

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

McNamee and McDonnell Solicitors' Application [2011] NIQB 104

IN THE MATTER OF AN APPLICATION BY MCNAMEE AND
MCDONNELL SOLICITORS FOR JUDICIAL REVIEW

TREACY J

Introduction

1. This is an application for judicial review by a firm of solicitors of a decision made by the Police Service of Northern Ireland (the "PSNI") on 27 October 2009 at Antrim Serious Crime Suite. On that date, a suspect was refused access to legal advice from a number of solicitors including the applicant firm on the basis that the police deemed them to be unsuitable. Leave to apply for judicial review was partially granted and partially refused by McCloskey J on 9 November 2009 ([2010] NIQB 29). Following an appeal against the partial refusal of leave, three further grounds were reinstated by the Court of Appeal on 25 May 2010.
2. By this application, the applicant, a firm of solicitors, seeks, *inter alia*, an order quashing the decision of the PSNI on 27 October 2009 that an arrested person could not be afforded access to a solicitor of the applicant firm and an order restraining the PSNI from making any similar decision and/or advising clients (or prospective clients) of the applicant firm that it, or its principals, are "unsuitable" to provide legal advice and assistance to arrested persons.
3. The grounds upon which relief is sought are set out in the amended Order 53 Statement as follows:

(i) The PSNI's decision was taken in a procedurally unfair manner as it did not provide the applicant firm with an opportunity to make representations at the time of the proposed decision; [Ground 3(b)]

(ii) The PSNI's decision was in breach of the applicant's Convention rights: (i) Article 8¹ European Convention on Human Rights ("ECHR") and/or Article 1² of the first Protocol - interference with such rights was not for a legitimate purpose, was not in accordance with the law and/or was not proportionate; and (ii) Article 14³ of the ECHR - the applicant was treated differently from another firm of solicitors without legitimate justification; [Ground 3(c)]

(iii) The PSNI acted unlawfully contrary to Article 59 of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE") under which an arrested person had rights to consultation with a solicitor of his/her choice both on the face of this provision and /or as interpreted in light of Article 6(3)(c)⁴ of the ECHR, pursuant to section 2 of the Human Rights Act 1998); [Ground 3(d)]

(iv) The PSNI took the following irrelevant considerations into account:

¹ "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

² "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law...".

³ "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

⁴ "Everyone charged with a criminal offence has the following minimum rights: ...(c) to defend himself in person or through legal assistance of his own choosing...".

- (a) its own view as to whether or not the applicant firm was conflicted; and
- (b) a view that Mr McNamee had been involved in “dealings with the suspects’ transactions” which formed the basis of the charges against him.

[Ground 3(e)]

4. The applicant sought leave to admit a further proposed amendment to the Order 53 Statement on 12 October 2010, being ground 3(e)(iii). This proposed ground is that the PSNI took into account the irrelevant consideration of a view that Mr McNamee was a partner or senior member of Tiernan & Co. Solicitors.

Background

5. As part of a major police investigation into fraudulent banking and property transactions involving the loss of millions of pounds by banking institutions, known as Operation Radix, the PSNI arrested a Mr Creegan on 27 October 2009. He has not filed an affidavit and has not participated in these proceedings.

6. Mr Creegan’s detention began at 18.25 on 27 October 2009. At 18.39 the custody record records him as stating he did not want anyone informed of his arrest. At 18.45, he requested Thomas Tiernan, a solicitor, to be informed of his arrest. The custody record states that:

“DP requested Thomas Tiernan as his legal representative. I had previously been briefed by police that there may be a conflict of interests if this solicitor was used. I informed the d/p of this and he stated that he wished to use this solicitor. I informed him that the PACE Supt would be contacted and attend to decide”.

7. At 20.24, the custody record states that:

“At 1945 Supt Kee has authorised that the dp’s solicitors Mr Tiernan is not suitable. I visited dp in cell and informed [him] the dp and he requested Mr McNamee dp informed that he is also not suitable. Dp informed that access to a solicitor is not denied or delayed but he was advised to select another sol either the duty solicitor or one from a list. He stated he would think about it”.

8. At 21.11, an entry in the custody record states that:

“dp spoken to in cell he has requested liam mallon of LJ Mallon & Co Armagh. Spoke to D/C/Insp Clements ref this and it appears that this solicitor is the brother of further dp held in custody on same matters and he stated in interview that he has discussed matters with his brother. D/C/Insp feels this solicitor is unsuitable for interview purposes and request I inform the PACE sup, Supt Kee”.

9. A further custody entry record at 21.50 states that:

“At 2150 dp was spoken to in cell and the list of solicitors was shown to the dp. After consulting the list the dp states he wished mr Kieran Rafferty sol be contacted to represent him.

At 2205 hr mr rafferty contacted I rang home but went to ans phone rang mobile and spoke to mr rafferty informed him of the situation and he agreed to represent the dp. Discussion regarding interviews and agreed with interview coordinator that interviews will begin at 0930 and he consult with dp on the phone when he rings back”.

10. Mr Rafferty attended the police station at 23.30 and consulted with his client. A further custody record entry at 01.32 on 28 October 2009 indicates that:

“general discussion to clarify the position regarding the authorization by supt kee for delay in access to legal advise (*sic*) and at no time was there a delay in notification of arrest (incommunicado) the delay in access to legal advise was due to the unsuitability of the solicitors requested, details of which have been documented by the SIO and the SUPT and every effort was made to allow the dp to exercise their right to legal advice by allowing the dp to nominate further solicitors that fall outside the criteria set out in the codes of practice that must be satisfied when authorization can be granted by the supt for such delay.

in these circumstances the dp was allowed to choose another solicitor as soon as possible and mr rafferty accepted the reason why a general explanation/reason was given to the DP for the delay/authorization.

Mr Rafferty had no representations to make at this stage”.

11. Mr Creegan was interviewed on 28, 29, 30 and 31 October 2009 with his solicitor, Mr Rafferty, present at each interview. Mr Creegan was charged at 17.06 hrs on 31 October 2009 and it seems that before 12 November 2009 he transferred his instructions to McNamee McDonnell LLP.
12. On 3 November 2009, the applicant firm wrote to PSNI Headquarters. The letter was an abbreviated form of pre-action protocol letter. The letter stated that:

“We have been informed by Mr Creegan’s solicitor that his client following arrest sought representation from this firm and specifically from our Mr McNamee. We further advised that police officers refused to allow representation by our Mr McNamee as he was deemed “unsuitable””.

13. Detective Chief Inspector McCauley replied on 11 November 2009 that:

“Other legal representatives who having been involved in dealings with the subject suspect’s transactions had been informed that in the interests of all parties and to avoid any potential conflict of interests did not represent the suspect.

Indeed we can confirm that we are in receipt of a letter from one such firm being not only fully appreciative of the position but also offering assistance”.

14. The correspondence to which the Detective Chief Inspector refers is that with another firm of solicitors, Tiernan & Co. That firm wrote to PSNI Financial Investigation Unit on 4 November 2009 with reference to “Our Client – Peter Creegan”. The text of the letter referred to a “Bring Forward” application for the purpose of notifying change of solicitor. Detective Chief Inspector McCauley replied to this letter and stated:

“Whilst at this juncture we make no assertions whatsoever, we believe from the evidence that we already possess that Tiernan’s bank accounts have been used in this fraud in relation to the movements of monies and the conveyancing of properties connected with this Fraud and Money

Laundering from what would appear to be your professional legal services.

However, we do have a voluminous amount of documentation yet to review & take decisions upon.

As such, I believe that your firm's representation of a defendant in this investigation could possibly lead to a potential or actual conflict of interests".

15. On 8 November 2009 Tiernan & Co. replied to Detective Chief Inspector McCauley and indicated they would not pursue the application for a change of solicitor. The letter also stated:

"In light of the content of your letter we feel it is necessary however to advise you that we are most concerned that our bank accounts may have been used in the furtherance of a fraud in relation to the movements of monies and the conveyance of properties. We assure you that we are willing to offer what assistance we can".

16. The applicant's affidavit suggests that at some point before 12 November 2009 they received instructions to act for Mr Creegan.

17. At paragraph 12(iv) of his affidavit dated 21 December 2009, Mr McNamee avers that Mr Creegan asked to be given legal advice by a solicitor called Mr Liam Mallon where this solicitor was consulted regarding the appropriateness of representing Mr Creegan:

"He then asked for Mr Liam Mallon but was informed that Mr Mallon felt that he could not represent him as there was a conflict of interest. (This is particularly interesting since it appears that, unlike me or my practice, Mr Mallon was consulted as to whether he felt it was proper or not for him to represent Mr Creegan)".

18. Paras 5–8 of Detective Inspector Clement's affidavit dated 2 September 2010 sets out the briefing he gave to Superintendent Kee regarding the solicitors believed unsuitable to represent any of the detained persons and his reasons for coming to this decision:

"5...I briefed Superintendent Kee that there were a number of solicitors in the Newry area that had an involvement in the case and as a result of their

involvement in the case it was my opinion that they would be unsuitable to represent any of the detained persons for a number of reasons. One of the solicitors who I had identified in the course of our investigations as being involved in transactions with the detained person was Mr McNamee...

6. I took this decision for a number of reasons. Firstly, I considered that until further enquiries had been made...some of these solicitors...could be potential suspects. Secondly, I was concerned that if a solicitor who was allowed to represent any of the detained persons was later to become a suspect, the admission of that solicitor to the interviewing process (with prior knowledge of their possible involvement) could either compromise any subsequent criminal trial or undermine the Article 6 rights of the detained person. Thirdly, I formed the view that it would be detrimental to this complex and ongoing investigation to question the detained persons concerning the movement of monies through Tiernan's Solicitors with a member, or former member of Tiernan's being present during the interview.

7. I can state that in advising Superintendent Kee of a number of solicitors who should not be permitted to attend interviews with the detained person I was concerned that the investigation and any subsequent criminal process not be compromised. I placed no other constraints on the persons to be admitted to the interview other than that those who were, or may, become part of the investigative process should be excluded. The Applicant was entitled to be accompanied by any other solicitor of his choice.

8... I considered that the fact that Mr McNamee had, until recently, been a senior member of the solicitors firm at the centre of the investigation was a highly relevant factor. The concern which the Respondent had was not simply that there was a conflict of interest but that personnel from Tiernan's were involved in serious criminal conduct".

19. Para 10 of Superintendent Brian Kee's affidavit also dated 2 September 2010 sets out his understanding of why certain solicitors could not represent the detained persons:

"10. It was my belief, from the information provided to me, that to allow legal representation by a solicitor who I had been informed may become a suspect or defendant in the case could compromise an extensive criminal investigation or interfere with Mr Creegan's right to a fair hearing under Article 6 of the ECHR".

Statutory Background

The Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE")

20. The obligation on the police to afford a detained person access to a solicitor is contained in Art59 of PACE, which provides, so far as is materially relevant, as follows:

"59. - (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.

...

(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.*

...

(6) Delay in compliance with a request is only permitted-

(a) in the case of a person who is in police detention for an indictable 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) 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 an indictable 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.

(8A) An officer may also authorise delay where he has reasonable grounds for believing that-

(a) the person detained for the indictable 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).

(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".

[Emphasis added]

PACE (NI) Codes of Practice 2007 edition – Section C

21. Para6.5 of Section C refers to the fact a detainee who wants legal advice may not be interviewed or continue to be interviewed until they have received such advice unless certain circumstances listed in sub-paragraphs (a) – (d) arise. Sub-paragraph (c) suggests the detainee nominates the solicitor he/she wishes to provide the advice or a selection is made from a list. Paragraph 6B in the 'Notes for Guidance' provides:

"A detainee who asks for legal advice should be given an opportunity to consult a specific solicitor

or another solicitor from that solicitor's firm. If advice is not available by these means, the detainee should be given an opportunity to select a solicitor from a list of those willing to provide legal advice. If this solicitor is unavailable, they may choose up to two alternatives. If these attempts are unsuccessful, the custody officer has discretion to allow further attempts until a solicitor has been contacted and agrees to provide legal advice. Apart from carrying out these duties, an officer must not advise the suspect about any particular firm of solicitors".

22. Paragraph 6E in the 'Notes for Guidance' suggests that any question of a conflict of interest is for the solicitor to consider:

"Subject to the constraints of Annex B, a solicitor may advise more than one client in an investigation if they wish. Any question of a conflict of interest is for the solicitor under their professional code of conduct..."

23. Annex B of Section C relates to 'Delay in Notifying Arrest or Allowing Access to Legal Advice'. Paragraph B3 in the notes for guidance in respect of Annex B provides:

"A decision to delay access to a specific solicitor is likely to be a rare occurrence and only when it can be shown the suspect is capable of misleading that particular solicitor and there is more than a substantial risk that the suspect will succeed in causing information to be conveyed which will lead to one or more of the specified consequences".

The Police (Northern Ireland) Act 2000

24. Section 32 of the Police (Northern Ireland) Act 2000 sets out the general function of police officers, as follows:

"32. - (1) It shall be the general duty of police officers-
(a) to protect life and property;
(b) to preserve order;
(c) to prevent the commission of offences;
(d) where an offence has been committed, to take measures to bring the offender to justice..."

Relevant Case Law

25. A number of cases are referred to below which are relevant to the arguments in relation to procedural unfairness and which consider the scope of Article 59 of PACE and Article 6(3)(c) of the ECHR.
26. *Coyle v Reid* [2000] NI 7 was an appeal against a decision of Sheil J in the Queen's Bench Division whereby he gave judgment in favour of the respondents on a claim brought by the appellant for damages for trespass to the person, consisting of battery and false imprisonment. The appellant was a solicitor and was requested to attend at Grosvenor Road, Belfast police station, where her client had been brought after his arrest. In the course of her attendance at the station the appellant was removed from the custody suite while police took DNA samples from her client. The judge found that she was not entitled to remain in the room after being requested to leave and that the sergeant had used no more than reasonable force to put her out. He therefore held that she was not assaulted or wrongfully detained. Counsel for the appellant argued she had a statutory right to be admitted to the police station in order to fulfill her functions under Article 59 of PACE of giving advice to her client and to exercise additional rights conferred upon her by the Code of Practice. Rejecting this argument, Carswell LCJ stated, at p13:

“...We do not find it helpful to analyse the relationship between the police and a solicitor visiting a client 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 specifically given to the solicitor. A person detained does not have a right at common law to have his solicitor present during interviews, as Lord Browne-Wilkinson held in *R v Chief Constable of the Royal Ulster Constabulary, ex parte Begley* [1997] NI 275 at 280... Solicitors have in our view a statutory licence to be present in the interview room when their clients are being interviewed in custody and to remain there on the terms provided for in PACE and Code C. They will also have any ancillary licence necessary to enable them to secure the observance of the rights conferred by PACE upon the clients. This statutory licence does not in our opinion extend beyond the parameters of that which is required to permit the requirements of PACE to be properly observed. It does not extend to the solicitor's presence in the room where samples are being taken. If the police permit a solicitor to be present - which in practice

may be entirely sensible and reasonable in very many cases - he or she is there in consequence of a concession made or licence granted by the police. Such a concession can be withdrawn or licence revoked, just as in the case of any other licence. Whether the licence may be revoked at will, as being a gratuitous licence, or whether it is subject to conditions which govern its revocation, akin to a contractual licence, is a matter upon which we may require further argument if it becomes material in some future case...".

27. In *Re Paul Martin Campbell* [2010] NIQB 9 the applicant was a pupil solicitor apprenticed to his master, Paul Fitzsimons, who was a senior partner in the practice of Fitzsimons Kinney Mallon (solicitors) who practice in Newry. The applicant sought leave to apply for judicial review of the decision by the police to exclude him in, the company of his master, from attending police interviews. At para8 Treacy J held:

"[8]...If and insofar as the applicant relies on Article 59 of PACE and the codes thereunder as a source of his alleged right to be present I consider this to be misconceived and leave is not granted to rely on that ground. Article 59 confers a right on a 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 a solicitor 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.""

28. In *Croissant v Germany* (1992) 16 EHRR 13 the applicant challenged the decision to provide him with state-appointed counsel for the purposes of his criminal trial. The European Court of Human Rights addressed the nature of the Article 6(3)(c) ECHR right at para29:

"...It is true that Article 6 para. 3 (c) (art. 6-3-c) entitles "everyone charged with a criminal offence" to be defended by counsel of his own choosing (see the Pakelli v. Germany judgment of 25 April 1983,

Series A no. 64, p. 15, para. 31). Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes; indeed, German law contemplates such a course (Article 142 of the Code of Criminal Procedure; see paragraph 20 above). However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice".

29. In *Brennan v UK* (2002) 34 EHRR 18 the European Court found that the application of Articles 6(1) and (3) ECHR may be dependent on special features of the proceedings involved and on the circumstances of the case or may be restricted for good cause:

"...The manner in which Article 6 §§ 1 and 3 (c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In its judgment in *John Murray v. the United Kingdom* (8 February 1996, *Reports of Judgments and Decisions* 1996-I, pp. 54-55, § 63), the Court also observed that, although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause. The question in each case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing" [para45].

30. In *R v Blaney* [2004] NICA 28, Kerr LCJ considered a number of cases including the reasoning of the European Court in *Brennan v UK* and then proceeded to set out, at paragraph 49, a principled analysis of the requirements of Article 6, including an express recognition that the rights protected by Article 6(3) may be subject to restriction for good cause:

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

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

31. The Grand Chamber considered the scope of Article 6(3)(c) ECHR protections in *Salduz v Turkey* (Application no. 36391/02)(27 November 2008):

“51. The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial (*Poitrinol v. France*, 23 November 1993, § 34, Series A no. 277-A, and *Dembukov v. Bulgaria*, no. 68020/01, § 50, 28 February 2008). Nevertheless, Article 6 § 3 (c) does not specify the manner of exercising this right.

It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial. In this respect, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (*Imbrioscia*, cited above, § 38).

52. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right has so far been considered capable of being subject to restrictions for good cause. The question, in each case, has therefore been whether the restriction was justified and, if so, whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified restriction is capable of doing so in certain circumstances (see *John Murray*, cited above, § 63; *Brennan*, cited above, § 45, and *Magee*, cited above, § 44)".

32. In *Huang (FC)(respondent) v Secretary of State for the Home Department (appellant) and Kashmiri (FC) (appellant) v Secretary of State for the Home Department (respondent) (conjoined appeals)* [2007] UKHL 11 ("*Huang*") it was noted that in most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. The House of Lords then gave specific consideration to the subject of proportionality. Para19 of the House of Lord's decision in *Huang* sets out the questions generally to be asked in deciding whether a measure is proportionate:

"19. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80, the Privy Council, drawing on South African, Canadian and Zimbabwean authority, defined the questions generally to be asked in deciding whether a measure is proportionate:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

This formulation has been widely cited and applied. But counsel for the applicants (with the support of Liberty, in a valuable written intervention) suggested that the formulation was deficient in omitting reference to an overriding requirement which featured in the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, from which this approach to proportionality derives. This feature is (p 139) the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted. The House recognised as much in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368, paras 17-20, 26, 27, 60, 77, when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said that the judgment on proportionality

"must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage" (see para 20).

If, as counsel suggest, insufficient attention has been paid to this requirement, the failure should be made good".

Applicant's Submissions

Procedural Unfairness

33. The applicant submits it has been adversely affected by the PSNI's decision not to permit a solicitor from the applicant firm to represent

Mr Creegan. The PSNI's decision is described as tantamount to an economic tort because the direct result of being denied the opportunity to represent Mr Creegan was the loss of professional income and possibly, also, the loss of opportunity to represent this client at trial. Further, it is contended that the PSNI telling a prospective client that it (or a solicitor in the firm) was "unsuitable" and awareness amongst the applicant firm's clients or prospective clients that the PSNI refused to permit it to represent Mr Creegan reflects upon and affects its professional standing and reputation.

34. The applicant argues that, as it was adversely affected by the PSNI's decision, the principles of fairness or natural justice required procedural protection. It is asserted that, in the present case, the modest procedural protection required by fairness was that the applicant firm be notified the PSNI were concerned about their being engaged by Mr Creegan where the firm was also informed of the basis of those concerns and then permitted to give its view as to whether there was a conflict of interest.
35. The applicant firm states there were plainly representations which could have been made to the PSNI about its concerns and that the firm could have offered the services of another solicitor about whom there were not similar concerns.

Breach of ECHR rights

(i) Article 8 ECHR and Article 1 of the First Protocol ECHR

36. It was submitted the applicant firm's and Mr McNamee's Article 8 ECHR rights have been violated because the firm's professional reputation has been damaged by the PSNI decision it was "unsuitable" and because it has been deprived the opportunity of engaging in a commercial or economic relationship with a client.
37. It was argued that the PSNI decision interferes with the applicant firm's right to the peaceful enjoyment of its possessions under Article 1 of the First Protocol. The applicant contends that "possessions" has a wide interpretation and includes contractual rights, goodwill and legitimate expectations extending to all manner of things which have an economic value. Therefore, the applicant asserts that the deprivation of the opportunity to engage in the commercial activity of representing Mr Creegan after he sought to retain the applicant firm represents an interference with its property rights.
38. In respect of its Article 8 and/or Article 1 of the First Protocol rights, the applicant does not formally concede the PSNI was pursuing or seeking to pursue a legitimate aim in arriving at its decision but, in the event that this Court may find against it, the applicant firm submits the

PSNI decision was made on a misinformed basis because procedural protections which should have been afforded to the applicant firm were not provided; the decision was not in accordance with the law; and the decision was made in a way which was neither necessary nor proportionate.

39. It is submitted that the PSNI actions were in breach of Article 59 of PACE (detailed arguments in this regard are considered below) and, therefore, any interference with ECHR rights which is not in accordance with the law will automatically be rendered a violation of those rights.
40. In reliance on *Sunday Times v UK (1979) 2 EHRR 245* (para59), the applicant submits that if there is interference with an ECHR right which is asserted to be necessary and proportionate such interference must be “relevant and sufficient”. It is asserted that authority, such as, for example, para52 of *Vogt v Germany (1995) 21 EHRR 205*, establishes it is not sufficient that the authority interfering with the ECHR right acted “reasonably, carefully and in good faith”. Rather, the Court must examine the reasons for the state’s actions and determine whether, in fact, they are adequate. It is contended that cogent evidence is required and that mere suspicion is not enough.
41. The applicant submits the PSNI’s actions were entirely misplaced and unwarranted and then repeats its earlier submissions in respect of procedural fairness. It is contended the interference with the applicant firm’s ECHR rights was unlawful because the PSNI decision was not proportionate due to its failure to consult the applicant firm or give it a right to a hearing.

(ii) Article 14 of the ECHR

42. It is asserted that another firm of legal practitioners was provided with the opportunity to make its own decision as to whether it had a conflict of interest in representing Mr Creegan and a further firm of legal practitioners was given the opportunity to actually represent Mr Creegan. The applicant argues there is no material reason justifying the differential treatment afforded to these firms and such disparity of treatment without adequate justification is a breach of the applicant firm’s rights under Article 14 ECHR.

Illegality

43. It is submitted the PSNI decision breached Mr Creegan’s rights to consult a solicitor of his choice pursuant to Article 59 of PACE. Further, the applicant asserts that Article 59 must be read compatibly with Article 6(3)(c) ECHR which provides the right of access to a solicitor is

“of his own choosing”. By reference to para30 of *Croissant v Germany* (1992) 16 EHRR it is contended that the European Court of Human Rights has recognised the requirement that there be “relevant and sufficient reasons” for refusing access to the lawyer of an accused’s choice.

44. The applicant explains that, at the leave stage, Mr Justice McCloskey considered this discrete ground of challenge manifestly unarguable, for the simple reason that Article 59 conferred rights on detained suspects rather than solicitors. He found this followed inexorably from the statutory language and that the correctness of this proposition was confirmed in *Coyle v Reid & Anor* [2000] NI 7 where precisely the same contention was rejected by the Court of Appeal. However, the applicant refers to the fact that, in respect of the present case, the Court of Appeal granted leave on this issue on appeal of the leave decision. It is contended, therefore, that the Court of Appeal has plainly accepted it is arguable that the approach in *Coyle v Reid* should not be followed by this Court.
45. The applicant asserts it is in error to reason that Article 59 of PACE confers rights on detained suspects rather than solicitors. The applicant recognises the purpose of Article 59 of PACE is to provide rights to a detained person but argues his entitlement plainly imposes a corresponding legal obligation on the PSNI to afford him access to a solicitor as is made clear in Article 59(4). It is submitted that if the PSNI act in breach of that plain statutory obligation, it is acting unlawfully.
46. It is contended the applicant firm has *locus standi* to raise this breach of duty because:
 - (a) *this accords with the present approach of the courts to standing in judicial review*
 - (b) *Coyle v Reid is distinguishable and not concerned with the question of standing in public law proceedings.*
47. The applicant accepts the *ratio decidendi* of *Coyle v Reid* is binding on the High Court but adds that case had nothing to do with a challenge by a solicitor to the legality of police action by way of judicial review. The applicant says *Coyle v Reid* involved a private action for trespass to the person in which the Court was required to determine whether the removal of a solicitor from a particular room in a police station was in breach of a statutory right (essentially in property law) on her part to be present at that location. The Court preferred to treat the solicitor’s rights as involving a statutory licence.

48. It is submitted the Court of Appeal was correct to hold that Article 59 did not confer on a solicitor a statutory right (in private law) to be present in a particular part of the police station. However, it is argued that is quite different from the question of whether there is an obligation in public law on the police to afford a suspect access to a particular solicitor. It is asserted that *Coyle v Reid* is not authority for the proposition that a solicitor in circumstances such as this case has no standing to rely on a breach of the PSNI's obligations under Article 59 of PACE.

(c) the question of the legality of the PSNI's actions under Article 59 of PACE is relevant to the applicant's ECHR challenge

49. The applicant also points out that leave has been granted on ground 3(c)(i)(breach of Article 8 ECHR and Article 1 of the First Protocol) on the basis that interference with those rights was not in accordance with law. It is submitted this encompasses a claim that interference with the applicant's rights was unlawful as there was a breach of Article 59 of PACE.
50. On the substance of the claim, it is submitted the PSNI decision refused Mr Creegan access to a solicitor (Mr McNamee) of his choosing and denied him the right to consult privately with that solicitor. The applicant says this is a plain breach of the PSNI obligations under Article 59 of PACE.
51. Further, the applicant adds that this resulted in delay to Mr Creegan's access to a solicitor and to this particular solicitor. The solicitor who eventually represented Mr Creegan attended some 5 hours after the request for a solicitor had been made and almost 3.5 hours after Mr McNamee had been requested. It is argued such delay was not permitted by Article 59 of PACE. It is asserted that none of the permissible reasons for which delay in access to a solicitor can be justified have been invoked in this case. The applicant refers to the custody record entry at 01.56 on 28.10.09 which appears to accept (i) there was delay in providing access to a solicitor; and (ii) this was "outside the criteria set out in the codes of practice that must be satisfied when authorisation can be granted by the supt for such delay".

Irrelevant consideration: The PSNI view on "conflict of interest"

52. It was submitted the PSNI took into account the irrelevant consideration of its own view as to whether or not the applicant firm was conflicted. The applicant agrees with Mr McNamee's averment that he believes the question of whether or not there is a conflict of interest between a solicitor and a client which requires that solicitor not

act in a particular matter is a question of professional judgment for the solicitor concerned to be considered in consultation with his client. The applicant says the police are potentially entitled to raise their view about a possible conflict of interest with the suspect or with the solicitor but, it is submitted whether there is, in fact, a conflict of interest and, if so, whether it precludes a solicitor from acting consistently with his professional obligations and the client's interests, is a decision for the solicitor (and his client).

53. The applicant submits this is an important issue of principle relating to the solicitor/client relationship and the client's right to legal representation of his own choosing. It is asserted it is constitutionally improper for the police to speculate about whether a solicitor has a conflict of interest and then use this as a ground for refusing access to that solicitor.
54. It is submitted that both Mr McNamee and his client are satisfied that no conflict of interest arises. The applicant asserts that the PSNI's decision there was (even potentially) a conflict of interest which made it improper for Mr McNamee to act as an improper usurpation of the solicitor and client's judgment on that issue.

Irrelevant consideration: the purported involvement in suspect transactions

55. The applicant refers to the PSNI's suggestion Mr McNamee had some involvement in the transactions which were the subject of the investigation leading to the arrest of Mr Creegan. The applicant explains that this suggestion was made obliquely in the PSNI letter dated 11 November 2009 (referred to in paragraph 13 above) and then more boldly in the respondent's replying affidavit evidence, in particular, in paragraph 5 of Detective Inspector Clement's affidavit.
56. It is submitted this was an irrelevant consideration because it was wrong in fact and there was no evidence presented to the Court to support or substantiate this bald statement. It is asserted that if an allegation of such severity is to be made on affidavit the Court can properly expect that some evidence will be provided to corroborate it, particularly, where Mr McNamee, in his affidavit, had taken issue with the PSNI's suggestion of his involvement in the suspect transactions; and where the veracity of the PSNI's suggestion to this effect is central to one of the grounds of challenge in this case.
57. Reference is made to paragraph 10 of Superintendent Kee's affidavit. The applicant is not sure if this is a specific reference to Mr McNamee but, if so, it is again emphasised there is no evidence in the papers provided to the Court or even any suggestion Mr McNamee was likely to become a suspect or defendant.

Irrelevant consideration: the view Mr McNamee was a partner or senior member of Tiernan & Co., Solicitors

58. As already mentioned the applicant seeks leave to admit this further proposed amendment to the Order 53 Statement. It is argued the PSNI's understanding of Mr McNamee's professional position or employment within Tiernan & Co. was, at best, not clear or, at worst, incorrect. The applicant states the custody officer initially informed Mr Creegan that Mr McNamee worked for Tiernan & Co. when, in fact, he left that firm some time before Mr Creegan's arrest and had set up his own practice. It is submitted the suggestion Mr McNamee had been involved in the suspect transactions was simply wrong for the reasons set out in his second affidavit.
59. The applicant then makes reference to a number of errors made by the PSNI (wrongly stating Mr Creegan was not a client of the firm when at that time he had instructed the applicant firm in relation to the matters in respect of which he had been arrested and believing Mr McNamee had been a partner or "senior member" of Tiernan & Co. when that was not the case). However, the applicant appears to believe that the nub of the PSNI's reasons for its decision was that Mr McNamee had been involved in dealings with the subject suspect's transactions. It is asserted that insofar as these matters were taken into account by the PSNI in reaching their decision they were irrelevant considerations and material errors of fact.
60. Also, the applicant refers to possible confusion on the part of the PSNI as to whether Mr McNamee left Tiernan & Co. at the same time as, or in connection with, an individual who was the central suspect in the case. The applicant submits this was not the case.

Respondent's Submissions

Procedural unfairness

61. It is submitted that the concept of procedural fairness is "a context-sensitive elastic concept". It is argued that the detained person was afforded the right to appoint a solicitor and was advised the selection of solicitors was subject to constraints in light of the factual backdrop to the investigation into allegations of serious criminality. It is pointed out that the detained person was able to nominate a solicitor, Mr Rafferty, to represent him. The respondent explains, when the detained person was offered the opportunity to make representations about the delay in access to legal advice he had no representations to make; no representations were made at a later date; and, to date, he has made no complaint about the selection of solicitors.

62. It is asserted there is no evidence supporting the applicant's contention that another solicitor, Mr Mallon, was consulted by the respondent as to whether he had a conflict of interest in acting for Mr Creegan. Further, reference is made to the entry in the custody record of 27th October 2009 which provides that the Detective Chief Inspector Clements decided Mr Mallon would be unsuitable to represent Mr Creegan because of his connections with the other detained person. It is contended that the applicant's speculative averment that another solicitor was allowed to make representations about suitability is at odds with the contemporaneous records.
63. The respondent submits the applicant has confused the interests of Mr Creegan with the interests of the applicant. The respondent asserts it is not apparent that the applicant firm had any interests that were directly affected on 27 October 2009. It is contended the applicant was not on record for Mr Creegan at that time; it seemed unaware Mr Creegan had been detained and that any requests had been made for its engagement.
64. The respondent submits the only "right" in play was the detained person's right to legal advice during interview pursuant to Article 59 of PACE and that the obligation to permit access to a solicitor was fully discharged by the respondent.
65. It is submitted no procedural fairness issue arises. The respondent asserts that, in the absence of any legal right for a specific solicitor to gain access to police interview, the decision to deem certain solicitors unsuitable in this context of investigation into financial transactions, was a proper matter for the judgment of senior police officers.
66. In reliance on *Re Campbell* the respondent submits the right in question is that of the detained person and not the solicitor. Consequently, it is argued that the only person who can properly complain of a breach of Article 59 of PACE is Mr Creegan. Further, it is asserted this was also accepted by McCloskey J at the leave stage in the present application.
67. The respondent refers to *Croissant v Germany* in which the European Court held the Article 6(3)(c) ECHR right is not absolute and to *R v Blaney* which followed this approach. The respondent says that, in the present case, the applicant prays in aid Article 6(3)(c) ECHR in respect of pre-charge legal representation in the police station prior to his being charged with any offence. It is submitted the protections of Article 6(3)(c) ECHR are primarily directed at the trial and, as in *Croissant*, the scope for state restrictions on representation in the defence of a case at trial.

68. The respondent also relies on *Salduz v Turkey* and argues that the central consideration in determining whether a pre-trial restriction with an Article 6 ECHR right constitutes a breach is whether, in the context of the proceedings taken as a whole, the defendant has been deprived of a fair hearing.
69. The respondent submits that an assessment of whether Article 6(3)(c) ECHR has been breached can, as a matter of principle, only take place against consideration of all the circumstances of the trial. It is contended, in the present case, that no trial has taken place and the applicant's challenge is plainly premature.
70. The respondent submits the rationale for excluding a member of the applicant firm from the PACE interviews on 27 October 2009 was the need to maintain the integrity of an extant investigative process and the viability of any evidence obtained. It is asserted that the fair trial rights in play are those of Mr Creegan and if he contends his defence of the charges against him has been seriously compromised by the representation afforded by Mr Rafferty during the pre-charge interviews, then he will be entitled to raise that point at his trial. The respondent submits the introduction of the Article 6(3)(c) ECHR argument does not significantly alter the analysis of the rights afforded in domestic law by Article 59 of PACE.

Breach of Convention Rights

71. In respect of the applicant's arguments that its Article 8 ECHR rights have been breached, the respondent argues there is no evidence of damage to the professional reputation of the applicant as a consequence of the decision of 27 October 2009 and as the applicant firm is now instructed by Mr Creegan its argument that it has been deprived of the opportunity to form a commercial relationship with him is unsustainable.
72. The respondent contends that in order for the PSNI's decision to interfere with the applicant's Article 8 rights a threshold requirement of seriousness must first be met. Reference is made to para28 of *R (Gillan) v Commissioner for the Metropolis* [2006] UKHL 12 in which Lord Bingham stated:

"...it is clear Convention jurisprudence that intrusions must reach a certain level of seriousness to engage the operation of the Convention..."
73. The respondent states that if the Court holds the PSNI decision was an interference with the applicant firm's Article 8 ECHR rights, then the

issue of Article 8(2) ECHR justification arises. In this regard, it is argued that a decision to ensure solicitors who may have been involved in practices which are the subject of a live and ongoing criminal investigation do not attend PACE interviews for a detained person is clearly in furtherance of a legitimate aim. Reference is made to section 32 of the Police (Northern Ireland) Act 2000 which expresses the general statutory duty of police officers to prevent the commission of offences and, where an offence has been committed, to take measures to bring the offenders to justice.

74. The respondent asserts that Mr Creegan was charged with extremely serious offences while an extensive investigation into serious criminal activity involving complex financial transactions was ongoing. In such a context, it is submitted, that a decision to exclude certain solicitors who were, or had been, associated with firms under investigation, was both necessary and entirely proportionate.
75. In considering the proportionality of an interference with Article 8 ECHR, the respondent referred to *Huang* which set out the questions which must be considered as defined in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69. The respondent submits it is highly questionable whether there has been any interference with the Article 8 ECHR rights of the applicant firm as any restriction on its legal representation of Mr Creegan was confined temporally to a series of pre-charge interviews. In each of those interviews Mr Creegan was represented by a competent solicitor about whom he has made no complaint. It is asserted that the restriction on access for a small number of solicitors was imposed to preserve the integrity of a complex investigation and that most of these solicitors accepted this without demur. The respondent says that the applicant firm has not been restricted from representing Mr Creegan at his trial and, consequently, the means used to impair any Article 8 ECHR right were rationally connected to a proper police function and were no more than was considered necessary at the material time.
76. In respect of the applicant's arguments that its rights under Article 1 of the First Protocol to the ECHR have been breached, primarily, the respondent argues this is not a sustainable argument because the applicant firm now represents Mr Creegan. The respondent says that even if this was not the case, it does not accept the claimed "possession" falls within the meaning of Article 1 of the First Protocol. It is submitted that in order for a claim to constitute a possession within the meaning of this article the party must be able to show a legal entitlement to the economic benefit in issue or a legitimate expectation that the benefit will materialise. It is argued that the

applicant firm has no legal entitlement to the commercial benefit of representing Mr Creegan. It is submitted, in reliance on Pine Valley v Ireland (1991) 14 EHRR 319, that the argument the firm enjoyed a legitimate expectation they would derive such a benefit will only be protected where there has been detrimental reliance resulting in financial liability. It is asserted there is no such feature in the present case.

Irrelevant consideration: The PSNI view on “conflict of interest”; the purported involvement in suspect transactions; and the view Mr McNamee was a partner or senior member of Tiernan & Co., Solicitors

77. The respondent submits the PSNI’s letter dated 11 November 2009 indicates the PSNI did no more than explain at the material time, in general terms, that a potential conflict of interest might arise where solicitors who were involved in “*dealings with the subject suspects transactions*” engaged in representation at interview.
78. Further, it is argued that decisions as to access to detained persons subject to PACE interviews are governed by a comprehensive framework of the PACE statute and Codes of Practice. The applicant argues it is plain that Article 59(8) and (8A) of PACE require the PSNI to give active consideration to the existence of any actual or potential relationships between the detained person and their chosen solicitor in the event that an authorisation for delay in access to a solicitor arises. It is submitted that when viewed through the correct statutory prism the possibility of a potential conflict of interest is manifestly relevant.
79. It is argued there is no evidence (apart from a speculative averment from the applicant) to support the applicant’s submission that the PSNI contacted another solicitor as to whether or not he had a conflict of interest. It is asserted that the contemporary notes in the custody record states the Senior Investigating Officer decided Mr Mallon would not be a suitable solicitor to attend upon Mr Creegan as he was the brother of the detained person being interviewed in relation to the same matter. There is no evidence the decision on “suitability” was made by anyone other than Detective Chief Inspector Clements.
80. The applicant’s proposed further amendment of the Order 53 Statement to include the ground that the PSNI view Mr McNamee was a partner or senior member of Tiernan & Co., Solicitors was an irrelevant consideration is resisted by the respondent. The respondent submits it is clear both Mr McNamee and Mr McDonnell were members of Tiernan & Co. until relatively recently. It is submitted that little turns on the applicant’s arguments regarding whether Mr McNamee was a member of that firm or a “senior member”. The respondent says that the Tiernan & Co. letters exhibited in the papers

indicate the structure of the firm was far from transparent. The respondent asserts it is clear Mr McNamee worked at the firm during a period when large sums of money were transferred by Mr Creegan into accounts held by Tiernan & Co. It is submitted that is a relevant consideration for the PSNI in determining whether members of former members of the firm should be admitted to PACE interviews.

Conclusion

81. Ordinarily a breach of the statutory right of access to a solicitor may give rise to a judicial review brought at the instance of the person who has allegedly been denied that right. However vindication of that right by way of judicial review is not necessarily limited to an application by that person. *Coyle v Reid*, which is binding on this Court, was not concerned with the question of standing in public law proceedings.
82. In *Family Planning Association of Northern Ireland v Minister for Health, Social Services and Public Safety* [2005] NI 188 (para45) in which Nicholson LJ cited, with approval, a passage from the 5th edition of *De Smith*:

“In summary it can be said that today the court ought not to decline jurisdiction to hear an application for judicial review on the grounds of lack of standing to any responsible person or group seeking, on reasonable grounds, to challenge the validity of government action”.

To similar effect see also the decision of Kerr J in *In Re McBride's Application* [1999] NI 299.

83. The combined effect of Art59(1) and (4) is that the request to consult a solicitor must be permitted “... except to the extent that delay is permitted by this Article”.
84. The statutory provisions and the PACE Code provide a comprehensive legislative framework governing the right of access to a solicitor together with the extent and the grounds upon which the suspect's right of access to his solicitor may be delayed.
85. Once the request is made the detained person must be permitted to consult the solicitor except to the extent that delay is permitted by Article 59. The respondent contended, relying principally on the Police Act 2000, that it was open to them to refuse permission to consult with the requested solicitor on the grounds of unsuitability by reason of alleged conflict of interest. I disagree. There is a comprehensive legislative Code and this refusal to comply with the detained person's

request was outside it. The respondent did not seek to contend otherwise. I fully appreciate the importance of the concerns of the PSNI recited at paras 73 and 74 above. Art 59(8) and (8A) of PACE provide the only statutory vehicle for addressing these concerns. The police did not however seek to use this existing statutory mechanism; indeed they expressly rejected the idea that they were doing so in this case. They preferred instead to base their decision on some alternative, implied and unspecific power alleged to derive from the Police (NI) Act 2000. I do not consider that any such alternative power exists. I see no reason why the PSNI could not have used the existing statutory provisions to deny access if they believed that was warranted on the facts of the case. In the absence of the proper exercise of any such power I conclude that the PSNI, in breach of Art 59(1) and (4), failed to comply with the detained person's request to consult his nominated solicitor.

86. In light of my conclusion that the PSNI acted unlawfully and in breach of Article 59 it is unnecessary to consider Ground 3(b) which alleges procedural unfairness.
87. Insofar as Convention rights are concerned Art 6 ECHR governs the accused's right to a fair trial of which the right to defend himself through legal assistance of his own choosing is an aspect [Art 6(3)(c)]. The accused was interviewed with a solicitor present, the applicant now acts for him and his trial has not yet taken place. Any alleged breach of the right to a fair trial is likely in those circumstances to be fairly tenuous and can in any event be addressed if necessary at the trial.
88. It does not follow at all that the breach of the *suspect's* Art 59 rights resulted in any breach of the applicant's rights. Particularly since the applicant is now instructed on behalf of the accused. The argument that the applicant has been deprived of the opportunity to form a commercial relationship with Mr Creegan is, in those circumstances, unsustainable.
89. I also consider that even if the applicant could overcome the hurdle of proving interference and the threshold requirement of seriousness identified in *R(Gillan)* the issue of justification with any alleged interference necessarily arises. If that matter was to be pursued I do not consider that this could be determined solely on the basis of the affidavit evidence presently before the Court. I consider that such a claim, were it to be pursued, would require pleadings and evidence and that this Court would not be well suited to the resolution of such a dispute.

90. Accordingly, my conclusion is that the applicant has persuaded the Court that the PSNI acted unlawfully and in breach of Art59 of PACE in denying Mr Creegan permission to consult with his chosen solicitor as soon as practicable.