

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

Delivered: 22/03/10

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Campbell's (Paul Martin) Application [2010] NIQB 40

IN THE MATTER OF AN APPLICATION
FOR JUDICIAL REVIEW BY PAUL MARTIN CAMPBELL

TREACY J

Introduction

1. The applicant is a Pupil Solicitor apprenticed to his Master, Paul Fitzsimons, who is a Senior Partner in the practice of Fitzsimons Kinney Mallon (Solicitors) who practice in Newry. By this application he seeks declaratory relief in respect of the respondent's decision to exclude him, in the company of his Master, from attending police interviews on the evening of 8 July 2009 at Antrim Custody Suite.

The Grounds

2. The applicant was directed to amend the Order 53 Statement to reflect the narrow basis upon which I had granted leave outlined in my judgment at [2010] NIQB 9. The amended Order 53 Statement dated 1 February 2010 contains the following two grounds at para.12:

"(a) That the decision to exclude the applicant, having admitted him to the earlier four interviews, in accordance with well established custom and practice, was unreasonable or irrational;

(b) That the refusal to admit him to further interviews along with his Master on the evening of

8 July 2009 was contrary to law on the basis that he had a legitimate expectation to be able to accompany his Master in the course of his training and in the discharge of the Master's duties as Solicitor."

Background

3. The applicant and his Master arrived at Antrim Police Station at 11.30am on 8 July 2009 and were immediately brought across to the Custody Suite. The applicant was identified by his Master to the police as his Pupil Solicitor. No objection whatsoever to his presence was raised and he was able to consult at length with the client in the presence of the applicant before, during and after four tape recorded interviews. The applicant was with his Master throughout for a period of 7½ hours that day from 11.37am on their arrival at the Custody Suite until an arranged break for tea at 7.02pm. In summary the applicant was present with his Master during the following stages:
 - (i) during the "pre-interview disclosure meeting" (which was their first meeting convened with the Detective in charge of the murder investigation and the Inquiry Team which interview took place prior to the commencement of the formal tape-recorded interviews);
 - (ii) during the pre-interview private consultation with the client who was a young female detained in connection with the murder of a Polish national;
 - (iii) during the four tape-recorded interviews which took place from (1) 14.20pm - 15.03pm; (2) 15.03pm - 15.39pm; (3) 17.23pm - 18.06pm; and (4) 18.06pm - 18.33pm.;
 - (iv) during post-interview private consultation with the client.
4. No objection was raised by *any* police officer to the presence of the applicant at any of the above stages. The decision to allow the applicant to be present with his Master was agreed or impliedly consented to by the following:
 - (i) the Custody Sergeant on their arrival that morning at the Custody Suite;
 - (ii) the Detective in charge of the investigation;

- (iii) the Interviewing Officers;
- (iv) the Client.

Moreover it is common case that the applicant did not at any time give any cause for objection, his conduct throughout being perfectly proper and his presence not in any way interfering with the conduct of the interviews or the investigation.

5. After the fourth interview ended at 7.00pm the applicant and his Master took a break for refreshment with an "*arrangement*" that the interviews would recommence at 8.00pm. There was no suggestion that the previous arrangement was to be altered in any way. However at 8.00pm the applicant was refused admission to the interview by Custody Sergeant McMahon. Despite representations from the Master for the applicant to be admitted again the Custody Sergeant maintained that as the applicant was *unqualified* he was not entitled to be present under PACE Regulations.
6. Mr Fitzsimons complained to Chief Superintendent Nigel Grimshaw whom he eventually saw approximately 10.25pm. At para.5 of his first affidavit Mr Fitzsimons avers that he told the Chief Superintendent that Custody Sergeant McMahon had specifically denied that there was an Inspector available or a Superintendent available in answer to his earlier request that he wished to speak with a Senior Officer. C S Grimshaw responded "*well technically he is correct because I am not a Superintendent I am actually a Chief Superintendent*". Mr Fitzsimons indicated that he wanted his complaint about the denial of access to his Pupil Solicitor recorded. The Chief Superintendent took a verbatim handwritten note of the conversation to allow his complaint to be immediately transcribed into the custody record.
7. At para.5 he further avers:

"At the end of this process Chief Superintendent Grimshaw told me that he would speak with Custody Sergeant McMahon and that he could see, in the circumstances, *no difficulty* with the Pupil Solicitor being admitted and that he would recommend that to the Custody Sergeant. I thanked him for his helpful consideration of the matter and was returned to an interview room. A short time later the Custody Sergeant reappeared and asked if

we were now ready to go ahead with the interviews. This was now at approximately 11.15pm. I said I was waiting for my Pupil Solicitor to be brought across from the police reception area in the outer building where he had now been *waiting for over 3 hours*. The Custody Sergeant told me that the Pupil Solicitor was *not* being admitted and that was his decision. I told the Custody Sergeant that was not what Chief Superintendent Grimshaw had related to me. The Custody Sergeant said, "he was in charge and that *no* such representation had been made to him by Chief Superintendent Grimshaw before he left the station.

As the Pupil Solicitor was continued to have been denied access I told the Custody Sergeant that I was no longer prepared to engage with him and there would be no further interviews with my client now this evening given the lateness of the hour, *the interviews having been delayed by 3½ hours at this stage.*"

8. The Custody Record reveals that whilst the Chief Superintendent reversed the impugned decision he was, on the basis of the legislation and the Code of Practice, purportedly satisfied with the actual judgment and decision of the Custody Sergeant (which he nevertheless reversed). The Custody Record included the following entry:

"[C S Grimshaw] informed the Solicitor that I had been briefed by Sergeant McMahon¹ and on the basis of the legislation and the CoP [Code of Practice] I was satisfied with his judgment and decision. However, in light of the fact that Mr Campbell had been present at the previous interviews which I had not been briefed about I was prepared to *reverse* the decision of the Custody Sergeant."

Mr Fitzsimons went on to state "I was here at 20:00 hours at the front reception and had to wait 45 minutes because a Custody Sergeant was not

¹ There was no explanation as to why Sgt McMahon did not brief the CS about the applicant's presence at the earlier interviews etc.

available yet the Custody Record reflects I arrived at 20:45 hours."

9. On 25 September 2009 Paul Fitzsimons wrote to the Sub-Divisional Commander at Antrim Serious Crime Suite setting out some of the background in relation to what had occurred and then continues:

"... When I returned to Antrim Police Station after the tea recess (from 7.00pm - 8.00pm) I was delayed and denied access to my client from 8.00pm until 8.45pm. My Pupil Solicitor was entirely denied access for the evening session by Custody Sergeant Gordon McMahon. Because of the denial of access by ... McMahon of my Pupil Solicitor to consult with me before our client, CMcG aged 18 years, no interviews took place on the evening of 8 July 2009.

I made forceful representations to Sergeant McMahon as to his unreasonable stance and his unacceptable attitude in refusing and denying access to my Pupil Solicitor for the evening session. The unreasonable attitude by Custody Sergeant McMahon was in total contradiction to the earlier attitude of the Custody Sergeant on duty on our arrival at Antrim Police Station at 11.00am right through until the interviewing process was adjourned for a dinner break at 7.00pm.

I find Custody Sergeant McMahon's attitude belligerent, arrogant, patronising in the extreme and utterly 'Wednesbury unreasonable'. I had to record a formal complaint on tape recorded interview before Chief Superintendent Nigel Grimshaw. Chief Superintendent Grimshaw had *no difficulty* with my Pupil Solicitor being admitted and advised me that he was making that direction and recommendation to the Custody Sergeant, *to allow the interviewing process to continue*. After Chief Superintendent Grimshaw had left the station Sergeant McMahon continued to deny access by my Pupil Solicitor to the Defendant in my presence and so therefore again the interviewing process was delayed and denied. On 9 July 2009 I spoke with Custody Sergeant Richard Clinghan at Antrim

Custody Suite. He told me that he had no objection to my Pupil Solicitor attending.

When I spoke with Detective Sergeant ... at Newry Court on 9 July 2009 he told me as well that *the Detectives had no objection to my Pupil Solicitor attending* and indeed [he] advised that his own daughter was studying law. *He further commented that there was no better training ground for any apprentice or Pupil Solicitor to learn the procedures and administration and workings of the law in a serious crime investigation other than attending to participate and observe in the interviewing process with his/her accredited Master.* He further advised that it was known that Custody Sergeant McMahon had refused access in the past to Solicitors simply because they could not identify themselves in an accredited format to him as Solicitors when they presented to consult with their clients at Antrim Serious Crime Suite.

This matter is utterly intolerable. Solicitors require certainty of knowing that if they travel 70 miles in a two hour car journey with a Pupil Solicitor to attend upon their client arrested in relation to a serious crime such as murder that the Pupil will not be obstructed from attending with his Master at the interviewing process.

I write in the first instance to seek your written confirmation in open correspondence that you will have reviewed this complaint and that you will confirm to me and undertake that if I ever have to attend again at Antrim Serious Crime Suite for any matter under investigation that my Pupil Solicitor accredited to me and registered to me at the Law Society will not be obstructed, hindered or denied access unreasonably and will be allowed to attend, participate, observe the interviewing process at all times in the presence of his Master.

Failing hearing from you in open correspondence within 7 days from the date hereof it is my intention to apply to the High Court for an application for

leave to apply for judicial review and/or damages on behalf of both my Pupil Solicitor, Paul Martin Campbell, and on behalf of my client, CMcG ..."
[Emphasis added]

10. This complaint was then, in accordance with the appropriate legislation, forwarded to the Police Ombudsman's Office who, by letter dated 5 October 2009, informed Mr Fitzsimons that they had fully considered all of the available information relating to the complaint and were of the opinion that the matter was suitable for informal resolution. By document dated 6 October 2009 Mr Fitzsimons indicated that he did not consent to his complaint being informally resolved and that he wished it to be formally investigated.
11. In support of his application the applicant also relied on the affidavit of Pearse McDermott who is a well-known and very experienced Solicitor in the firm of McCann & McCann who deposed as follows:

"(1) I am a partner in the firm of McCann & McCann, Solicitors and I have near 20 years experience in relation to criminal practice and procedure.

(2) I am also the Public Relations Officer of the Solicitors Criminal Bar Association and have been since 1993, and as such, have contact with a large number of solicitors in our association. There are presently 76 firms attached to our association.

(3) ...

(4) I understand that no protocol exists between the Law Society and the Police Service of Northern Ireland regarding the admission of Pupil Solicitors to police stations for PACE interviews. I am aware from my own experience that we have in the past sought the consent of the PSNI for our Pupil Solicitors to attend at interview and this has *never* been refused.

(5) I have made enquiries with my colleagues in the Greater Belfast area and I am aware that other firms who have sought the consent of the PSNI for their Pupil Solicitor to attend PACE interviews and

this has *not* been refused. I am unaware of *any* Belfast Solicitor having been refused a Pupil Solicitor to attend with them at interview.

(6) I believe that access to a PACE interview for a Pupil Solicitor along with their Master is a fundamental tenet of their training in the practice of criminal law. This is the only way in which a Pupil Solicitor can see how, in real terms, a police station interview operates. The benefit of attending with a Master is the Pupil Solicitor can see how an experienced solicitor deals with both client, police and custody staff in a courteous and professional manner and can take the benefit of the experience with them into their future role as a practising solicitor.

(7) I believe that refusal to allow Pupil Solicitors to attend at Police Stations along with their Masters prior to qualification would lead to a potentially difficult situation for that Pupil Solicitor in qualification. Without appropriate experience in this field it is difficult to see how a newly qualified solicitor could give appropriate advice and deal with the difficulties that arise from time to time in a police station."

12. In C S Grimshaw's first affidavit [para.5] in response to an enquiry from the Court as to whether there was a policy to exclude Pupil Solicitors from PACE interviews he stated:

"I can say that there is no such *policy* in place. The events which occurred on 8 July 2009 appear to have arisen from a *dispute* which escalated between the Custody Sergeant and Mr Fitzsimons. ..."

13. In Sergeant McMahon's affidavit (sworn 25 February 2010) he states that he is a Custody Sergeant based at the Serious Crime Custody Suite and that he has been working as a Custody Sergeant in this "department" (of which there is only one in Northern Ireland) since 1991. He states that he has extensive experience of managing the custody of persons being interviewed for terrorist related offences and serious crime in Northern Ireland.

14. Sergeant McMahon continued:

"10. At Antrim Police Station the Serious Crime Custody Suite is not physically proximate to the reception area where legal representatives arrive. Some time after 20:00 hours I received word from another member of the custody staff indicating that two solicitors had arrived at reception to consult with Ms McG. I instructed the staff to enquire as to whether they were both in fact solicitors. I was advised that one of the persons was an apprentice solicitor. I stated that *only* the solicitor should be admitted to the Serious Crime Custody Suite.

11. I have been involved in the management of custody and detention in relation to serious crime and terrorist related crime since 1991. I was involved in a related capacity for 4 years prior to that. During that time I have always sought to ensure that *only* those who are entitled to attend interviews under the PACE Code of Practice are admitted into the interview rooms where detained persons are being interviewed in relation to serious crime or terrorist related matters. I am aware, anecdotally, that persons other than qualified solicitors have, on occasion, been admitted to police interviews relating to less serious offences at other police stations. However, that has never been *my practice* when on duty at the Serious Crime Custody Suite and this is in compliance with the *instructions of my authorities.*"

The instructions to which the deponent refers were **not** reduced to writing. [The Court enquired from Counsel for the respondent as to whether there were any force instructions or other internal documents governing this matter and was informed that upon enquiry it had been confirmed that no such documents exist].

15. At para.14 he goes on to state:

"... It is my *practice*, and I believe that of other *Custody Sergeants*, to determine whether a person should be admitted to the Custody Suite by asking whether the person is a solicitor qualified to practice

in accordance with the Solicitors (NI) Order 1976 or the Solicitors Act 1974. The position is that only one solicitor is permitted to act as the legal representative at any one time.” [Emphasis added]

If this is the *practice* it is difficult to understand the averment of C S Grimshaw that there was no policy in place to exclude Pupil Solicitors and that the events which occurred arose from a *dispute* between the Custody Sergeant and Mr Fitzsimons which escalated (see para.12 above). The clear implication being that but for the “dispute” access would not have been a problem.

16. At para.17 he states that the Custody Record shows that when Mr Fitzsimons was asked at 21:12 hours whether he was ready for another interview with the detained person it was recorded that he refused to co-operate until he had spoken to the Inspector (cf the averment of Mr Fitzsimons set out at para.21 hereof).
17. At para.18 McMahon states that the Custody Record notes the Chief Superintendent having been told by Mr Fitzsimons incorrectly that the applicant had been present at five previous interviews. He then states that Mr Fitzsimons had in fact been present “at at least *one* of the two previous interviews ...”. I am not entirely clear why the deponent has made this averment since it is quite clear that Mr Fitzsimons and the applicant had been present at four taped interviews as set out above. Nor is it clear why the Custody Sergeant failed to brief C S Grimshaw about the applicant’s previous presence. Clearly this was an important matter; so much so that it was this which purportedly led to the reversal of the decision to exclude. The Custody Sergeant avers that he was conscious that there had been no interviews at all conducted that evening and that the detectives had advised him that they wished to conduct a further interview with the detained person.
18. At para.19 he states:

“I spoke to Chief Superintendent Grimshaw after the review. He advised me that the management of further interviews that evening was a matter to be determined by me. I also understood him to state that the applicant would *not* be admitted to interviews again that evening and the situation would be reviewed the following morning. I have read the Custody Record and the affidavit filed by

the Chief Superintendent. *I am aware that his record of his decision and his averments differ from my record and recollection. It would appear that there has been either a misunderstanding on my part or a miscommunication of the Chief Superintendent's decision.* [Emphasis added]

19. At para.27 he asserts that the fact that no interviews took place on the evening could be attributed to the actions of Mr Fitzsimons. The solicitor refused to co-operate in the interviewing process whilst his Pupil Solicitor was being excluded. He accused the Solicitor of being hostile and confrontational.
20. Sergeant McMahon denied that he conducted himself in anything other than a professional manner.
21. Mr Fitzsimons swore a further affidavit in these proceedings on 11 March in which he averred as follows:

"I was not hostile towards Sergeant McMahon at any stage. I did not 'demand' anything of the Sergeant. I sought an explanation from him as to why the apprentice was not being admitted. Sergeant McMahon did not complain to me at any time or to any of his superiors that my conduct was unreasonable or unacceptable. I spoke to him and addressed him in an entirely appropriate manner, as is my practice and my training, and I acted and conducted myself at all times throughout our exchanges in a perfectly professional and proper manner. I find it remarkable that Sergeant McMahon seeks to support his assertion by stating that the Custody Record indicates that other staff found me to be 'uncooperative'. I presume that he is referring to the entry at 9:12pm on 8 July 2009 which states that I was asked if I was ready to commence the interview with the defendant whereupon I pointed out that I was still waiting to speak to the Custody Sergeant or an Inspector. I note from the Custody Record that I had requested to speak to the Custody Sergeant at 20:46pm regarding the sudden refusal to allow the applicant to accompany me to the next scheduled interview and that by 9:13pm I was still waiting to speak to the Custody Sergeant or

an Inspector following my pre-arranged return to the police station for that purpose at 8:00pm.

(4) ... I reject Sergeant McMahon's contention that I was confrontational. I made my points to him in a forthright and professional manner. This was entirely in keeping with the professional approach which I had adopted and which is evidenced throughout the four tape-recorded interviews with the two interviewing detectives. The taped interviews disclose occasional but entirely appropriate interjections by me of a helpful and proper nature, with mutual courteous exchanges between myself and the interviewing detectives which could only be described as cordial and professional throughout. So likewise were my subsequent representations to Chief Superintendent Grimshaw, (who I note does not suggest or record in his entry to the custody notes and records, or in either of his affidavits, that he found me at any time or in any way confrontational or obstructive or unprofessional by my tone or in my demeanour, my comportment, my conduct or in my actions). Nor, for the avoidance of doubt, did I have the slightest complaint whatsoever in how Chief Superintendent Grimshaw dealt with me. He was attentive, efficient, pragmatic and courteously professional throughout.

(5) After speaking with Chief Superintendent Grimshaw I was satisfied that the matter had been resolved however it soon became apparent that Sergeant McMahon was still refusing to admit the applicant. I note that the Sergeant concedes at para.19 of his affidavit that this was as a result of a 'misunderstanding' on his part or a 'miscommunication of the Chief Superintendent's decision'. Again, I totally reject the suggestion that I was at any time or in any way confrontational. Furthermore, I did not say that I had been given an assurance that there would be no further interviews that evening. Indeed, I was waiting in the Custody Suite and had been returned to a consultation room expecting that someone had gone over to the outer

reception area to bring across the applicant for what would have been a short continuation interview given the lateness of the hour. Para.21² of Sergeant McMahon's affidavit does not accord or reconcile with my very clear recollection and my contemporaneous recording of my then having asked Sergeant McMahon to contact Chief Superintendent Grimshaw whereupon I was told by Sergeant McMahon that Chief Superintendent Grimshaw had left the station and was no longer available."

Observations

22. Before turning to the legal issues that arise in this case it is important to acknowledge that solicitors and police officers involved in advising or otherwise dealing with persons who are detained for interview in relation to serious crime perform an extremely valuable, difficult and complex task that calls for the utmost sensitivity and professionalism on the part of all those involved. I do not underestimate the difficulties. Solicitors, for their part, need to be able to focus on the job at hand and certainly do not need unnecessary or needless distractions from the important duties which they have to discharge in advising suspects.
23. Solicitors and police officers do generally recognise that each is trying to do a professional, responsible and frequently taxing job. It therefore behoves all those engaged in the discharge of these important tasks in the public interest to conduct themselves with mutual respect and integrity and to avoid anything which may appear unseemly or unprofessional or may detract from the high standards which are expected. The public interest and common courtesy demands nothing less. Bad manners and unjustified obduracy ought to have no part in this process.
24. C S Grimshaw confirmed that the police do not operate a policy of excluding Pupil Solicitors from interviews. This is hardly surprising given the importance of Pupil Solicitors being able to attend with their Masters at police interviews to learn their craft the better to discharge their public

² "I returned to Chief Superintendent Grimshaw in light of what Mr Fitzsimons said about this assurance. He *repeated* his earlier decision that the management of interviews on that evening was a matter to be determined by me in consultation with the investigating team. I returned to the detectives who advised me that they were ready to commence a further twenty minute interview." This is a surprising averment which rather undercuts the Custody Sergeant's explanation at para.19 of his affidavit of misunderstanding or miscommunication set out at para.18 above.

duties when they finally qualify as solicitors and are placed in the demanding position of having to advise clients detained and being questioned about serious crime.

25. In my view the sorry state of affairs which has been set out above had a serious and detrimental impact on the conduct of a major criminal investigation and on the ability of the suspect's legal representative to discharge his duties.
- (i) First, it interfered with the administration of justice by delaying the completion of the interview process. Indeed, given the short duration of the interviews that took place on 9 July it may well have been that the detention of the detained person was unnecessarily prolonged. If the interviews scheduled for the evening of 8 July had not been disrupted it may have been possible to complete the interviewing process that evening since the interviews on 9 July were relatively brief.
 - (ii) Secondly, it was clearly very frustrating for the Master concerned to have had to deploy so much time and energy in having the decision made by Sergeant McMahon reversed. And even more frustrating, believing the matter had been resolved, then to be faced with the Custody Sergeant *still* refusing to give access to the Pupil Solicitor. And this notwithstanding that his decision had been reversed and this reversal had been communicated to the Master. Inexplicably, the Custody Sergeant appears to have been oblivious to this decision despite the contents of the Custody Record. Whilst he has averred that this was as a result of a misunderstanding or a miscommunication of the Chief Superintendent's decision it is, on any showing, quite unacceptable. I have no doubt this must have appeared to the Master concerned as maddening obduracy.
 - (iii) Thirdly, for the Pupil Solicitor to have been inconsistently excluded in this way, and forced to wait for over 3 hours in another part of the Custody Suite, cannot have been the most enjoyable of experiences.
26. I hope this case is an isolated incident. It plainly should not have occurred. Incidents of this kind, if repeated, have the capacity to corrode the professional relationship which must underpin the interactions between the solicitor and the police who each discharge important duties in the public interest. Their interests are not opposed to one another - they are

opposite sides of the same coin sharing the common objective, subject to strict professional standards, of acting in the public interest.

27. C S Grimshaw in his first affidavit averred that there was no policy to exclude Pupil Solicitors and indicated that this was an isolated incident which arose out of a *dispute* between the solicitor and the Custody Sergeant. By contrast the Custody Sergeant deposes to his *practice* and the practice of other Custody Sergeants namely that Pupil Solicitors would **not** ordinarily be admitted to interviews in Antrim Serious Crime Suite – thus elevating the issue to a point of principle rather than an isolated “dispute”. If his averment is correct it does betoken a policy of exclusion of Pupil Solicitors. Certainly C S Grimshaw’s first affidavit chimes more readily with the averments of Mr McDermott in relation to his experience and that of other solicitors in the Belfast and Greater Belfast area who had not previously encountered any difficulty in their Pupil Solicitors gaining access to police interviews. It is also consistent with the response of Mr Fitzsimons [recorded in the Custody Record] where he said that “I have attended PACE interviews at every other police station in Northern Ireland with my last seven pupils without hindrance or obstruction from police administration until tonight” (see p15 of Custody Record). Very importantly the absence of such a policy accords with the course of conduct which occurred on 8 July prior to the evening intervention of Custody Sergeant McMahan (see para.3 above).
28. The evidence of Mr McDermott and the comment of Mr Fitzsimons recorded in the Custody Record are consistent with C S Grimshaw’s first affidavit that there is no policy and that, as he put it, the events which occurred on 8 July “appear to have arisen from a dispute which escalated between the Custody Sergeant and Mr Fitzsimons”. That averment was made in response to an enquiry from the Court and I had inferred from that paragraph, first, that there was no policy to exclude and, secondly, that this was essentially a one-off incident. However, the Custody Sergeant’s averment [at para.14] as to his practice and the practice of *other* Custody Sergeants is inconsistent with a significant body of evidence in this case namely:
- (i) the affidavit of Pearse McDermott;
 - (ii) the experience of Master Fitzsimons;
 - (iii) the conduct of those referred to at para.4(i) – (iii) above;
 - (iv) the comments of one of the interviewing detectives referred to in the complaint letter from Mr Fitzsimons summarised at para.9 above;
 - (v) the conduct of C S Grimshaw in reversing McMahan’s decision;

- (vi) the conduct of the Custody Sergeant on 9 July admitting the Pupil Solicitor to the further interviews.

This inconsistency will, I do not doubt, be the subject of detailed scrutiny by the respondent.

- 29. Indeed, if the practice was, as he deposed to, I am surprised that there was such a division of approach as between two Custody Sergeants within the *same* Custody Suite on the *same* day and in relation to the *same* Pupil Solicitor. It is also surprising that it never occurred to the officer in charge of the murder investigation or the interviewing detectives to question the presence of the Pupil Solicitor during the four stages referred to at para.3(i)-(iv) above. On the contrary, as appears from the letter of complaint from the Master the interviewing detectives not only had no objection but could readily see the public policy value in permitting the attendance of Pupil Solicitors at serious crime interviews (see para.9 above). If the practice was, as deposed, the Chief Superintendent would have been required to indicate that in his first affidavit in response to the Court's query. Furthermore, if such a practice/policy existed one might have expected internal police instructions or documents to confirm that position. If there were such a policy it is strange that the Law Society and solicitors practising in this area were unaware of it. Indeed, I would have expected that if access by Pupil Solicitors was an ongoing difficulty that it would have been likely that this would have been litigated in the Judicial Review Court before now.

Issue

- 30. Arising out of the foregoing the issue to be addressed in this case is:

Can a Pupil Solicitor, who has been admitted to PACE interviews with his Master, be thereafter excluded by the Custody Sergeant *solely* on the basis that he is not a qualified solicitor?

- 31. The impugned exclusion decision of the Custody Sergeant in this case was reached on the basis that the applicant was not a qualified solicitor (about which there is no dispute) and *therefore* was not entitled to be present *under PACE Regulations*. Was that a sufficient or proper basis for exclusion especially since the applicant had already been admitted to four tape recorded interviews, had been present together with the Detective in charge of the murder investigation in relation to pre-interview disclosure and was also present with his Master during the pre and post interview consultations that took place with the suspect?

32. The Custody Record reveals that whilst the Chief Superintendent reversed the impugned decision he was, on the basis of the legislation and the Code of Practice, satisfied with the actual judgment and decision of the Custody Sergeant (which he nevertheless reversed). He has said [para.3 second affidavit] that his decision was made because the Pupil Solicitor had already been admitted to previous interviews³ and that he was taking a “pragmatic” course whilst also apparently recognising the validity of the Custody Sergeant’s decision that only a person recognised as a “Solicitor” as defined by statute should be admitted to a serious crime interview. I have some difficulty reconciling this approach with the earlier contention by the Chief Superintendent that there was no policy to exclude Pupil Solicitors since if only a person recognised as a Solicitor as defined by statute “**should**” be admitted to a serious crime interview then that does betoken a policy to exclude Pupil Solicitors. This averment is inconsistent with (i) the decision of the Custody Sergeant on the morning of 8 July to admit the applicant and (ii) of the Detective in charge of the murder investigation and (iii) the interviewing detectives all of whom consented to the Pupil Solicitor’s presence. What transpired is much more in keeping with the averment of Mr McDermott as to the experience of Solicitors in Belfast and the Greater Belfast area. It is, to say the least, unfortunate that there is such a lack of clarity about this matter and such an obvious inconsistency between the experience of Mr McDermott and the practice at the Custody Suite on the morning of 8 July and throughout the four tape recorded interviews and indeed the decision of the Chief Superintendent himself to reverse the decision of the Custody Sergeant. If the Custody Sergeant was acting, as he says, in compliance with the instructions of his authorities it is difficult to understand why the Chief Superintendent decided to reverse his decision. If the Custody Sergeant and the Chief Superintendent were in true agreement on the issue of disallowing Pupil Solicitors one might have expected the Chief Superintendent to have disallowed the visit and explained to the Solicitor that the Custody Sergeant who had already granted access had not been acting in compliance with the instructions of his authorities.
33. As the challenge had originally been framed the applicant heavily relied on Article 59 of PACE⁴ and the Codes thereunder as the source of the

³ About which he was not informed by the Custody Sergeant when being briefed by him about the matter. As previously pointed out there has been **no explanation** from the Custody Sergeant as to why this plainly relevant information was not furnished to the Chief Superintendent.

⁴ Access to legal advice

59. ^{E1}— (1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time.

alleged right to be present. As I previously explained in my judgment on the leave application I considered that reliance on Article 59 was misconceived and leave was not granted to rely on that ground. The reason for that was simply that Article 59 and the Codes thereunder confer a right on the *detained person* to consult with his or her Solicitor. That right vests in the detained person. In *Coyle v Reid* [2000] NI 7 Carswell LCJ, held:

“We do not find it helpful to analyse the relationship between the police and the solicitor

-
- (2) Subject to paragraph (3), a request under paragraph (1) and the time at which it was made shall be recorded in the custody record.
- (3) Such a request need not be recorded in the custody record of a person who makes it at a time while he is at a court after being charged with an offence.
- (4) If a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable except to the extent that delay is permitted by this Article.
- (5) In any case he must be permitted to consult a solicitor within 36 hours from the relevant time, as defined in Article 42(2).
- (6) Delay in compliance with a request is only permitted –
- (a) in the case of a person who is in police detention for a serious arrestable offence; and
 - (b) if an officer of at least the rank of superintendent authorises it.
- (7) An officer may give an authorisation under paragraph (6) orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.
- (8) ^[E2]Subject to paragraph (8A)] an officer may only authorise delay where he has reasonable grounds for believing that the exercise of the right conferred by paragraph (1) at the time when the person detained desires to exercise it –
- (a) will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with or physical injury to other persons; or
 - (b) will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or
 - (c) will hinder the recovery of any property obtained as a result of such an offence.
- ^[E3](8A) An officer may also authorise delay where he has reasonable grounds for believing that –
- (a) the person detained for the serious arrestable offence has benefited from his criminal conduct, and
 - (b) the recovery of the value of the property constituting the benefit will be hindered by the exercise of the right conferred by paragraph (1).
- (8B) For the purposes of paragraph (8A) the question whether a person has benefited from his criminal conduct is to be decided in accordance with Part 4 of the Proceeds of Crime Act 2002.]
- (9) If the delay is authorised –
- (a) the detained person shall be told the reason for it; and
 - (b) the reason shall be noted on his custody record.
- (10) The duties imposed by paragraph (9) shall be performed as soon as practicable.
- (11) There shall be no further delay in permitting the exercise of the right conferred by paragraph (1) once the reason for authorising delay ceases to subsist.
- (12) Nothing in this Article applies to a person arrested or detained under the terrorism provisions.

visiting a client detained in a police station in terms of the *solicitor's* rights. By the terms of PACE certain rights are conferred on a *person detained in police custody* but none are given *specifically* to the solicitor."

The Parties Submissions

34. The principal ground relied upon by the applicant was that the decision to exclude him from the later interviews, in the circumstances set out at para.3 above, was irrational. Mr McGleenan, on behalf of the respondent, accepted that if the decision to exclude the applicant from the later interviews was irrational that the Court could intervene by way of judicial review. The applicant also relied on legitimate expectation.
35. This case is *not* about the police denying a suspect access to his Solicitor in breach of his statutory or common law rights. As the evidence for the Pupil Solicitor indicates, it is not uncommon that Solicitors seek to consult with their clients in police stations accompanied by their Pupil Solicitor. Whilst it appeared to be common case that the respondent had a wide discretion to exclude Pupil Solicitors the parameters of exclusion were only lightly canvassed in submission. Until the present case the system appears to have been working without problem – confirmed by the affidavit of Mr McDermott. This is because, no doubt, common sense and professionalism generally prevail and that police and solicitors appear to recognise the benefits of permitting Pupil Solicitors to attend serious crime interviews.
36. Accepting the wide discretion which the respondent has to exclude Pupil Solicitors it is nevertheless not in the public interest for a *Custody Sergeant* to exclude a Pupil Solicitor from an interview *solely* on the basis that he is a Pupil Solicitor. The whim of the Custody Sergeant cannot be the touchstone of rationality otherwise unwelcome inconsistencies emerge which, as here, can prejudice the interests of all. It is particularly inimical to the public interest to exclude a Pupil Solicitor where:
 - (i) the detective in charge of the murder investigation does not object to his presence;
 - (ii) the interviewing detectives have expressly or impliedly consented to the presence of the Pupil Solicitor;

- (iii) he was in fact permitted to be present at the first four tape recorded interviews and there is no criticism whatsoever of his presence during that period.

In the teeth of such apparently capricious inconsistency it would have been obvious that the Master was likely to take umbrage at the exclusion of his pupil. In a matter of such significance for the legal profession and the public at large decisions to exclude Pupil Solicitors should not rest at the whim of individual Custody Sergeants.

- 37. There are sound professional educational reasons why, in the public interest, Pupil Solicitors are permitted by the police to accompany their Master when he/she is consulting with a client. It is imperative for the Pupil to observe and learn the complexities of advising a suspect under detention. Such experience cannot come from any textbook (though they can help). Advice at the police station is of particular significance since the introduction of the Criminal Evidence (Northern Ireland) Order 1988 which permitted the drawing of adverse inferences from the failure of a suspect to answer police questions and so forth. The dynamics of serious crime interviews can have profound effects on the dynamics of a trial. This merely serves to reinforce the vital public interest in ensuring that pupil solicitors get the best practical experience to enable them to properly discharge their public functions upon qualification. Generations of solicitors would be needlessly handicapped in their professional education if they could be excluded by Custody Sergeants from serious crime interviews solely on the basis of their unqualified status.
- 38. Parallels are to be found, for example, in the barrister's profession where pupil barristers will attend with their Master at the prison to consult with clients to observe and learn at the coal face. This practice has not, so far as the Court is aware, given rise to any difficulty in the past. It continues to the present day and throughout what is euphemistically referred to as "the troubles" pupil barristers regularly attended with their Masters during consultations with suspects who were charged with the most serious terrorist crimes and consulted with them in places such as Crumlin Road Prison, the Maze Prison and Maghaberry Prison. I think most, if not all, of those concerned with the administration of justice in Northern Ireland and indeed beyond are aware of just how important this aspect of legal training actually is.
- 39. It is quite unrealistic to suppose that a Pupil Solicitor, having been accepted as a student of the Law Society for Northern Ireland and undertaking an apprenticeship with a Master should be viewed as an

ordinary member of the public. Plainly he is not. He is a member of a restricted class training in a profession that in the public interest requires skills to ensure that those who are being questioned about serious crime receive the best possible advice and representation from a Solicitor. Access to a Solicitor is also an aspect of the right to a fair trial since the Article 6 requirement is not confined to the trial process itself but also embraces the pre-trial police interviews – see, for example, *Murray v UK* [1996] 22 EHRR 29. There is therefore significant public interest in ensuring that Pupil Solicitors receive the best possible training and that can only be achieved by them being able to attend with their Masters during the course of police interviews. Likewise, it is irrational (and contrary to the public interest) for a Custody Sergeant to exclude Pupil Solicitors from police interviews *solely* because they are Pupil Solicitors. Something more than that would be required in order to justify a decision to exclude them particularly where they had, as here, already been admitted to previous interviews. For a Custody Sergeant to exclude a Pupil Solicitor from interviews solely on the ground that he is a Pupil Solicitor is, in my view, so plainly contrary to the public interest that it must be condemned as irrational. In layman’s terms it simply doesn’t make sense.

Conclusion

40. Subject to the wide discretion of the respondent in an individual case to exclude a Pupil Solicitor in a particular context I hold that it was irrational for this **Custody Sergeant**, in the circumstances of this case, to exclude the Pupil Solicitor from interviews *solely* on the basis that he was a Pupil Solicitor.
41. In the light of my ruling on the rationality challenge I do not propose to examine the applicant’s alternative claim based on a legitimate expectation.
42. For these reasons the application for judicial review is allowed and I will grant a declaration the terms of which I will request the parties to agree and furnish to the Court and in the absence of agreement I will hear further submissions as to the form of a declaration.