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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

PATRICK ANTHONY GUINNESS

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Before: Weir LJ, Stephens LJ and Treacy J

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This is an historic case in which some 25 years ago, on 31 January 1992 Patrick Anthony Guinness ("the applicant") pleaded guilty to 7 offences committed over 27 years ago between 10 December 1989 and 29 June 1990. On 27 August 1992, some 7 months after his convictions, the applicant lodged a Notice of Appeal against all of those convictions but on 16 December 1994 he abandoned that appeal. The abandonment of his appeal is irrevocable unless the Court of Appeal treats the abandonment as a nullity. The applicant now applies to this court for an order that the abandonment of his appeal be treated as a nullity on the basis that it was not the result of a deliberate and informed decision by him but rather that his mind did not go with his act of abandonment.

[2] Mr O'Donoghue QC and Mr Devine appeared on behalf of the applicant and Mr Henry appeared on behalf of the prosecution.

Legal Principles

[3] The principles governing the abandonment of an appeal are to be seen in the context of the principle of finality. There are many aspects to the principle of finality including that notice of an application for leave to appeal against conviction is required to be given with 28 days from the date of conviction, see section 16(1) of the Criminal Appeal (Northern Ireland) Act 1980 and *R v Brownlee* [2015] NICA 39. In

R v Smith [2013] EWCA Crim 2388 Jackson LJ, delivering the judgment of the court, stated that:

> "Criminal litigation is a process in which the defendant is required to make a series of irrevocable (or usually irrevocable) decisions: for example, whether to plead guilty, whether to give evidence and so forth. If things go badly for the defendant, he cannot simply go back to square one and try a different tack. Criminal litigation is not a tactical exercise."

He added that:

> "The need for finality in litigation is a basic principle, which applies in all areas including criminal justice."

He also observed that:

> "In the criminal context the principle of finality has less drastic consequences because there exists a safety net outside the courts."

That safety net is the Criminal Cases Review Commission ("the CCRC") which can refer a case to the Court of Appeal (see *R v Mulholland* [2006] NICA 32) and which can be requested by the Court of Appeal to make a reference in circumstances where an appeal has been abandoned and the abandonment was not a nullity so depriving the Court of Appeal of jurisdiction but where the conviction is unsafe, see *R v Burt* [2004] EWCA Crim 2826.

[4] The principles governing the abandonment of an appeal were considered by this court in *R v Stewart* [2015] NICA 62. In that case the applicant had been convicted of the murders of Lesley Howell and of Trevor Buchanan. She appealed against both of these convictions but upon the hearing of the appeal and in court by her counsel she abandoned the appeal in relation to the murder of Trevor Buchanan. That abandonment was treated as having the same effect as abandonment by notice under rule 16 of the Criminal Appeal (Northern Ireland) Rules 1968. The applicant continued with the appeal in relation to her conviction for the murder of Lesley Howell but that appeal was dismissed. Subsequently she wished to pursue the appeal in relation to her conviction for the murder of Trevor Buchanan. She contended that the purported abandonment should be declared a nullity in that she did not authorise the abandonment of her appeal as she was not advised by her legal representatives that withdrawing the appeal would have the consequence of her appeal being treated as having been dismissed or refused by the court. It was submitted on behalf of the applicant that her mind had not gone with the abandonment since she was unaware of the consequence of so doing and she had

not been apprised of the grounds of appeal which had subsequently been formulated.

[5] Gillen LJ, in delivering the judgment of the court, considered the authorities and then set out the principles which should be applied when considering an application to withdraw a Notice of Abandonment of an Appeal or of an application for leave to appeal. The authorities included *R v Medway* [1976] QB 779, a decision of a five judge Court of Appeal in England and Wales. Lord Justice Gillen stated that:

> "[33] Counsel were ad idem on the legal principles that govern the concept of abandonment. They cited well known authorities which included: *R v Medway* [1976] QB 779, *R v Grey* [2004] 2 Cr. App. R. 30, *R v Grace* [1995] NIJB 113, *R v Shawn Edward Offield* [2002] EWCA Crim 1630, *R v Lambert* [2004] EWCA Crim 154, *R v Elrayess* [2007] EWCA Crim 2252, *R v Nelson Richards* [2010] EWCA Crim 3330, *R v RL* [2013] EWCA Crim 1913 and *R v Paul James Smith* [2014] Crim App R 1.
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> [34] From these authorities the following undisputed principles can be distilled:
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> (i) A Notice of Abandonment of Appeal is irrevocable unless the Court of Appeal treats that Notice as a nullity.
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> (ii) The "nullity test" is that the court is satisfied that the abandonment was not the result of a deliberate and informed decision but that the mind of the applicant did not go with his/her act of abandonment.
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> (iii) It is impossible to foresee when and how such a state of affairs might come about and it is wrong to make a list, under such headings as mistake, fraud, wrong advice, misapprehension and such like, which would purport to be exhaustive of the types of case where this jurisdiction can operate.
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> (iv) Bad advice given by some legal advisor, which has resulted in an unintended or ill-considered decision to abandon the appeal, may constitute grounds for nullity of abandonment. This would constitute one of the clear cases of a fundamental misconception, the basis of a decision that was plainly and clearly wrong and that led the applicant to apply his/her mind in ignorance of a very material consideration."

[6] It follows from *R v Stewart* that the decision for us is whether it can be said that the abandonment was not the result of a deliberate and informed decision; in other words that the mind of the applicant did not go with the abandonment of his appeal. In *R v Grant* [2005] EWCA Crim 2018 Hedley J, delivering the judgment of the court, stated that this question was not a question of discretion but of fact. We consider that it is for the applicant to satisfy this court that the factual basis probably exists. So in order to answer the question as to whether the mind of the applicant did not go with the abandonment of his appeal it is necessary for him to piece together what happened in relation to his Notice of Appeal dated 27 August 1992 so as to satisfy this court that probably his mind did not go with the abandonment of his appeal. That factual question requires an assessment of credibility for which see the observations of Gillen J in *Thornton v NIHE* [2010] NIQB 4 at paragraphs [12] and [13]. Furthermore, this application is made many years after the abandonment of the appeal. The effect is that if documents have been destroyed or if memories have dimmed with the passage of time it may prove difficult for the applicant to satisfy this court of the facts surrounding the abandonment of the appeal.

[7] If the abandonment of the appeal is not set aside, then following the decisions in *R v Medway* and in *R v Stewart,* this court has no further jurisdiction in the matter.

[8] Headings such as mistake, fraud, wrong advice, misapprehension and such like can only be regarded as guidelines the presence of which may justify a conclusion that the abandonment was not the result of a deliberate and informed decision.

[9] In order to satisfy the *Medway* test the wrong advice has to have a certain quality. In relation to an application based on advice a distinction has to be drawn between negligent or wrong advice and advice which transpires to be wrong footed by later events.

[10] *R v Burt* [2004] EWCA Crim 2826 is an example of advice which was wrong footed by later events. In that case the appellant had been tried and convicted with two others. All three had appealed but the appellant had withdrawn his appeal after the single judge had refused leave to appeal and after the appellant had received advice from counsel that the grounds, as they stood at that stage, would be unlikely to be any more successful before the full court. The advice from counsel was to abandon his appeal. The appellant abandoned his appeal though the other two accused continued with their appeals. In the event the appeals by the other two accused were successful. The appellant then applied for an order that notice of abandonment of his appeal should be treated as a nullity on the basis of wrong advice from counsel. During the hearing of that application it was conceded by the Crown in relation to the appellant that his conviction was not a safe conviction. However, the Court of Appeal considered the advice to the appellant by counsel was not wrongheaded or unreasonable, still less negligent or wrong, only that it was wrong footed by later events. In such circumstances the Court of Appeal did not have jurisdiction to set aside the abandonment of the appeal. Rather the remedy for

the court was to invite the Criminal Cases Review Commission to refer the matter to the court.

[11] Another example as to the quality of advice is contained in *R v Smyth* [2013] EWCA Crime 2388. At paragraph [59] of that judgment it was stated that incorrect legal advice means advice which is *positively wrong*. It does not mean the expression of an opinion on a difficult point with which some may agree and others may disagree. So an opinion cannot be characterised as wrong advice for the purpose of the *Medway* test if some lawyers take a different or more optimistic view.

[12] We are also of the view that it is the overall quality of the legal advice which the court has to consider. The applicant may well be concentrating on those aspects of the advice which he asserts were bad or wrong or negligent but, especially in a case where there is an understandable lack of evidence as to what occurred many years ago, the court should also take into account the advice which it is likely would have been given in relation to the prosecution case against the applicant.

[13] In addition to the advice having a certain quality it has to have a certain causal impact. Advice is there to be accepted or rejected. The applicant has to establish not only that there was positively wrong advice but also that it was of such a degree of materiality as to cause his mind not go with the abandonment of his appeal. Accordingly, the impact of the positively wrong advice is that it has to overbear or over reach the mind of the applicant.

[14] In *R v Stewart* this court considered the impact on the applicant in that case of not having been advised as to the consequence of abandoning her appeal. On the facts of that case Gillen LJ, in delivering the judgment of the court, stated that the court was prepared to proceed on the assumption that the appellant had not been expressly told that abandonment constituted dismissal. However, he stated that the court did not accept that her mind did not go with the abandonment of her appeal. He concluded that the fact of the matter was that she fully accepted the advice of counsel that the appeal in the case of the murder of Trevor Buchanan was groundless.

Factual background

[15] In 1989 and 1990 members of the Irish People's Liberation Organisation ("IPLO") including Peter McNally and Anthony Kerr were on the European continent with the aim of buying weapons.

[16] On 9 December 1989 a Belgian police officer was shot in Antwerp by two men who abandoned their car at the scene.

[17] On 11 December 1989 the investigation into that shooting led Dutch police to a flat in Amsterdam. There they found and arrested Anthony Kerr, who initially provided a false name to police. A large number of firearms were also located along

with some ammunition, including the firearm used to shoot the Belgian police officer. The Dutch police also seized two passports, one Irish and one British, in the name of Peter McNally, as well as a Northern Ireland driving licence in the same name. Anthony Kerr had a false passport in the name of Terence Anthony McDonagh. Dutch police also described finding a shopping list of firearms and a diary with English writing which included the words, "FAT PAT" beside the word "Shop." (At that time the applicant was overweight, he had a close association with the McNally family, and he ran a chip shop that was referred to throughout his police interviews as a "shop.") A birth certificate in the name of Desmond Black was found and some Bank of Ireland materials marked with Black's name and what appeared to be an Andersonstown branch sort code.

[18] The Dutch police were subsequently alerted to another address in Amsterdam which was used as a storage area for a builder, but the next door neighbour's post was often delivered there by mistake, meaning he often checked the mail. On the 28 June 1990 an envelope which was addressed to BM McCartney was mistakenly delivered to the storage area. The neighbour opened the envelope and found that it contained an Irish passport in the name of Michael Collins. The photo on the passport was of Peter McNally, who was on the run following the shooting in Antwerp and the arrest of Anthony Kerr in Amsterdam. In the envelope the Dutch neighbour also found a birth certificate in the name of Michael Collins and four press passes containing NcNally's photo, but Michael Collins' name. The press passes had all been stamped with a rubber National Union of Journalists ink stamp. The Dutch neighbour gave these items to the Dutch police.

[19] In 1991 two searches were carried out by police in Belfast. On 12 February 1991, police searched the applicant's home in Belfast as part of an unrelated investigation. A chequebook in the name of Gerard Campbell was found in a drawer below his bed along with an identity card in the same name. When the drawer was removed, a hidden box was found inside the unit. It contained 80 blank press passes, some photographs and a photographic negative. The photographs were of the applicant in various different disguises. The negative was of Peter McNally. The press passes in the applicant's bedroom were the same batch as those found in Amsterdam with McNally's photo, but Michael Collins' name. There was also a press pass with the applicant's photo, but Gerard Campbell's name. Police also found an inkpad and a rubber stamp. The stamp was for the National Union of Journalists ("NUJ"). It was forensically tested by FSNI who confirmed that it was used to stamp the press pass seized by police in Amsterdam with McNally's photo, but Collins' name. Also in the applicant's bedroom was a list of bars in Belfast and their respective telephone numbers, along with commentary about whether or not they could receive incoming calls. For example:

> "Joxer – was not able to receive incoming calls even thow (sic) told it could…
>
> Europa – no good for receiving incoming calls"

The inference is they were listed for warning calls from a terrorist organisation. The list of telephone numbers also contained a Belgian telephone number (according to police) and what appears to be a note of arrangements for the timing of calls from Belgium to Northern Ireland on a particular telephone number. The police also found two pairs of binoculars and a pair of walkie talkies, which had the serial numbers partially removed.

[20] The applicant was arrested on 12 February 1991.

[21] On 14 February 1991 the police carried out the second search which was of the applicant's chip shop on the Ormeau Road Belfast. In a filing cabinet in the chip shop police found a file marked 'Guinness & Company' which contained a letter from the Bank of Ireland about the account of Gerard Campbell (the false name used on the press card ID in the defendant's bedroom along with the various disguise photos). The letter referred to the report of a large number of stolen cheques and a request for the account holder to make contact with the bank. The letter was addressed c/o Patrick Guinness at the applicant's home address in Belfast. During the course of his police interviews the applicant was asked about financing for the IPLO, the various trading names he was associated with and he admitted operation of a bank account in Dublin held under a false name. He said it was to do with greyhounds, like the fake press passes. Also contained within the "Guinness & Company" file police found three IPLO statements sellotaped together. The statements contained an assurance to the local community that the IPLO was not involved in drug dealing and would punish any members found to be involved in the trade. It urged members of the public to report any such activity to the IPLO. This was an issue of concern for the IPLO at the time because their reputation was becoming tarnished with drugs. During his police interviews the applicant explained that the statements were found on the floor of the customer area of his chip shop. He believed they had been dropped by a customer and he stuck them together before pinning them on the notice board for the customer to retrieve the next time they visited. When asked why these were in a file marked Guinness & Company in his filing cabinet he said he had taken the statements down after a while because they had not been retrieved. He admitted sticking them together. Also within the folder police found press cuttings about the IPLO. There was an Irish News cutting dated 23 April 1990 concerning the murder of Eoin Morley, who had been shot by the IRA. There was a second article concerning the connection between the murder of Eoin Morley and a £57,000 fraud in which Eoin Morley and the applicant had been involved.

[22] The applicant was detained at Castlereagh RUC station and questioned by police. According to the statements of the police officers involved, the applicant initially claimed he had obtained the false NUJ credentials to pose as a journalist in the greyhound racing community but refused to answer questions about the IPLO documents found in his shop. The applicant, however, then admitted to being recruited into the IPLO in early 1989 by John McNally (the brother of

Peter McNally); that he knew Peter McNally had travelled to Holland in order to buy guns for the IPLO and that he was now on the run. He then said a man called Donnelly had brought him a photographic negative and a birth certificate in the name of Michael Collins; and admitted to making the fake NUJ press cards with Michael Collins' name and Peter McNally's photograph. He also admitted that he made an application for an Irish passport in the name of Michael Collins with Peter McNally's photograph; sent it off to Dublin to be processed; and on recieving the completed passport giving it, together with the forged press cards and birth certificate to Peter McNally's father. He further admitted to having recruited members to the IPLO when he was in prison in 1989. The applicant, however, retracted these admissions. It is then claimed that he repeated the admissions while openly weeping during the questioning. The applicant did not sign any of the interview notes.

[23] On 29 November 1991 the applicant was charged with the following offences:

(i) Making available a false passport and other false documents knowing, or having reasonable cause to suspect, they might be used in connection with terrorism, contrary to section 9(2)(a) of the Prevention of Terrorism (Temporary Provisions) Act 1989;

(ii) Belonging to a proscribed organisation, namely the Irish People's Liberation Organisation (IPLO) contrary to section 21(1)(a) of the Northern Ireland (Emergency Provisions) Act 1978;

(iii) Completing a passport application form in the name of Michael Collins with the intention that it be passed off as genuine, contrary to section 1 of the Forgery and Counterfeiting Act 1981;

(iv) Making false instruments, namely a number of NUJ membership cards bearing photographs and the NUJ stamp, contrary to section 1 of the Forgery and Counterfeiting Act 1981;

(v) Making a false instrument, namely a NUJ membership card in the name of Gerald Campbell, contrary to section 1 of the Forgery and Counterfeiting Act 1981;

(vi) Making false instruments, namely a number of blank NUJ membership cards, contrary to section 1 of the Forgery and Counterfeiting Act 1981;

(vii) Possessing an Irish passport in the name of Michael Collins contrary to section 5(1) of the Forgery and Counterfeiting Act 1981.

[24] The applicant was returned for trial in the Crown Court. He was represented by PJ McGrory & Co, Solicitors who instructed both Mr Harvey QC and Mr Eugene Grant, barrister-at-law. Enquiries have been made of Barra McGrory QC

previously of the firm of PJ McGrory & Co. Mr McGrory has only the barest of recollections of the applicant and does not consider that he can be of any assistance.

[25] The arraignment of the applicant was adjourned on a number of occasions to permit his legal representatives to obtain medical reports on whether he was fit to plead. Two Consultant Psychiatrists assessed him as being fit to plead.

[26] On 31 January 1992 at Belfast Crown Court the applicant was arraigned and pleaded guilty to all charges. He was duly sentenced by the Crown Court judge to 5 years' imprisonment on each count, concurrently. A suspended sentence of 4 years' imprisonment imposed on 9 March 1990 was activated, also to run concurrently.

[27] The applicant claims that his legal representatives advised him to plead guilty as he was not mentally strong enough to withstand the rigours of giving evidence.

[28] On 20 May 1992 the applicant prepared a lengthy document setting out the basis upon which he contended that he had been wrongly convicted. Amongst other matters he contended that the police claim to have secured an admission from him that he was a member of the IPLO was a fabrication. He also alleged that he had been subjected to pressure during the police interviews though we note that during his detention he was examined by a doctor who noted that "he was alert and composed and did not show any sign of undue distress".

[29] On 21 August 1992 without the benefit of legal advice but with the assistance of a prison governor and a fellow prisoner the applicant lodged a Notice of Appeal together with grounds of appeal against conviction and sentence. The grounds of appeal were inadequate, baldly asserting that the convictions were both unsafe and unsatisfactory and the sentence was manifestly excessive and wrong in principle. On 27 October 1992 Master Care wrote to the applicant requesting that the applicant set out proper grounds of appeal. The applicant at some stage towards the end of 1992 instructed Francis Keenan & Co, Solicitors, to deal with his appeal.

[30] In February 1994 a report from a handwriting expert relating to the passport application form was obtained for the purpose of the appeal, which report supported the proposition that the handwriting on the application for the fake Irish passport was not the applicant's handwriting. The applicant states that he was advised by Mr Murphy, a solicitor in the firm of Francis Keenan, that this was a strong point in his favour.

[31] On 4 February 1994 the applicant commenced civil proceedings against the Chief Constable of the RUC on the basis that the search of his home, his arrest and his detention in Castlereagh police station in February 1991 had been unlawful and, in the alternative that during the course of his detention he was subject to assaults, batteries and trespasses to his person by RUC officers. The statement of claim in those proceedings was served on 16 May 1996. The writ was issued by

James Johnston Solicitors on behalf of the plaintiff but by the date of the service of the statement of claim Francis Keenan Solicitor had taken over carriage of these civil proceedings having served a notice of change of solicitors on 11 January 1995. Accordingly, that firm was instructed by the applicant and remained in the civil proceedings after his appeal had been abandoned. Mr Murphy left Francis Keenan Solicitors in January 2000 forming his own firm of Morgan and Murphy. The applicant transferred the civil proceedings to Mr Murphy's new firm and at some date and from recollection those proceedings were settled on terms endorsed for some £2,000 or £3,000. Thereafter, Mr Murphy dealt with the applicant in relation to various civil matters and also dealt with cases for his wife and grandchildren. He states that during the whole of this time he was never made aware by the applicant of any issues in relation to Mr Murphy's conduct of the appeal. It was not suggested to Mr Murphy that he had incorrectly advised the applicant or that he had failed to inform the applicant as to the effect of abandoning his appeal; rather the applicant continued to rely on Mr Murphy for legal advice and services.

[32] On 9 March 1993 there is a note in the court papers that Mr Keenan stated that he had consulted three times with the applicant and at the minute he has no proper grounds available. Mr Keenan requested further time. On 28 January 1994 the Court of Appeal ordered that proper grounds of appeal should be lodged. There were then various mentions before the Court of Appeal and the applicant states that on each occasion he was produced in court and that he was represented by Mr Keenan.

[33] In June 1994 the applicant was released from prison.

[34] On 16 December 1994 before MacDermott LJ, Carswell LJ and Campbell J the appeal was dismissed following abandonment. We consider that Mr Keenan would have appeared before the court on this occasion and that the applicant was also present when his appeal was abandoned.

[35] The original file held by Francis Keenan Solicitors (now McKenna Sweeney McKeown, Solicitors) has been destroyed.

[36] Mr Keenan has no meaningful recollection of relevant events but rather can only rely on his usual practice.

[37] It is the recollection of John Murphy, who was at that time a solicitor in the firm of Francis Keenan, that Mr Cinnamond QC and Mr Cushinan BL "were instructed by Mr Keenan but neither would draft grounds of appeal as at that stage Mr Guinness had pleaded guilty and they felt there was no 'flagrant or incompetent advocacy' and as a result Mr Keenan withdrew from the case." Mr Murphy went on to state that he believed that "Mr Guinness ultimately withdrew his appeal having already served his sentence."

[38] Mr Murphy commenced his apprenticeship with the firm of Francis Keenan in the summer of 1990 and qualified as a solicitor in September 1992. He does recall working on the applicant's file on behalf of and as directed by Mr Francis Keenan who had carriage of the case. Mr Murphy was a young, newly qualified solicitor and he would not have been put in charge of a Court of Appeal case of such seriousness, particularly where allegations were being made against the applicant's former lawyers. Mr Murphy would not have made a decision about the viability of the applicant's appeal and he cannot recall any specific consultation concerning the withdrawal of the appeal. However, he does not understand how the appeal was abandoned without full and proper instructions being obtained from the applicant that this is what he wanted done and that he understood the consequences of this. Mr Murphy states that the applicant's averment that the appeal was withdrawn following a conversation with Mr Murphy cannot be correct and that the applicant must have spoken to Mr Keenan.

[39] Some 15 years after the abandonment of his appeal and on 8 May 2009 the applicant instructed his present solicitors, Kevin R Winters & Co, to apply to the CCRC to consider his convictions. In April 2011 the CCRC issued a decision not to refer the case to the Court of Appeal. Following further representations by the applicant, the CCRC reviewed its decision and issued a final report in April 2013 again declining to refer the case to the Court of Appeal.

[40] Some 22 years after his convictions and by a document dated 22 September 2014 entitled 'Grounds of Appeal' the applicant purported to commence another appeal to the Court of Appeal.

The reasons for the abandonment of the appeal

[41] To the CCRC the applicant stated that there were two reasons for the abandonment of his appeal. Firstly, that the original passport application document was not available to his expert and he felt that a report based on copy documents was not good enough (or he was told this by the defence). Secondly, there was no barrister who would take his case on as he had pleaded guilty.

[42] The applicant also dealt with the reasons for the abandonment of his appeal in his affidavits sworn on 8 December 2014 and 3 February 2016.

[43] In his affidavit sworn on 8 December 2014 the applicant stated that he was told that his appeal could not proceed because no counsel could be found to settle the grounds of appeal. That the appeal was abandoned and not proceeded with. That the withdrawal was in or about December 1994. In that affidavit he gives no details of any conversation in relation to the decision to abandon the appeal.

[44] In his affidavit sworn on 3 February 2016 the applicant states that at the time that he instructed his then solicitor that he would agree to withdraw his appeal he

believed that he would be able to reopen his appeal if fresh evidence became available to support an appeal. He goes on to state that:

> "All that I can remember about the appeal being withdrawn was that I had a consultation with Mr Murphy sometime prior to the withdrawal of my appeal. He told me that counsel were unable to draft grounds of appeal. He told me that this was as far as they could take the appeal at this time. I was not told, however, that this meant that if I withdrew the appeal I could not seek to reinstate it at a later stage."

The applicant repeated that he did not understand that this was an absolute bar to his raising his appeal at a later time. Rather he stated that he was never advised as to the consequence of withdrawing the appeal in the way that it occurred. In support of the proposition that he genuinely believed that the abandonment of his appeal was not a bar, the applicant relies on the fact that, after the appeal was abandoned, he was seen by Dr Ian Bownes on 17 February 1995 and 10 March 1995 to deal with another potential ground of appeal which was the issue of his susceptibility to suggestion and how that may have impacted upon what the applicant was supposed to have said at interview. On 25 May 1995 Dr Bownes sent a copy of his report to Mr Murphy. It appears from that report that at the time of the interviews on 17 February 1995 and 10 March 1995 the applicant was understood by Dr Bownes to be appealing against conviction on a number of offences of forgery whereas in fact he had abandoned his appeal. In relation to this Mr Murphy states that he notes that the applicant changed solicitors in relation to the civil proceedings on 11 January 1995 and, though he does not specifically recall, it may well be that the appointment with Dr Bownes related to the civil proceedings. In relation to this suggestion that the instruction of Dr Bownes was in connection with the civil case, it is asserted on behalf of the applicant that it is apparent from Dr Bownes' report that it was in relation to the appeal. It is submitted that this supports the applicant's claim that he was unaware of the consequences of the withdrawal of his appeal in December 1994. We refer to this as the third reason, namely that the applicant was not advised as to the consequence of the abandonment of his appeal and that he genuinely believed, given the lack of advice to him and what positively occurred, that he could bring a further appeal at a later date.

[45] We consider that the first reason given by the applicant to the CCRC does not stand up to any analysis in that the handwriting expert did in fact have the originals and completed an addendum report before the applicant abandoned his appeal.

[46] In respect of the second reason given by the applicant to the CCRC, we consider that the applicant is relying on bad or incorrect advice to support the proposition that his mind did not go with the abandonment of his appeal. That by the assertion that there was no barrister who would take on his case he was in effect being wrongly advised that there were no grounds upon which to settle proper

grounds of appeal, whereas in fact there were grounds which could have been advanced.

[47] On the basis of the recollection of Mr Murphy we are prepared to accept that advice on the lines that his plea of guilty presented difficulties for the appeal was given to the applicant. However, we consider that it is likely also that he was given advice as to the prospects of success of the appeal based on all the prosecution evidence. We do not consider it necessary to decide whether such advice were positively wrong as we consider that at most the advice fall within the category of advice with which some may agree and others may disagree. Accordingly, it is not wrong advice for the purpose of the *Medway* test.

[48] In addition, we do not accept that the advice that we consider that the applicant received caused his mind not to go with the abandonment of his appeal. That is not our view of the applicant. He had demonstrated independence of mind in that he was prepared to and had acted on his own behalf in seeking advice from a fellow prisoner, a prison governor and from a number of organisations. If he had any concerns as to the advice of his solicitor, we consider it likely that he would have instructed another firm of solicitors or asked for advice from other counsel. In that respect we note that he did in fact initially instruct another firm of solicitors in relation to his civil claim. Furthermore, in relation to the applicant's credibility we note that in his document prepared on 20 May 1992 the applicant denied making admissions to the police, stating that they were fabrications. He now accepts that he did make the admissions but contends that he was pressurised into them by the police. We consider that the applicant has changed the nature of the case that he is making. The applicant also states that he had no contact with Mr Keenan at any time other than at the mentions in the Court of Appeal and at an initial consultation. However, the contemporaneous note dated 9 March 1993, before any of the mentions in the Court of Appeal, records Mr Keenan as stating that he "has consulted three times with Guinness." We not only rely on the contemporaneous note in preference to the applicant's recollection but we also consider that, given that the applicant demonstrated an ability to put together the comprehensive document dated 20 May 1992, it is far more likely that he would have requested and had a number of consultations with Mr Keenan. Furthermore, that if there was a lack of, or an inadequate number of, consultations he would simply have changed solicitors. Accordingly, we approach the evidence of the applicant that his mind did not go with the abandonment of his appeal with some caution. We accept the evidence of Mr Murphy that it is more likely that the appeal would not have been abandoned without full and proper instructions being obtained from the applicant so that the abandonment was what he wanted done. As we have indicated, we consider it probable that the applicant would have been advised much more generally in relation to the prospects of a successful appeal and we conclude that his mind went with that general advice. We just do not see the applicant doing anything else but giving very careful consideration and deciding what he was going to do in relation to his appeal.

[49] In relation to the third reason we note that the allegation that the applicant was not told that he could not bring a further appeal was an allegation that he neither made to the CCRC nor was it contained in his affidavit sworn on 8 December 2014. This raises concerns as to the credibility of this reason which we would have no hesitation in rejecting but for the anomaly of the medical examinations which took place after the abandonment of the appeal. However, there was no evidence as to whether the medical report was commissioned before or after the appeal was abandoned and if before then proceeding with it could have been a simple administrative error. We also consider that in some way it might have been connected to the ongoing civil claim or, alternatively, the reasons are now simply no longer capable of being pieced together so that it remains an unexplained anomaly. We are clear that if it did relate to an ongoing prospect of appeal then this is a point which the applicant would have made, and made forcefully, to the CCRC and in his affidavit of 8 December 2014.

[50] On the facts of this case we consider that the applicant was aware that he was making a final decision in relation to his appeal.

Conclusion

[51] We conclude that the applicant abandoned his application for leave to appeal against conviction. That abandonment is irrevocable. We reject his application to treat the abandonment as a nullity.