

[43] In *Brennan v United Kingdom (Application no. 39846/98)* the applicant was arrested under section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989 and interviewed for thirty-five hours on consecutive days, beginning at 11.01 a.m. on 21 October until 25 October. At the time when the applicant was arrested there was an initial decision made to defer the applicant's access to a solicitor. The deferral was effective until the morning of 22 October. His solicitor was informed of the deferral but did not attend until 12.10 p.m. on 23 October. There was a period of time from early morning on 22 October when the applicant was not being denied access to his solicitor. He made relevant admissions that afternoon.

[44] The applicant's first interview with his solicitor lasted forty minutes and the applicant made no complaint of ill treatment during that visit. The applicant saw his solicitor again at 3.15 p.m. on 25 October and again no complaint of ill treatment was made in that interview, which lasted until 4.00 p.m. During the first interview with his solicitor, a policeman was present. The consultation took place within sight and hearing of the police officer who was in close proximity to the applicant and his solicitor. At the beginning of the interview, the police inspector told the solicitor in the presence of the applicant that no names were to be discussed or information conveyed which could assist other suspects and that the interview should be purely on legal advice.

[45] In addressing the question of the deferral of access to the applicant's solicitor, ECtHR again emphasised the need to concentrate on the particular circumstances of the case. At paragraph 45 the court said: -

> "45. The Court recalls in this connection that, even if the primary purpose of Article 6, as far as criminal matters are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 – may be relevant before a case is sent for trial if and so far

> as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see *Imbrioscia v. Switzerland*, judgment of 24 November 1993, Series A no. 275, p. 13, § 36). The manner in which Article 6 §§ 1 and 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In its judgment in *John Murray v. the United Kingdom* (8 February 1996, *Reports of Judgments and Decisions* 1996-I, pp. 54-55, § 63), the Court also observed that, although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause. The question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing."

[46] The court concluded that the deferral of access did not constitute a breach of article 6. At paragraph 48 it said: -

> "48. … while the applicant was interviewed by the police during the 24-hour deferral period, he made no incriminating admissions. The first admissions made by him occurred during interview on the afternoon of 22 October 1990 when he was no longer being denied access to a solicitor. Nor is it the case that any inferences were drawn from any statements or omissions made by the applicant during the first 24-hour period as was the case in *John Murray* (cited above; see also *Averill v. the United Kingdom*, no. 36408/97, § 58, ECHR 2000-VI). The essence of the applicant's complaints is not that he was denied access to legal advice to enable him to choose between silence and participation in police questioning, but rather that he made incriminating statements after the deferral period ended and before the arrival of his solicitor (see *O'Kane v. the United Kingdom* (dec.), no. 30550/96, 6 July 1999, unreported, and *Harper v. the United Kingdom* (dec.), no. 33222/96, 14 September 1999, unreported). The Court is not persuaded therefore that the denial of access

> during this initial period can be regarded in the circumstances as infringing the applicant's rights under Article 6 §§ 1 or 3 (c) of the Convention. It accordingly finds no violation of these provisions in this regard."

[47] The applicant in the *Brennan* case complained that the oppressive conditions in which he was interrogated, allied to his vulnerable personality, amounted to a breach of article 6 and that the admissions that he was alleged to have made ought to have been excluded on that account. After recalling that the rules on admissibility and the assessment of evidence were principally matters for domestic courts to determine, ECtHR rejected this claim in the following passage from its judgment: -

> "52. It is to be noted that in the instant case the circumstances in which the confession evidence was obtained were subjected to strict scrutiny at the *voir dire*. The applicant was represented both at his trial and on appeal by experienced counsel. The trial judge heard the applicant in person as well as the police officers who had questioned him at Castlereagh police station. The trial judge, whose findings were upheld by the Court of Appeal following extensive review of the evidence presented in the course of the *voir dire*, was satisfied as to its reliability and the fairness of admitting the evidence. The Court also notes that the applicant does not complain that the decision of either court was in any way arbitrary, or that there was inadequate inquiry into the circumstances in which the confession evidence was obtained such that neither court could have reached a properly informed assessment as to its reliability or fairness.
>
> 53. The applicant argued that in the absence of independent evidence of video or taped records of the police interviews, and the absence of the accused's solicitor, there were considerable difficulties for an accused to convince a court, against the testimony of the police officers, that any oppression took place. The Court agrees that the recording of interviews provides a safeguard against police misconduct, as does the attendance of the suspect's lawyer. However, it is not persuaded that these are an indispensable

> precondition of fairness within the meaning of Article 6 § 1 of the Convention. The essential issue in each application brought before this Court remains whether, in the circumstances of the individual case, the applicant received a fair trial. The Court considers that the adversarial procedure conducted before the trial court, at which evidence was heard from the applicant, psychological experts, the various police officers involved in the interrogations and the police doctors who examined him during his detention, was capable of bringing to light any oppressive conduct by the police. In the circumstances, the lack of additional safeguards has not been shown to render the applicant's trial unfair.
>
> 54. As regards the applicant's reliance on *Magee* (cited above), the Court observes that this case concerned a more extreme situation where the applicant was kept incommunicado by the police for a 48-hour period and his admissions were all made before he was allowed to see his solicitor. In the present case, the applicant's access to his solicitor was deferred for twenty-four hours and his admissions were made during the subsequent period when he was not being denied legal consultation. The applicant's complaint that his legal consultations were prejudiced by the presence of a police officer is examined separately below.
>
> 55. The Court concludes that there has been no violation of Article 6 § 1 of the Convention and/or Article 6 § 3 (c) as regards the police interviews."

[48] The court found that there had been a breach of article 6 because the first consultation that the applicant had with his solicitor took place in the presence of a police officer – see paragraphs 60-63 of the judgment.

[49] From these cases the following principles can be recognised: -

1. Article 6 § 3 normally requires that an accused be allowed to benefit from the assistance of a lawyer at the initial stages of an interrogation.
2. This right, which is not explicitly set out in the Convention, may be subject to restriction for good cause.

3. The question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.
4. The conditions of detention, especially if they are found to be oppressive of the detainee or psychologically coercive, may give rise to a breach of article 6.
5. The rules on admissibility and the assessment of evidence are principally matters for domestic courts to determine.
6. There is no general rule that requires that a legal representative be present during every police interview of a criminal suspect.
7. In each case where a solicitor has not been present during interview an assessment had to be made of the particular facts in order to decide whether a breach of article 6 arose.
8. Where a disadvantage accrued to the interviewee by the drawing of inferences at his subsequent trial, the fact that he had not had the benefit of legal advice at a time when he had to make choices that would affect whether inferences might be drawn is more likely to give rise to a breach of article 6.

The application of the relevant principles to the appellant's case

[50] The appellant did not have a consultation with his solicitor before he was interviewed. This was not because police had refused him this facility but rather because his solicitor found himself unavailable to attend on his client. It would be a bizarre situation if the convenience of a solicitor could be allowed to dictate the commencement of interviews of a suspect in a serious criminal investigation. While some short delay to allow a solicitor to attend the police station may be appropriate, it could not be right that the proper inquiry into grave crime should be delayed significantly because the legal representative of the interviewee found it difficult to be present before interviews were due to begin.

[51] Whether it will be right to start an interview before a solicitor has advised the arrested person will obviously depend on the particular circumstances of the case. Here the trial judge examined closely the grounds on which authorisation to allow interviews to begin was sought, notwithstanding that the appellant had not seen his solicitor. He also carefully assessed the reasons given for approving that course. He concluded that the decision to start interviews of the appellant was reasonable. We can find no reason to doubt the correctness of this determination. The decision to begin interviews before the appellant's solicitor consulted with him was, in our view, taken for good cause.

[52] The trial judge did not draw an adverse inference against the appellant. He was not placed at a disadvantage on that account by the absence of his solicitor until after interviews began. Moreover, he made no admissions until after he had consulted with his solicitor. Indeed he had consulted with his

solicitor twice before making admissions. At no time after consulting his solicitor did the appellant withdraw or seek to modify admissions that he had made earlier. No complaint was made on his behalf to the police or in the course of the trial that the absence of his solicitor before interviews began had resulted in unfairness. These were powerful factors that the judge was entitled to take into account and which militated strongly against the notion that the absence of the appellant's solicitor, either before interviews began or in the course of those interviews, resulted in any unfairness in his trial.

[53] One must then examine the circumstances of the appellant's detention and the effect that these had on him in order to assess whether they might give rise to a breach of article 6. The contrast between the conditions described in *Magee* and those encountered by the appellant is clear from the following passages of the learned trial judge's judgment: -

> "…The accused had access to his solicitor at 4.26 pm on 30 November 1999 after three interviews during which he had made no admissions of any kind. A further interview then took place during which he made no admissions and he then again saw his solicitor for consultation at 5.24 pm. The accused is alleged to have made admissions during the seventh interview which lasted from 10.56 pm on 30 November until 1.08 am on 1 December. The accused was again interviewed at 10.26 am on 1 December during which interview it is alleged that he again made admissions and this interview was actually terminated at 11.52 am in order to permit the accused to consult with his solicitor. The accused did not give evidence on the voir dire and his solicitor did not make any complaint to the court that interviewing the accused prior to his arrival had resulted in unfairness (paragraph 15)"
>
> and
>
> "… It is clear that prior to the offences with which he was charged and, indeed, at the time those offences were committed, the accused was acting as a Special Branch source. The interviewing officers were aware of these activities before their first interview with the accused. Detective Sergeant Lynas gave evidence that, at the start of the first interview, after the audio tape had been switched off at the insistence of the accused, the

accused had then mentioned his connection with Special Branch but had requested the interviewing officers not to make any notes about this matter. Detective Sergeant Lynas said that, accordingly, no notes of this matter were made although they did draw the attention of Detective Inspector Irwin to the fact that it was mentioned by the accused at the post interview briefing. Detective Sergeant Lynas said that, since the accused's involvement with Special Branch was already known to them prior to the interview, it did not seem to be particularly important" (paragraph 16)

and

"(*e*) … Of the nineteen interviews which took place between police officers and the accused during his detention only the audio/video tapes of interview five were played for the court at the request of the defence. Interview five took place after the accused had enjoyed a break from interviewing of approximately three hours. During interviews 1-4 the accused made no admissions nor did he make any admission during interview 5. At the commencement of interview 5 the accused was smoking a cigarette and during the interview neither the audio nor video tapes confirm any obvious signs of anxiety or distress on the part of the accused. Interview 5 lasted, in all, only some 33 minutes. After interview 5 concluded his detention was reviewed by the Detective Inspector Irwin to whom the accused made no complaint. During interview 6, which took place approximately one hour after the completion of interview 5 the accused made no admissions.

(*f*) Mr Treacy QC criticised Detective Sergeant Lynas and Detective Constable Morton for commencing the seventh interview at 10.56 pm – some 16 hours after the accused's arrest at 7.05 am. However, it is important to bear in mind that, while the accused had been interviewed upon six previous occasions during those 16 hours, the total time occupied by all six previous interviews was only just over 3 hours. In cross-examination by Mr Treacy QC Detective Sergeant Lynas agreed that it

was probably abnormal to commence an interview at 11.00 pm but he suggested that the relevant decision had probably been taken by Detective Inspector Irwin. Detective Inspector Irwin confirmed that this had been the case and that he had taken into account the fact that from 5.30 to 10.30 pm the accused had been interviewed for a total of approximately one hour with interview six lasting only some 20 minutes. Detective Inspector Irwin recalled that Detective Sergeant Lynas had indicated to him at some stage during interview 7 that the accused was making admissions and he then directed that the interview should proceed after conferring with the duty inspector who was monitoring the interviews. At the commencement of interview 7 the accused once more made it perfectly clear that he would not speak while the audio tape was recording and stated that he would tell the truth but he didn't want it on tape. This would appear to have been a rational decision reached by a positive exercise of the independent will of the accused.

(*g*) In his skeleton argument Mr Treacy QC referred to the "spartan conditions" at Gough Barracks and the fact that the accused was held "incommunicado" during his detention, drawing the attention of the court to the report of the Bennett Committee 1979, the report of the Independent Commissioner for Holding Centres 1994, the report of the Committee for the Prevention of Torture 1993 and the recommendations of the Patten Commission 1999. In cross-examination by Mr Treacy QC, Detective Sergeant Lynas agreed that, apart from a solicitor, terrorist suspects generally had no contact with the outside world at Gough Barracks, although he pointed out that upon request, a yard was available for smoke breaks and exercise. However, during the course of his detention neither the accused nor his solicitor appears to have made any complaint about being held incommunicado or the spartan conditions of Gough Barracks nor did the accused apparently attribute the making of his admissions to any such

> factors during the course of his interview with Mrs Tunstall.
>
> Mr Treacy was also critical of the failure to re-administer the caution when moving from recording the interview on audio tape to recording the interview in handwritten notes. However, I am quite satisfied that the appropriate caution was administered at the commencement of each interview, that the accused would have been aware of his right to remain silent and that he was under no misapprehension as to the status of the handwritten notes which he preferred upon the rational basis that they could later be denied (paragraph 17)"

[54] There was nothing in the evidence before the trial judge to support the view that the appellant felt oppressed or that he found the atmosphere in Gough Barracks oppressive. As the judge pointed out, he had had contact with police previously and felt sufficiently self-assured to insist that his interviews should not be recorded. The judge had the benefit of seeing and hearing a number of interviews and was able to make a confident assessment of the lack of pressure on the appellant. Again nothing that has been placed before us causes us to doubt the correctness of this finding. We have therefore concluded there was no unfairness in the trial of the appellant as a result of the absence of his solicitor either before the interviews began or in the course of those interviews and that no breach of article 6 has been established.

[55] Although we have reached this conclusion because of the particular circumstances of the appellant's case, we should emphasise that it will almost invariably be necessary to ensure a fair trial that a suspect receive legal advice before he is interviewed. This is especially so where the possibility of an adverse inference being drawn against the interviewee on a subsequent trial exists. Mr Treacy was right to draw to our attention the wide acceptance in many jurisdictions throughout the world of the principle that a person charged with a criminal offence should have the benefit of independent legal counsel. He was also right in asserting that the absence of legal advice is always relevant to the fairness of the trial. But, as has been repeatedly stated in other contexts, fairness is a concept that must be understood and applied according to the specific situation where it arises as an issue. It would be quite wrong to assume that a fair trial could never be achieved where, whatever the circumstances, a person was interviewed without his solicitor. This is why, in the cases referred to above, ECtHR has consistently stated that "the manner in which article 6 §§ 1 and 3 (c) is to be applied … depends on

the special features of the proceedings involved and on the circumstances of the case".

Article 14

[56] So far as is relevant article 14 of the Convention provides: -

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... national ... origin, association with a national minority, ... or other status."

[57] Mr Treacy argued that since, in November 1999 suspects arrested under equivalent legislation in Great Britain would have been permitted access to a solicitor and their legal representatives would be present during interviews and there was no justification for differential treatment of prisoners detained in Northern Ireland, the refusal to permit the appellant's solicitor to be present constituted a breach of article 14.

[58] In *Magee* the applicant raised a similar argument, complaining that unlike the position in Northern Ireland, suspects arrested and detained in England and Wales under Prevention of Terrorism legislation could have access to a lawyer immediately and were entitled to his presence during interview. In addition, in England and Wales, at the relevant time, incriminating inferences could not be drawn from an arrested person's silence during the interview in contradistinction to the position under the 1988 Order in Northern Ireland. He claimed that these differences in treatment amounted to a violation of his rights under article 14.

[59] ECtHR rejected this argument in paragraph 50 of its judgment: -

> "50. The Court recalls that Article 14 of the Convention protects against a discriminatory difference in treatment of persons in analogous positions in the exercise of the rights and freedoms recognised by the Convention and its Protocols. It observes in this connection that in the constituent parts of the United Kingdom there is not always a uniform approach to legislation in particular areas. Whether or not an individual can assert a right derived from legislation may accordingly depend on the geographical reach of the legislation at issue and the individual's location at the time. For the Court, in so far as there exists a difference in treatment of detained suspects under the 1988 Order and the legislation of England and Wales on

> the matters referred to by the applicant, that difference is not to be explained in terms of personal characteristics, such as national origin or association with a national minority, but on the geographical location where the individual is arrested and detained. This permits legislation to take account of regional differences and characteristics of an objective and reasonable nature. In the present case, such a difference does not amount to discriminatory treatment within the meaning of Article 14 of the Convention."

[60] This reasoning applies with equal force in the present case. The difference in treatment does not derive from factors such as national origin or association with a national minority or other similar status but from the geographical location of the applicant at the time of his arrest and prosecution. Article 14 has not been breached in this case.

The applicant's personality

[61] It was suggested that the trial judge had too readily dismissed the evidence given about the appellant's vulnerability to pressure in the interview setting. We do not accept this claim. In paragraph 17 (*i*) and (*ii*) of the judgment, Coghlin J analysed the evidence given on this subject in commendable detail. He concluded that the appellant's will had not been overborne and we agree that this was the only feasible conclusion to be reached on the available evidence.

Conclusions

[62] None of the grounds advanced on behalf of the appellant has been made out. His appeal against conviction is therefore dismissed.