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Judgment: approved by the Court for handing down
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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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Brownlee (Raymond)'s Application [2013] NICA 57

IN THE MATTER OF AN APPLICATION BY RAYMOND BROWNLEE FOR JUDICIAL REVIEW

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Before: Morgan LCJ, Higgins LJ and Girvan LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] The Department of Justice appeals against the decision of Treacy J given on 20 March 2013, holding that the Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 as amended by the Crown Court Proceedings (Cost) (Amendment) Rules (Northern Ireland) 2011) (the 2005 Rules as amended) defeated the respondent's right to practical and effective access to legal assistance. On 24 April 2013 the learned trial judge granted an Order of Mandamus compelling the appellant to take all necessary steps to make the respondent's right to legal aid effective. The Judge found that there must be a modest adjustment to the impugned scheme under the 2005 Rules as amended or some other provision to enable the necessary adjustment to meet the exceptional and unusual circumstances of this case and avoid the injustice which would otherwise result.

Background

[2] The respondent, Mr Brownlee, was convicted of one count of false imprisonment, one count of threats to kill, two counts of wounding with intent and one count of common assault. He was represented at his trial by senior and junior counsel and a solicitor who were retained on foot of a legal aid certificate. He pleaded guilty to the count of common assault and contested the remaining charges. The matter proceeded by way of a five day trial before Judge Miller QC sitting with a jury between 28 May 2012 and 2 June 2012.

[3] On the morning of 31 May 2012 all of the evidence had concluded. Although the respondent himself had not been called evidence had been led on his behalf. Senior counsel retained under the legal aid certificate advised the learned trial judge that he and junior counsel felt that they could not continue in the case. The solicitor was not present at that stage but he arrived shortly afterwards. The solicitor had a short consultation with the client and indicated that the respondent was concerned in particular in relation to some documentary evidence that he felt should have been put before the court. The solicitor also informed the judge that the respondent said that there was a person who could provide evidence on his behalf to say that a witness had made false allegations of rape in the past. Thirdly, the respondent indicated concern about the way in which an issue in the trial relating to padlocks and the connection to the false imprisonment charge had been dealt with. The solicitor indicated that the respondent had lost a degree of faith and confidence in his legal team because of those issues and he also indicated his intention to withdraw.

[4] The learned trial judge noted that the issue of the padlocks was fully explored with the police witness during cross-examination and noted that the false imprisonment charge related to other matters such as locks on doors. The judge explained to the respondent that his senior counsel felt professionally compromised and unable to further represent him. The respondent indicated that that was not his wish. He thought that things had been taken up the wrong way. In those circumstances the solicitor indicated that the position may be retrievable and that there may well have been misunderstandings. The judge noted that it would be in the interests of the respondent that he should continue to have the services of counsel and the solicitor who had served him and his interests in a proper fashion. On the basis of the circumstances explained to him he said that he would be "loath to conclude" that there was a proper ground for withdrawing instructions. If it turned out to be the position that the respondent had no legal representation he did not consider it appropriate to transfer the legal aid certificate to other representatives but would deny the Crown the opportunity to address the jury. The case was adjourned over lunchtime.

[5] After lunch the respondent indicated that he had dispensed with the services of his legal representatives. The judge explained that the basis upon which he had dispensed with the services of his lawyers were such that he did not believe that it would be appropriate to transfer the certificate of legal aid. With the agreement of the parties the learned trial judge thereafter proceeded to charge the jury. After the respondent's conviction the learned trial judge directed a pre-sentence report and fixed the sentencing hearing for the beginning of July 2012.

[6] On 29 June 2012 new solicitors made an application "for a transfer of legal aid". In fact this was an application for the issue of a fresh legal aid certificate. The Recorder adjourned the application to be dealt with by the learned trial judge the following week. Although there is no transcript of that hearing it appears that the

learned trial judge granted a legal aid certificate for one counsel for the sentence hearing. On 3 July 2012 senior counsel appearing in this application announced his appearance in the sentencing hearing. By that stage a pre-sentence report was available which assessed the respondent as constituting a significant risk of serious harm. The judge indicated that given the contents of the pre-sentence report he would extend the certificate. Senior counsel said that a report on the respondent would be required to deal with the dangerousness issue and the learned trial judge adjourned the sentencing hearing until 14 September 2012.

[7] Over the summer enquiries were made about the fees payable to the new legal team. By letter of 4 September 2012 the Legal Services Commission confirmed that the fees payable in the case in respect of the sentencing hearing were set by Schedule 1, Part IV Para 15 of the 2005 Rules as amended. A fee of £240 was payable to senior counsel, £120 to junior counsel and £100 to the solicitor. The solicitor maintained that there was a large amount of work involved for counsel to read themselves into the case to ensure that all relevant facts were ascertained. This would include full consideration of a significant body of documentation including statements and attendance notes, correspondence from the respondent's previous solicitor and five days of transcript of evidence and submissions. She observed that the respondent had a large number of convictions that needed to be evaluated in light of the relevant convictions and their likely impact on the sentence and that detailed consultations would be required with both counsel, both of whom would require reasonable preparation. The solicitor assumed this work would be necessary even before the work required specifically for the sentence hearing. A psychiatric evaluation and report on the respondent had been obtained and it was likely that evidence from the psychiatrist would be required at the hearing. A pre-sentence report had raised the possibility of the respondent being a dangerous offender and therefore close analysis of the report would be required, with the Probation Officer perhaps being tendered for cross-examination.

[8] Both counsel originally instructed by the new solicitor declined to continue to act because in particular there was no fee available to cover a substantial amount of preparation which would be required for the sentencing hearing. The respondent's solicitor had approached several junior and senior counsel but all said they would have to decline the work on a professional basis, citing the size, complexity and gravity of the task involved and the meagre fee as the reason for not being able to undertake the work. The solicitor also approached the committee of the Bar's Criminal Bar Association. Mark Mulholland QC responded on its behalf on 3 October 2012 stating that the Committee was of the view that given the fees payable, it would not be possible to obtain counsel to act.

[9] On 24 October 2012 the respondent successfully applied for leave to issue judicial review proceedings seeking a declaration that the absence of any provision for exceptional circumstances for the payment of fees under the 2005 Rules as amended was unlawful and compelling the appellant to take all such necessary steps

as were required to give effect to the legal aid certificate granted to the respondent on 2 July 2012.

[10] The criminal case was mentioned before the learned trial judge on 25 October 2012. By that stage counsel originally instructed under the new legal aid certificate granted in July 2012 had informed the judge that in light of the absence of a fee to cover preparation they were unable to continue. The solicitor had indicated that in spite of the meagre fee she was prepared to continue to act but would not take on any advocacy role. The learned trial judge expressed his view that the respondent was both entitled to and should receive the fullest representation before sentence was passed and in light of the contents of the pre-sentence report he had extended legal aid to senior counsel. He said that he considered it important, if not actually essential, that the respondent be represented by two counsel and that could certainly be reflected in any observations made to the appropriate authorities. The learned trial judge asked whether the respondent wished to proceed with the sentencing hearing now or hold matters in abeyance. He was informed that although the respondent was concerned about the delay he would prefer to have full representation. The learned trial judge stated that it was in the respondent's interests and in the interests of the proper administration of justice that he have the level of representation provided for in the legal aid certificate and in light of that adjourned the sentencing hearing.

[11] The solicitor subsequently provided further information to the committee of the Bar's Criminal Bar Association, indicating that additional fees may be payable for the drafting of a skeleton argument, £250 for senior counsel and £125 for junior counsel, where a skeleton argument was directed by the court. The solicitor noted that the court had not made such a direction. Further potential fees may include consultation fees, £63 per hour for senior counsel and £31 per hour for junior counsel, and mention fees on additional days in Court, £100 for senior counsel and £63 for junior counsel.

[12] By letter of 24 January 2013 Andrew Trimble, the interim Chief Executive of the Bar Council, responded stating that no skeleton argument had been directed in the case and that consultation was not paid for when it occurred at the court building or on the day of hearing. He also stated that it was likely that to properly prepare, counsel would be required to visit the prison to conduct a consultation and this would entail a fee. He also noted that there was no provision for the necessary preparation which would be unremunerated. He further observed that the payment options mentioned by the solicitor did not constitute a trial fee and in any event would not necessarily be paid. Mr Trimble stated that the Bar Council was not minded to join in the judicial review.

[13] In granting the judicial review application Treacy J referred to the decision in R v P [2008] EW MISC 2 [EWCC] where the court stayed criminal proceedings because the defendant was unable to retain counsel because of a failure to provide

adequate fees in criminal confiscation proceedings. He concluded that the fixed payment scheme in the sentencing hearing was wholly inflexible and incapable of accommodating the unusual and exceptional circumstances that had arisen. He noted that the right to legal aid had to be effective (see Re John Finucane [2012] NICA 12). He considered at some length the decision of the Privy Council in the Scottish case of Buchanan v McLean [2001] SCCR 475. He noted that it referred with apparent approval to another Scottish case, McGowan v Marshall [2012] SLT (St Ct) 109, in which the Sheriff stayed the criminal case as a result of a similar failure to provide for exceptionality in the ABWOR Regulations. In this case the respondent's solicitor had made strenuous efforts to engage senior and junior counsel. He specifically commented that, apart from the fixed fee, no fee would be paid for any preparatory work and there was no exceptionality provision. He found that the inflexibility of the impugned aspect of the scheme was preventing the respondent from being able to make his right to legal aid effective. That was a consequence of a blanket measure which made no allowance for exceptional and unusual circumstances. Treacy J subsequently made an order compelling the appellant to take all necessary steps to make the respondent's right to legal aid effective.

The appellant's submissions

[14] The appellant submitted that if the respondent had unreasonably discharged a perfectly able legal team for no good reason no breach of his Article 6 ECHR rights would follow from the fact that he would thereafter remain unrepresented. The test which is applied in considering the grant of legal aid is whether it appeared to the court, having regard to all the circumstances of the case, that it was desirable in the interests of justice that the respondent should have free legal aid in the preparation and conduct of his defence at the trial pursuant to article 29(3)(b) of the 1981 Order. The granting of a legal aid certificate is not therefore indicative of a finding that the absence of counsel would lead to a breach of the respondent's Article 6 rights.

[15] Article 6 does not guarantee any particular level of remuneration to lawyers. Mr Cullen's evidence on behalf of the Department was that Senior counsel coming into the case at this stage could be paid a fee of between £653 and £1,003 plus VAT, rather than the £240 suggested as the limit by the respondent, and junior counsel could be paid a fee of between £276 and £464 plus VAT, rather than the £120 suggested by the respondent. Those fees were made up of additional fees for a skeleton argument, consultation and mentions. Further fees may be payable if several consultations were required.

[16] The fees payable in Northern Ireland compare favourably in certain respects to those available in similar circumstances in England and Wales and Scotland. The appellant concedes there may be additional scope in those jurisdictions for payment by way of preparation. The lack of similar fees in Northern Ireland is balanced out by the provision of additional fees and a higher level of basic trial fee than is payable under the English system. The refusal of counsel to appear in this case, thus lending

weight to the respondent's challenge to Rules which the profession generally were strongly opposed to, could be characterised as self serving.

[17] The absence of counsel to conduct the sentencing hearing should not in the circumstances of this case be viewed as a breach of Article 6. The respondent has had the opportunity to discuss possible sentences with two legal teams. Even if he had to represent himself at the sentencing he will be assisted by an experienced judge. In any event the requirements of Art 6 at the sentencing stage after a fully contested Article 6 compliant trial are different from those where a defendant is facing a complex trial. It is also evident in this case that the respondent will continue to benefit from representation by his solicitor.

[18] Fair remuneration must be determined taking into account all of the factors mentioned in article 37 of the 1981 Order including the cost to public funds and the principle of securing value for money. This assessment is carried out by the Department and the Assembly. This is an area where the court should be slow to intervene. The court in Buchanan and AG for Scotland v McLean [2001] SCCR 475 endorsed the view that it was not unreasonable for practitioners to take the rough with the smooth. It is not irrational to seek to avoid a system of costs assessment which requires detailed assessment of each and every case. It is not accepted that the equivalent Rules in England and Wales or Scotland would have had any material effect on the level of costs in a comparable case in those jurisdictions.

[19] In any event the appellant argues that this litigation, relying as it does on a purported breach of art 6, is a species of satellite litigation which ought not to be countenanced by the Court (Re Officer C and Others' Application [2012] NICA 47). If the Crown Court Judge concluded that a fair trial in accordance with Art 6 was impossible, he could stay the proceedings, or, alternatively, the respondent could appeal based on a breach of Article 6.

The respondent's submissions

[20] The respondent submitted that the trial Judge granted a fresh legal aid certificate because it was essential. The Department makes the argument that Article 6 does not guarantee any particular level of remuneration to lawyers but the respondent's case is that any level of remuneration should be adequate to enable his solicitor to instruct counsel (see Artico v Italy 3 EHRR 1).

[21] The figures set out at paragraph 15 above and relied upon by the appellant are entirely misleading. The judge observed that none of the figures quoted allow for preparation time. The figure of £1,003 for Senior Counsel is made up of additional fees for additional work such as a skeleton argument, consultations and mentions which may not be payable at all. The fees are not comparable to those payable in England and Wales where an hourly rate is payable for preparation in these circumstances. The appearance fee there is £300 rather than £240 in this

jurisdiction. The Department's argument that the fees in one area are balanced out by the provision for additional fees in other areas is of no interest to the respondent if he cannot secure counsel for his own case in the circumstances in which he finds himself. The Department's assertion that the judge would be of assistance to the respondent would undermine the independence of the judge. The respondent's solicitor has made it clear that her role for the £100 payable will be as instructing solicitor and she will withdraw from the case if required to act as an advocate.

[22] All of the case law relating to satellite litigation relates to proceedings attempting to halt a prosecution. These proceedings do not attempt to interfere with the trial process. The only option available to the trial Judge is to stay the proceedings. The Department is attempting to undermine the judge's decision as to representation.

[23] The lack of public funding is not an answer to this application. The need to secure value for money does not mean that payment rates should be set so low that a defendant in a criminal trial is unable to secure counsel. The judge addressed the issue of the limited availability of public funds when he referred to Poitrimol v France 18 EHRR 130.

[24] The decision in Buchanan deals with the breach of Article 6 which might arise from a lack of flexibility in a fixed scale fee scheme. The Privy Council found that there was nothing wrong in principle with a fixed scale fee scheme, but that different considerations would arise if the solicitors were to withdraw because the levels of fees were inadequate and the appellants were unable to find replacement solicitors. The Scottish Executive amended the fixed payment regime so as to avoid accused persons being deprived of the right to a fair trial.

Statutory Framework

[25] Article 29(3)(b) of the Legal Aid, Advice and Assistance (NI) Order 1981 (the 1981 Order) deals with the granting of legal aid certificates.

> "29(3) A criminal aid certificate shall not be granted in respect of any person unless it appears to the [Crown Court] that his means are insufficient to enable him to obtain such aid, but where it so appears to the Crown Court, that authority-
> ….
> (b) may grant a criminal aid certificate in respect of any person … if it appears to the Crown Court, having regard to all the circumstances of the case (including the nature of the defence, if any, as may have been set up) that it is desirable in the interests of justice that he should have free legal aid …"

Article 35 of the 1981 Order expressly makes the power to grant a legal aid certificate applicable to the determination of sentences.

[26] The power to make Rules in respect of the remuneration of counsel and solicitors is contained in Article 37.

> "37. The Department of Justice in exercising any power to make rules as to the amounts payable under this Part to counsel or a solicitor assigned to give legal aid, and any person by whom any amount so payable is determined in a particular case, shall have regard, among the matters which are relevant, to-
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> (a) the time and skill which work of the description to which the rules relate requires;
>
> (b) the number and general level of competence of persons undertaking work of that description;
>
> (c) the cost to public funds of any provision made by the rules; and
>
> (d) the need to secure value for money,
>
> but nothing in this Article shall require him to have regard to any fees payable to solicitors and counsel otherwise than under this Part."

[27] The Department made the Legal Aid for Crown Court Proceedings (Costs) Rules (NI) 2005 which provided for fixed and time based fees in Rule 11. It is material to this application that there was a provision for an uplift in fees in exceptional circumstances.

> "11(4) Where an advocate considers that, owing to the exceptional circumstances of the case (or part of the case which is the subject-matter of the application) the amount payable by way of fees in accordance with paragraphs (2) and (3) would not provide reasonable remuneration for some or all of the work involved, he may apply to the Commission for a certificate of Exceptionality and the Commission may, in its discretion, grant such application in accordance with paragraph (5).

(5) When considering an application for a Certificate of Exceptionality, the Commission shall have regard, among the matters which are relevant, to

(a) whether the issues involved were significantly more complex than other cases involving the same offence or Class of Offence;

(b) whether the volume of evidence (including any un-used evidentiary material) was significantly greater than that in other cases involving the same offence or Class of Offence;

(c) any novel issues of law which were involved in the case; and

(d) any new precedents established in the case

(6) Where a Certificate of Exceptionality has been granted by the Commission, it may allow an uplift on one or more of the classes of fee specified in paragraph (3), as it considers to be reasonable, as appropriate to the Class of Offence…."

[28] The Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (NI) 2011 amended the 2005 Rules by inter alia omitting the provisions set out in paragraph 27 above thereby removing the exceptionality uplift. The fixed fee for appearing at a sentencing hearing was also reduced from £300 to £240 for senior counsel and from £250 to £120 for junior counsel.

Consideration

[29] Article 6(3)(c) of the ECHR provides that everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. This is a specific application in criminal cases of the fair trial rights guaranteed by Article 6(1). The obligation on the state includes a positive duty to make that right practical and effective if the authorities are on notice that the applicant has been left without assistance (see Artico v Italy [1981] 3 EHRR 1).

[30] The positive obligation to ensure access to legal aid can also arise in any event in the determination of civil rights under Article 6(1). R v P [2008] EW Misc 2 (EWCC) was a case in which the prosecution applied for the variation of a restraint order. Such proceedings do not involve the determination of a criminal charge. It

was anticipated that the variation application might take 6 weeks to hear and required consideration of 4,548 individual transactions and 6,586 pages of documents. The fee allowable under the representation order was £178.25 per day. It was accepted that no barrister of remotely appropriate experience and ability would be prepared to take the case on those terms. The court found that no significant blame could be attached to P for the inability to obtain representation and that there was no manipulation of the process. P could not fairly deal with the matter on his own. The proceedings were stayed as an abuse of process. An earlier appeal to the Court of Appeal on the basis that the provisions prohibiting access to the restraint monies to fund legal representation was contrary to the Convention was dismissed on the basis that it was for the trial court to determine the effect of the legal aid provisions on P's Article 6 rights.

[31] The relevance of this line of authority in the context of fixed fee legal aid regimes was considered by the Privy Council in Buchanan and AG for Scotland v McLean [2001] SCCR 475. Each of the appellants was represented by solicitors who were subject to a fixed fee regime. It was common case that the allowable fee would give rise to considerable hardship for each of the solicitors as the amounts for fees and outlays had already at an early stage exceeded the allowable sum. The Privy Council noted that the solicitors were still acting. They could be expected to provide their service according to the standards to be expected of their profession. In looking at the issue of any conflict of interest it was permissible to take into account the spread of money the solicitors derived from legal aid, taking the rough with the smooth. The appeal was dismissed.

[32] Lord Hope stated, however, that if there was no provision to remunerate work of an exceptional nature a breach might arise where this would lead to incomplete preparation for trial. Where there was a financial disincentive to avail of procedures designed to secure the protection of the accused then a breach may similarly be established. Lord Clyde and Lord Hobhouse both recognised that a lack of flexibility could give rise to a breach and Lord Clyde stated that if no legal representative was available for an accused where the ECHR required it a breach would, unsurprisingly, follow.

[33] These cases establish the principle that inadequate remuneration within a legal aid scheme may give rise to an Article 6 breach if an accused consequently finds it impossible to obtain the services of an appropriate lawyer to represent him. In this case, however, the appellant was provided with legal representatives who conducted the trial on his behalf until it was near its end at which stage he dismissed them. There is nothing to indicate that those representatives would not have continued to act in the sentencing hearing if they had not been dismissed and they, unlike newly instructed counsel, had benefitted from the overall trial fee payable.

[34] The approach which the court should follow in circumstances where the accused dismisses his legal team and then requests the opportunity to instruct

alternative representatives was discussed in R v Ulcay [2007] EWCA Crim 2379. The principles which are generally applied are set out at paragraphs 30 and 31.

> "30. The overwhelming majority of defendants in the Crown Court are legally represented at public expense. Our approach to the issue of principle is consistent with the provisions of the Criminal Defence Service (General) (No 2) Regulations 2001, the relevant regulations which apply to the provision of legal representation in criminal cases at public expense. Regulation 16 governs any application for a change of representative. The court may grant or refuse it. The grounds are set out in regulation 16(2)(a)(i)-(iv). One of the consistent requirements of the regulation is that the legal representative should provide details of the nature of the duty which he believes requires him to withdraw from the case, or the nature of the breakdown in the relationship between him and his client. Requirements like these cannot impinge on the obligation of confidentiality between lawyer and client. The lawyer will do his best to comply with the requirement within the limits of the rules governing legal professional privilege, with the result that the court may be less well informed of the pressures on the lawyer to withdraw from the defence or explain the nature of the breakdown. The principle nevertheless remains clear. The court cannot oblige the lawyer to continue to act when he has made a professional judgment that he is obliged, for compelling reasons, to withdraw from the case.
>
> 31. The purpose of this part of the Regulations is to ensure that the client does not manipulate the system, seeking to change his lawyers for dubious reasons which include, but are not limited to, the fact that the lawyer offers sensible but disagreeable advice to the client. Claims of a breakdown in the professional relationship between lawyer and client are frequently made by defendants, and they are often utterly spurious. If the judge intends to reject an application for a change of legal representative he may well explain to the defendant that the consequence may be that the case will continue without him being represented at public expense. The

> simple principle remains that the defendant is not entitled to manipulate the legal aid system and is no more entitled to abuse the process than the prosecution. If he chooses to terminate his lawyer's retainer for improper motives, the court is not bound to agree to an application for a change of representation. What we find in practice in most cases is that courts faced with this problem are usually prepared to agree to at least one change of representative, provided they are proposed in reasonable time before the trial, and before substantial costs have already been expended in the preparation of the defence case. In the end, however, the ultimate decision for the court is case and fact specific, and it does not follow from the repeated indication of the mantra "loss of confidence" that an application will be granted."

Although the Regulations do not apply in this jurisdiction the relevant principles applicable are the same.

[35] The appellant dismissed his legal team at the close of the evidence. The learned trial judge noted that his counsel and solicitor had served his interests and the interests of justice in a proper fashion. On the basis of the explanations given to him the learned trial judge was unconvinced that there was a proper ground for withdrawing instructions. Indeed in argument in this case senior counsel for the appellant conceded that no proper ground for withdrawing instructions had been provided. All of these matters are material to the issue of manipulation of the trial process. A trial is not to be stigmatised as unfair when the defendant seeking to derail it is prevented from doing so by robust judicial control (see paragraph 24 of Ulcay). It must also be taken into account that the learned trial judge considered it appropriate to issue a fresh legal aid certificate. That on its own does no more than what was said at paragraph 36 of Ulcay.

> "The fact that the judge was prepared to transfer the legal aid certificate does not mean that he was saying that, whatever the consequences to the trial, new representation must be obtained, and that thereafter he would conduct the trial in accordance with whatever applications were made by new counsel. The clear implication of what the judge decided was that whilst he was content for new representation to be obtained at public expense and no doubt he hoped that it would, nevertheless he could not and did not abrogate his responsibilities to the interests of justice

> in the overall context of the trial and its proper conduct and management."

[36] An accused who loses his legal representation in the course of a trial through no fault of his own should be given the opportunity to obtain alternative representation. Where he cannot do so because of the inadequacy of legal aid funding a breach of Article 6 may well follow. The inflexibility of these Rules potentially raises the possibility of such an outcome. In this case, however, the material before us suggests that the accused dismissed his counsel and solicitors without any reasonable explanation at a late stage of his trial. Whether the circumstances of this case are such that even then a breach of Article 6 would arise from the absence of an ability to secure further representation by counsel necessitates a careful review of the issues in the sentencing exercise. The learned trial judge will know the factual basis for the conviction, having heard the evidence. He will have the opportunity to hear from the author of the pre-sentence report and to see the psychiatric report prepared for the appellant if it is relied upon. He may wish to explore further the reasons for the decision by the appellant to dispense with his original legal team. He will be in a position to judge the materiality of previous convictions against the circumstances of the offence and the reports. All of those matters indicate that the decision as to whether the absence of legal representation gives rise to a breach of Article 6 is a highly fact specific exercise which should be decided by the trial judge.

[37] That conclusion is also consistent with authority. In R(Kebilene) v DPP [2000] 2 AC 326 the House of Lords held that criminal proceedings should not be subjected to delay by collateral challenges, and as a general rule the courts would refuse to entertain a judicial review application where the complaint could be raised within the criminal trial and appeal process. That approach has been consistently followed in this jurisdiction (see Re O'Connor's and Broderick's Application for Judicial Review [2005] NIQB 40 and Re McLuckie [2011] NICA 34). There is no reason to depart from the principle in this case.

Conclusion

[38] For the reasons given the appeal is allowed. It is for the trial judge to determine the Article 6 issues in this case. All of the issues raised should be dealt with in the criminal trial and appeal process relating to this case.