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(subject to editorial corrections)

IN THE CROWN COURT FOR NORTHERN IRELAND

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THE QUEEN

-v-

STEPHEN GREENAWAY

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KERR J

The accused, Stephen Greenaway, is charged with an offence of possession of a firearm and ammunition in suspicious circumstances contrary to Article 23 of the Firearms (Northern Ireland) Order 1981. It provides: -

> "Without prejudice to any other provision of this Order, a person who has in his possession any firearm or ammunition under such circumstances as to give rise to a reasonable suspicion that he does not have it for a lawful object shall, unless he can show that he had it in his possession for a lawful object, be guilty of an offence."

Mr Greenaway now applies for an order staying the case against him on the basis that it would be an abuse of process to require him to answer a charge which imposes a "persuasive" burden of proof on him. The applicant contends that Article 23 of the 1981 Order imposes precisely such an onus on

him. It is suggested that such a burden is contrary to Article 6 (2) of the European Convention on Human Rights which provides: -

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

In *Regina v Director of Public Prosecutions, ex parte Kebilene and others* [2000] 2 AC 326, 378 *et seq* Lord Hope of Craighead described the approach to be adopted in deciding whether a reverse onus may be said to be incompatible with Article 6 of the Convention: -

> "The first stage in any inquiry as to whether a statutory provision is vulnerable to challenge on the ground that it is incompatible with article 6(2) of the Convention is to identify the nature of the provision which is said to transfer the burden of proof from the prosecution to the accused. Various techniques have been adopted. Some provisions are more objectionable than others. The extent to which they encroach upon the presumption of innocence depends upon the legislative technique which has been used. The field can be narrowed considerably by means of this preliminary analysis.
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> It is necessary in the first place to distinguish between the shifting from the prosecution to the accused of what Glanville Williams, at pp. 185-186, described as the 'evidential burden,' or the burden of introducing evidence in support of his case, on the one hand and the 'persuasive burden,' or the burden of persuading the jury as to his guilt or innocence, on the other. A 'persuasive' burden of proof requires the accused to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence. It reverses the burden of proof by removing it from the prosecution and transferring it to the accused. An 'evidential' burden requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead

any evidence about it, so the accused needs to do this if he wishes to put the point in issue. But if it is put in issue, the burden of proof remains with the prosecution. The accused need only raise a reasonable doubt about his guilt.

Statutory presumptions which place an 'evidential' burden on the accused, requiring the accused to do no more than raise a reasonable doubt on the matter with which they deal, do not breach the presumption of innocence. They are not incompatible with article 6(2) of the Convention. They take their place alongside the common law evidential presumptions which have been built up in the light of experience. They are a necessary part of preserving the balance of fairness between the accused and the prosecutor in matters of evidence. It is quite common in summary prosecutions for routine matters which may be inconvenient or time-consuming for the prosecutor to have to prove but which may reasonably be supposed to be within the accused's own knowledge to be dealt with in this way. It is not suggested that statutory provisions of this kind are objectionable.

Statutory presumptions which transfer the 'persuasive' burden to the accused require further examination. Three kinds were identified by the applicants in their written case. I am content to adopt their analysis, which Mr. Pannick for the Director did not dispute. First, there is the 'mandatory' presumption of guilt as to an essential element of the offence. As the presumption is one which must be applied if the basis of fact on which it rests is established, it is inconsistent with the presumption of innocence. This is a matter which can be determined as a preliminary issue without reference to the facts of the case. Secondly, there is a presumption of guilt as to an essential element which is 'discretionary.' The tribunal of fact may or may not rely on the presumption, depending upon its view as to the cogency or weight of the evidence. If the presumption is of this kind it may be necessary for the facts of the case to be considered before a conclusion can be reached as

> to whether the presumption of innocence has been breached. In that event the matters cannot be resolved until after trial. The third category of provisions which fall within the general description of reverse onus clauses consists of provisions which relate to an exemption or proviso which the accused must establish if he wishes to avoid conviction but is not an essential element of the offence. In *Reg. v. Edwards* [1975] Q.B. 27 a provision of this kind was held to impose a burden of proof on the applicant to establish on the balance of probabilities that he had a licence for the sale of the intoxicating liquor. Lawton L.J. said, at pp. 39-40, when giving the judgment of the court that this exception to the fundamental rule that the prosecution must prove every element of the offence charged was limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with special qualifications or with the licence or permission of specified authorities. In *Reg. v. Hunt (Richard)* [1987] A.C. 352, 375 Lord Griffiths emphasised the special nature of these provisions when he said that he had little doubt that the occasions upon which a statute will be construed as imposing a burden of proof upon a defendant which did not fall within this formulation are likely to be exceedingly rare.
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> These provisions may or may not violate the presumption of innocence, depending on the circumstances."

Mr Treacy QC for the accused submitted that the persuasive burden in the present case fell within the first of the three categories adumbrated by Lord Hope, namely, a mandatory presumption of guilt as to an essential element of the offence. For the prosecution Mr Kerr QC accepted that, on its conventional interpretation, Article 23 imposed a persuasive burden but he claimed that it did not automatically follow that such a burden was in violation of Article 6 of the Convention. In any event, Mr Kerr submitted, the

provision was capable of being interpreted as imposing only an evidential burden and that, applying section 3 of the Human Rights Act 1998, it should be so interpreted.

In my opinion, the reverse onus imposed by Article 23, if approached by any traditional method of statutory construction, must be regarded as casting a persuasive burden of proof on the accused since it requires him "to prove, on a balance of probabilities, a fact which is essential to the determination of his guilt or innocence" *viz* that he had the weapon and ammunition for a lawful object. Again applying traditional techniques of construction, the burden imposed on the accused falls within the first category outlined by Lord Hope since there is a mandatory presumption of guilt once it is shown that the accused has the items in his possession in circumstances that give rise to a reasonable suspicion that he does not have them for a lawful object. That presumption can only be displaced by the accused "showing" that he has them for a lawful object. If he fails to "show" this, he must be convicted.

In *R v Lambert* [2001] 3 WLR 206 the defendant was arrested in possession of a bag containing over £140,000 worth of cocaine. He was charged with an offence of possession of a controlled drug with intent to supply contrary to s 5 (3) of the Misuse of Drugs Act 1971. At his trial he relied on the defence provided by s 28(2) and (3)(b) of the 1971 Act, asserting that he had not believed or suspected, or had reason to suspect, that the bag had contained cocaine or any controlled drug. Section 5(3) provides: -

"Subject to section 28 of this Act, it is an offence for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another "

The material parts of section 28 are: -

"(2) Subject to subsection (3) below, in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged.

(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused—

(a) shall not be acquitted of the offence charged by reason only of proving that he neither knew nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but

(b) shall be acquitted thereof—

(i) if he proves that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or

(ii) if he proves that he believed the substance or product in question to be a controlled drug, or a controlled drug of a description, such that, if it had in fact been that controlled drug or a controlled drug of that description, he would not at the material time have been committing any offence to which this section applies."

One of the issues that arose on the appeal was whether section 28 (2) imposed a legal burden on the accused and, if so, whether this constituted a violation of the appellant's rights under Article 6 of the European Convention on Human Rights. Lord Slynn of Hadley said: -

> "If read in isolation there is obviously much force in the contention that s 28(2) imposes the legal burden of proof on the accused, in which case serious arguments arise as to whether this is justified or so disproportionate that there is a violation of art 6(2) of the convention rights (see *Salabiaku v France* (1988) 13 EHRR 379 at 388 (para 28)). In balancing the interests of the individual in achieving justice against the needs of society to protect against abuse of drugs this seems to me a very difficult question but I incline to the view that this burden would not be justified under art 6(2) of the convention rights."

Lord Steyn held that section 28, if interpreted according to traditional norms of statutory construction, was incompatible with the appellant's Convention rights since it imposed a legal burden on him and was not proportionate to perceived difficulties facing the prosecution in drugs cases. Lord Hope said of section 28 (2) and (3): -

> "… the view hitherto has been that the burden on the accused is a persuasive burden. The wording of s 28(2) and (3), in which the words 'to prove' and 'if he proves' are used, supports this view. The ordinary meaning of these words is that there is a persuasive burden that must be discharged."

At a later point in his judgment, however, he made it clear that a reverse onus provision would not inevitably give rise to a finding of incompatibility with Article 6 (2). At paragraph 87 he said: -

> "For the reasons which I sought to explain in *R v DPP, ex p Kebeline* [2000] 2 AC 326 at 383–388, I do not

> think that a reverse onus provision will inevitably give rise to a finding of incompatibility. In *Salabiaku v France* (1988) 13 EHRR 379 at 388 (para 28) the European Court of Human Rights said:
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> > 'Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law … Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.'
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> Mr Owen said that the court was not concerned in *Salabiaku*'s case with a provision applicable to a person charged with a serious criminal offence which placed the burden of proof on him with respect to an essential element of it. That is true, but I do not think that this deprives it of value as a statement of principle. What it means is that, as the art 6(2) right is not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality: *Ashingdane v UK* (1985) 7 EHRR 528; see also *Brown v Stott* (*Procurator Fiscal, Dunfermline)*, [2001] 2 WLR 817. It is now well settled that the principle which is to be applied requires a balance to be struck between the general interest of the community and the protection of the fundamental rights of the individual. This will not be achieved if the reverse onus provision goes beyond what is necessary to accomplish the objective of the statute."

In the present case no reason relating to the general interest of the community was advanced by the prosecution to justify the modification of the accused's right under Article 6 (2) by imposing the reverse onus provided for in Article 23 of the 1981 Order. I consider that, if it is conventionally

construed, Article 23 imposes a persuasive burden on a person charged that is disproportionate to the fulfilment of the objective of the statute. In its ordinary meaning, therefore, it is inconsistent with the accused's rights under Article 6 (2).

Section 3 of the Human Rights Act 1998 provides: -

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights."

In *Kebilene*, at 373F Lord Cooke of Thorndon said that the new canon of interpretation which section 3(1) lays down "is a strong adjuration." Lord Steyn described the interpretative obligation as "a strong one": *R v A (No 2)* [2001] 2 WLR 1546, 1562H. Its effect is that the court must strive to find a possible interpretation of the legislation that is compatible with Convention rights, even though that is not its natural or ordinary meaning. The interpretative obligation in section 3(1) is therefore a radical departure from the traditional approach. Lord Hope has described the provision in this way:

> "What the rule seeks to do really is something quite new. It requires the court to do all it possibly can to interpret legislation compatibly with the Convention, even if this means straining words beyond the ordinary and natural meaning of those words. It allows the courts to alter the meaning of the words even if to do so would involve a departure from the meaning they were intended to have when the provision was enacted by Parliament."[1]

In *R v A (No 2)* at p 1563F-G Lord Steyn drew a contrast between the use of the interpretative obligation in section 3(1) and the making of

[1] Paper delivered to Judicial Studies Committee in Edinburgh, January 2002

declarations of incompatibility under section 4 of the Human Rights Act. A declaration of incompatibility is a measure of last resort, he said, that must be avoided unless it is plainly impossible to do so. There was only one check on the use of the interpretative obligation that he was willing to accept:

> "If a *clear* limitation on Convention rights is stated *in terms*, such an impossibility will arise … "

It has been suggested by Lord Hope that "if this is right, a great deal of legislative freedom has been given to the judges, as clear limitations of that kind are likely to be very rare – especially in legislation which was enacted before it became customary for Parliament to have regard to the Convention rights".[2] The words "so far as it is possible to do so" in section 3 have been read as words of expansion but I tend to agree with Lord Hope that "these words are words of limitation also which define the boundaries beyond which the judges must not go"[3]. It is, however, entirely consonant with the "strong adjuration" to interpret legislation in a way which is compatible with Convention rights to hold that Article 23 of the Firearms Order does not impose a persuasive burden but an evidential burden on a defendant. Indeed, this was the approach of the House of Lords in *Lambert.* This is how Lord Hope put it: -

> "The choice then is between a persuasive burden, which is what the ordinary meaning of the statutory language lays down, and an evidential burden, which is the meaning which it is possible to give to the statutory language under s 3(1) of the 1998 Act. If the evidential burden were to be so slight as to make no difference—if it were to be enough, for example, for

[2] Paper delivered to Judicial Studies Committee in Edinburgh, January 2002
[3] *ibid*

> the accused merely to mention the defence without adducing any evidence—important practical considerations would suggest that in the general interest of the community the burden would have to be a persuasive one. But an evidential burden is not to be thought of as a burden which is illusory. What the accused must do is put evidence before the court which, if believed, could be taken by a reasonable jury to support his defence. That is what Professor Glanville Williams envisaged when he was giving this meaning to the words 'unless the contrary is proved': 'The Logic of "Exceptions"'[1988] CLJ 261 at 265. It is what the Judicial Committee envisaged in *Vasquez v R* [1994] 3 All ER 674 at 683,[1994] 1 WLR 1304 at 1314 and in *Yearwood v R* [2001] UKPC 31. It is what the common law requires of a defendant who wishes to invoke one of the common law defences such as provocation or duress. "
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> and
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> "I would therefore read the words 'to prove' in section 28(2) as if the words used in the subsection were 'to give sufficient evidence', and I would give the same meaning to the words 'if he proves' in s 28(3). The effect which is to be given to this meaning is that the burden of proof remains on the prosecution throughout. If sufficient evidence is adduced to raise the issue, it will be for the prosecution to show beyond reasonable doubt that the defence is not made out by the evidence."

There is no reason that a different approach should be adopted in the present case. It is perfectly feasible to read the words "unless he can show that he had it in his possession for a lawful object" in Article 23 in a way that imposes on the accused no more than an evidential burden of raising the issue of his knowledge of the items found. If the accused raises this issue it will be for the prosecution to negative it. If sufficient evidence is adduced to raise the issue, it will be for the prosecution to show beyond reasonable doubt that the

defence is not made out by the evidence. I propose to construe Article 23 in that way, therefore. I find that Article 23 imposes no more than an evidential burden on the accused; this does not conflict with his rights under Article 6 (2) and the application to stay the prosecution must be dismissed.

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