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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

THOMAS IAN McQUADE

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Before Kerr LCJ, McCollum LJ and Weatherup J

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KERR LCJ

Introduction

[1] This is an application by Thomas Ian McQuade for leave to appeal against his conviction of the murder of his uncle, Joseph McQuade, on 19 October 2001. The applicant was found guilty by majority verdict (11 - 1) on 1 April 2003 after a trial before Higgins J and a jury at Downpatrick Crown Court. On 28 April 2003 Higgins J sentenced him to life imprisonment, ordering that the minimum period of imprisonment for the purposes of article 11 of the Life Sentences (NI) Order 2001 should be eleven years.

[2] At the trial the defence advanced on behalf of the applicant was that he should be found not guilty of murder but should be found guilty of manslaughter on the grounds of diminished responsibility, as defined in the Criminal Justice Act (Northern Ireland) 1966.

[3] On the application for leave to appeal against conviction the applicant raised the question of the compatibility of section 5 of the 1966 Act with article 6 of the European Convention on Human Rights and Fundamental Freedoms (1953) (Cmd 8969). In consequence this court caused to be served on the Secretary of State for Northern Ireland a notice pursuant to Order 121 Rule 3A of the Rules of the Supreme Court (Northern Ireland) 1980 in relation to Section 5(3) of the Act.

[4] In the course of the hearing of the application this court gave leave to the applicant to raise a further ground that had not been included in the original notice of application. This issue had not been raised at the trial. It was to the effect that the trial judge should not have directed the jury that the psychological insult suffered by the applicant as a result of the assaults by the deceased would not qualify as an injury that would bring any consequent abnormality of mind within section 5 of the 1966 Act.

Factual background

[5] At about 5.50 pm on 19 October 2001 the applicant entered Newtownards police station and reported to police that he had stabbed his uncle. He appeared sober and calm. He produced a lock knife from his pocket. It was in the closed position. When examined the blade was found to be blood stained. Police went to Joseph McQuade's house and they there found his body. Subsequent post mortem examination established that he had suffered eleven stab wounds and incisions to the neck, shoulder, chest, back, hand and fingers. Two of the stab wounds had pierced the heart.

[6] When he was interviewed later on 19 October 2001 the applicant said that an item on a radio programme that he had heard earlier in the day about a paedophile being sent to prison for abusing an eight year old child had prompted him to hurt or kill his uncle who, he claimed, had sexually abused him when he was young.

The medical evidence

[7] On the trial Dr Ian T Bownes, a consultant forensic psychiatrist employed jointly by the Western Health and Social Services Board and the Northern Ireland Prison Service, gave evidence on behalf of the applicant. He had had regular contact with the applicant during his various periods of imprisonment since 1988. Dr Christine Kennedy, a Master of the Royal College of Psychiatrists and a Master of Laws gave evidence for the prosecution.

[8] The medical experts agreed that the applicant was suffering from a severe personality disorder. It was also agreed that this amounted to a disorder of the mind. Dr Bownes considered that the applicant also suffered from an adjustment disorder; Dr Kennedy did not accept that this was the case. In the event, however, it was accepted by G A Simpson QC, who appeared for the applicant, that this disagreement was not relevant to the application for leave to appeal.

[9] Dr Bownes suggested that the personality disorder from which the applicant suffered was partly genetic in origin and partly due to external factors such as his social environment. Dr Kennedy on the other hand

considered that the applicant's personality disorder was predominantly due to external causes such as the impoverishment of his upbringing, the neglect by his parents and the physical and sexual abuse that he suffered while younger.

[10] Both experts agreed that the state of medical knowledge as to the cause of borderline personality disorder was best described in a supplement to the Journal of British Psychiatry published in January 2003 as follows: -

> "The aetiology of borderline personality disorder is thought to include a combination of neuro-psychiatric, genetic and early adverse factors in social environment"

The Criminal Justice Act (NI) 1966

[11] Section 5 (1) of the 1966 Act provides: -

> "Where a person charged with murder has killed or was a party to the killing of another, and it appears to the jury that he was suffering from mental abnormality which substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing, the jury shall find him not guilty of murder but shall find him guilty (whether as principal or accessory) of manslaughter."

[12] Section 5(3) deals with the burden of proof where it is claimed that the person charged suffered from a mental abnormality such as is described in subsection (1). It provides: -

> "On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder; but the prosecution, with the leave of the court, may assume the burden of such proof and proceed accordingly subject to any directions which may be given by the court as to the stage of the proceedings at which the prosecution may adduce or elicit evidence tending to such proof."

[13] Section 5 (4) deals with the standard of proof required to establish that the defendant was suffering from the requisite mental abnormality. It provides: -

> "Proof shall be sufficient to reduce, under this section, a verdict of murder to one of manslaughter if it satisfies the jury that, on the balance of probabilities, the accused was suffering from mental abnormality of the kind referred to in subsection (1)."

[14] Section 1 of the Act defines 'mental abnormality' as: -

> "an abnormality of mind which arises from a condition of arrested or retarded development of mind or any inherent causes or is induced by disease or injury"

Article 6 of ECHR

[15] Article 6 of the Convention, so far as is relevant, provides:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

The arguments

[16] Mr Simpson submitted that section 5 (3) of the 1996 Act imposed an impossible burden on the applicant. Unlike many other instances where reverse burdens were cast on the defence, in this case it was not possible for the applicant to establish the proposition contained in the subsection from facts within his own knowledge. It was necessary for him to prove that the abnormality of mind from which he suffered arose from an inherent cause or from injury, but medical knowledge on these questions was far from settled. To oblige the applicant to substantiate that he suffered from a condition that came within section 5 (3) was oppressive and incompatible with the presumption of innocence guaranteed by article 6 (2).

[17] On the question of the possible application of section 3 of the Human Rights Act 1998 (which provides that, so far as it is possible to do so, legislation must be read and given effect in a way which is compatible with convention rights) Mr Simpson argued that, in light of section 5 (4) of the 1966 Act, it was not possible to read down section 5 (3) so as to convert the persuasive burden to an evidential one. The combination of the two subsections, he said, precluded such an interpretation. Section 5 (4) was

unequivocal - that the accused must prove the relevant matters to the stated standard of proof.

[18] Finally, Mr Simpson argued that the learned trial judge was wrong to exclude psychological injury as a possible cause of the applicant's abnormality of the mind. He submitted that since it had now been recognised that 'bodily injury' for the purposes of sections 18, 20 and 47 of the Offences against the Person Act 1861 could include recognisable psychiatric illness, psychological assault should likewise be recognised as capable of producing an abnormality of the mind.

[19] For the Secretary of State Mr Morgan QC submitted that the legal effect of section 5 (3) should be characterized as a presumption of mental normality. Such a presumption did not violate article 6 (2) of the convention so long as it was confined to reasonable limits and took into account what was at stake for the defendant. This provision, he said, satisfied both requirements.

[20] The purpose of restricting the definition of mental abnormality in the 1966 Act and its equivalent in England and Wales (section 2 (1) of the Homicide Act 1957) was to exclude, among other things, the possibility of a finding that social circumstances had given rise to the mental abnormality on which an accused person relied in defence of a charge of murder. The decision as to whether social circumstances should enable an accused to avoid conviction for murder where the essentials of the offence are otherwise made out clearly involves a substantial measure of policy. It was therefore submitted that such a decision fell squarely within the discretionary area of judgment of the state and the court should show 'considerable deference' to the decision of the legislature on this matter.

[21] In relation to the added ground of appeal, Mr Kerr QC, who appeared for the Crown, submitted that this court should adopt the definition of 'abnormality of the mind' favoured by the Court of Appeal in England and Wales in *R v Sanderson* [1994] 98 Cr App R 325 in which it was suggested that the phrase 'induced by disease or injury' should be taken as referring to organic or physical injury.

Reverse burdens of proof

[22] In the conjoined appeals of *Attorney General's reference No 4 of 2004* and *Sheldrake v DPP* [2004] UKHL 43 Lord Bingham of Cornhill has provided a magisterial review of the law in this area. (This judgment has been deferred until the opinions of the appellate committee in these cases became available.) As Lord Bingham pointed out, the pre-convention law of the United Kingdom regarded the governing principle that the onus lies upon the prosecution in a criminal trial to prove all the elements of an offence as supremely important, but not as absolute. Parliament has been prepared in certain instances to

impose legal burdens on, or provide for presumptions rebuttable by, the defendant. But, although Parliament has not treated the presumption of innocence as universally absolute, the underlying rationale for this fundamental principle has clearly been, to borrow the words of Lord Bingham, that "it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so." It is against this yardstick that one must first measure the provision under challenge. Part of the means of measurement is to identify the nature of the provision that is said to transfer the burden of proof – see the speech of Lord Hope of Craighead in *R v DPP ex parte Kebilene* [2000] 2 AC 326, 378 F/G. Some provisions will be more objectionable than others. This is of particular importance in a case such as the present where the applicant is not required to discharge a burden in relation to an ingredient of the offence but is fixed with the onus of proving that he is entitled to avail of a statutory defence. As Lord Woolf CJ put it in *R v Lambert; R v Ali; and R v Jordan* [2002] QB 1112, 1124: -

> "If the defendant is being required to prove an essential element of the offence this will be more difficult to justify. If, however, what the defendant is required to do is establish a special defence or exception this will be less objectionable."

[23] Much of the Strasbourg jurisprudence on reverse onus is preoccupied with consideration of statutory presumptions of guilt such as where a man who lives with or is habitually in the company of a prostitute is presumed to be knowingly living on the earnings of prostitution unless he proves the contrary – *X v United Kingdom* (1972) 42 CD 135; or where a person found in possession of goods which he brought into France without declaring them to customs is presumed to be legally liable unless he can prove a specific event of *force majeure* exculpating him – *Salabiaku v France* (1988) 13 EHRR 379. This is not the case here. The applicant is not confronted by a statutory presumption that he is guilty of the offence (except, as suggested by counsel for the Secretary of State, in so far as he is presumed to be mentally normal). The prosecution must still prove that the traditional elements of the crime of murder are present.

[24] It might be interesting to consider whether the presumption of innocence enshrined in article 6 (2) will always be engaged where a defendant is required to produce proof to sustain a defence that has been created by statute and which was not previously available to him, although Lord Steyn in *R v Lambert* [2002] 2 AC 545, 570/571 was unimpressed by distinctions between the component essentials of an offence and proof that a defendant was entitled to avail of a statutory defence. At paragraph 35 he said: -

> "The distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and cast as a defensive issue whereas any definition of an offence can be reformulated so as to include all possible defences within it. It is necessary to concentrate not on technicalities and niceties of language but rather on matters of substance."

[25] We do not, in the event, believe it necessary to embark on this interesting debate in the present case for reasons that will appear presently. Whatever may be the true position, it is, in our view, clear that it is less difficult to justify a burden on the defendant, where he has raised an entitlement to a statutory defence, to prove entitlement to that defence than it is to support a requirement that a defendant discharge an onus of proof in relation to an element of the offence.

[26] In his opinion in the *Attorney General's reference* and the *Sheldrake* cases Lord Bingham, after examining a number of decisions of the Strasbourg courts, set out a number of principles distilled from them as follows: -

> "21. From this body of authority certain principles may be derived. The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any

> infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case."

[27] On the premise (which, for present purposes, we are prepared to accept) that the requirement imposed on a defendant to prove that he is suffering from a mental abnormality in order to avail of the defence under section 5 (1) of the 1966 Act involves a mitigation of the presumption of innocence, the following issues from those identified by Lord Bingham appear to us to be relevant: -

1. Is the presumption of fact (*i.e.* of mental normality) within reasonable limits?
2. Are the substance and effect of the presumption reasonable? And is the requirement that the defendant establish as a matter of probability that he suffered from a mental abnormality at the material time reasonable?
3. Does the defendant have a sufficient opportunity to rebut the presumption and to establish that he is suffering from a mental abnormality?
4. Does the court have ample power to assess the evidence?
5. Does the 'importance of what is at stake' make a significant difference?
6. What difficulties would a prosecutor face in the absence of such a presumption (in other words, if required to show that the defendant did not suffer from a mental abnormality)?

[28] In our judgment each of these questions can be confidently answered in a manner that supports the reasonableness and propriety of the presumption and the requirement that the defendant establish that he is entitled to the defence. The presumption does no more than assume that a defendant has normal mental capacity. Although the defendant who claims to suffer from mental abnormality may not be able from his own resources to produce evidence of this, such a condition is unquestionably personal to him and is one to which the prosecuting authorities will not normally be privy. It is reasonable that the defendant be required to prove that he suffers from the condition since it lies within his power to provide to medical experts the information necessary to establish its existence. The standard of proof that he is required to produce is such as will establish the proposition on the balance of probabilities, whereas if the burden were cast on the prosecution it would not only have to prove a negative (that the condition was not present) but would have to do so beyond reasonable doubt. While it may be true that medical knowledge about the aetiology of the condition is in a less than settled state, it does not appear to us to be reasonable that the prosecution

(facing as it does a higher standard of proof) should be burdened with such difficulties in evidence that may arise from this lack of certainty.

[29] The court is well placed to assess the evidence in support of or adverse to the proposition that the defendant is entitled to the defence, as this case readily exemplifies. Considerable medical evidence from two well respected experts was given to the jury and painstakingly explained by the trial judge. There is no restriction placed on the defendant as to the exposition of the argument in support of the claim and the jury is adjured to make its independent judgment on competing medical evidence. While the resolution of the conflict about the incidence of the burden of proof is of substantial consequence to the applicant, we do not consider that the 'importance of what is at stake' is of pivotal significance in this instance. As in *Salabiaku* the applicant is not left without means of defence. He must be acquitted of murder if he succeeds in establishing the statutory defence.

[30] One of the most important aspects of this debate is the difficulty that would face the prosecution if it were required to prove beyond reasonable doubt that a defendant who had raised the issue of a mental abnormality did not suffer from such a condition. This issue was highlighted by the Court of Appeal in England and Wales in the *Ali* and *Jordan* cases. In those cases the jury rejected the contention of the defence that the defendants should be found not guilty of murder but guilty of manslaughter by reason of diminished responsibility under section 2 (2) of the Homicide Act 1957. The defendants raised a similar argument to that presented for the applicant in the present case. Dealing with the difficulty that the prosecution might be placed in if it was required to prove that the defendants did not suffer from an abnormality of the mind, Lord Woolf said: -

> "18. There could be situations where there is an unco-operative defendant. Then it would be very difficult for the prosecution to satisfy a jury of the negative. A defendant is not required to submit to an examination by a doctor and it would not be desirable to change the law to require him to submit to an examination."

[31] We have not discussed these issues under the rubric of proportionality although it is clear that this is the context in which they are to be considered. We have concluded that it is proportionate that a defendant who seeks to avail of a defence under section 5 of the 1966 Act should be fixed with the legal burden of establishing that he suffers from mental abnormality as defined in the legislation. We have reached this conclusion principally because of what we perceive to be the practical difficulties in the way of requiring the prosecution to prove that a defendant who raises the issue of mental abnormality does not suffer from that condition. In arriving at that

conclusion we have not felt it necessary to have recourse to the question of deference that is said to be the due of Parliament on the issue. We accept that the legislature appears to have decided that social circumstances should not be alone sufficient to give rise to the type of mental abnormality that will sustain the defence but Parliament's deliberations on this matter took place (in the case of the Homicide Act) some fifty years ago. Medical knowledge has moved on from that time and it is questionable that conclusions reached then should have the effect of deterring judicial superintendence. We do not have to decide that question, however, and prefer to base our decision on our analysis of the issues identified by Lord Bingham in the *Attorney General's reference* and *Sheldrake* cases.

[32] For the sake of completeness we should mention that the compatibility of section 2 of the Homicide Act 1957 with article 6 (2) of the convention was considered by the European Commission on Human Rights in *Robinson v United Kingdom* (Application No 20858/92). In that case the applicant complained that the obligation on the defence to prove diminished responsibility constituted a violation of article 6 (2). The Commission found the complaint to be manifestly ill-founded, stating: -

> "The Commission observes that in English law the burden of proof remains with the prosecution to prove beyond reasonable doubt that the accused did act as charged. The Commission does not consider that requiring the defence to present evidence concerning the accused's mental state at the time of the alleged offence, constitutes in the present case an infringement of the presumption of innocence. Such a requirement cannot be said to be unreasonable or arbitrary. It finds, therefore, no appearance of a violation of Article 6 para. 2 (Art. 6-2) of the Convention in the present case."

[33] In light of our conclusion that the legal or persuasive burden imposed by section 5 does not infringe article 6 (2) of the convention, it is not necessary for us to express any opinion on the feasibility of 'reading down' the provision under section 3 of the Human Rights Act 1998 so as to convert that burden to an evidential one.

The additional ground of appeal

[34] At pages 235/6 the transcript records the learned trial judge having directed the jury in the following way: -

> "Now, it has to be an abnormality of mind which arises from one of the four causes set out there [in

> section 1 of the 1966 Act]. The first one is a condition of arrested or retarded development of mind. And the psychiatrists have told you that doesn't apply. It is (*sic*) induced by disease. I am taking these slightly out of turn. That doesn't apply either. It is (*sic*) induced by injury. Now Dr Bownes did say [at] some points in his evidence that a psychological assault, as he described it, or psychological insult resultant upon sexual abuse, could be an injury to a person, but, as a matter of law, I am instructing you that any psychological insult which the defendant suffered as a result of sexual abuse would not be an injury which would make any abnormality of mind he suffered one to qualify under section 5. Because that injury relates to a physical injury to the body or to the brain, and an obvious example would be where one took a hammer and hit someone over the head and fractured their skull and damaged their brain. That is the sort of injury envisaged in section 5. When Dr Bownes talked about a psychological injury, that doesn't apply to section 5."

[35] Mr Simpson criticised this passage, pointing out that in *R v Ireland; R v Burstow* [1998] AC 147, the House of Lords had held that 'bodily harm' referred to in sections 18, 20 and 47 of the Offences against the Person Act 1861 should be interpreted so as to include recognisable psychiatric illness. He therefore invited this court to consider whether the 'injury' referred to in section 1 of the 1966 Act could result from a psychological or psychiatric insult caused to a person as a result of (for example) sexual abuse.

[36] In *R v Ireland; R v Burstow* the appellant in the first appeal admitted making a large number of telephone calls to three women and remaining silent when they answered. A psychiatrist stated that as a result of the repeated telephone calls each of them had suffered psychological damage. The appellant pleaded guilty to charges of assault occasioning actual bodily harm, contrary to section 47 of the Offences against the Person Act 1861 but subsequently appealed his conviction. The appellant in the second appeal conducted a campaign of harassment of a woman with whom he had previously had a social relationship. A consultant psychiatrist stated that she was suffering from a severe depressive illness. The appellant pleaded guilty to unlawfully and maliciously inflicting grievous bodily harm contrary to section 20 of the Act of 1861. He also appealed his conviction.

[37] The Court of Appeal in *Ireland* and *Burstow* considered themselves bound by the decision in *Reg. v. Chan-Fook* [1994] 1 W.L.R. 689 where Hobhouse LJ had said at page 695: -

> "The first question on the present appeal is whether the inclusion of the word 'bodily' in the phrase 'actual bodily harm' limits harm to harm to the skin, flesh and bones of the victim. . . . The body of the victim includes all parts of his body, including his organs, his nervous system and his brain. Bodily injury therefore may include injury to any of those parts of his body responsible for his mental and other faculties."

[38] Although Lord Bingham CJ in the Court of Appeal in *Burstow* expressed some doubt whether the Victorian draftsman of the 1861 Act intended to embrace psychiatric injury within the expressions 'grievous bodily harm' and 'actual bodily harm', he nevertheless welcomed the decision, as did Lord Steyn in the House of Lords, who observed that "the statute must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury".

[39] In *Ireland* and *Burstow* and, indeed, in *Chan-Fook* current scientific thinking was that the body included the mind and that injury to the mind was therefore included in the expression 'bodily injury'. In the present case the question that arises is whether section 1 of the 1966 Act includes injury caused to the psyche by abuse in the form of neglect or sexual maltreatment. If the injury is to the body (including the mind) it appears to us not to matter what the particular mechanism of injury may be. The important question is whether the mind was injured; not how it was injured.

[40] The case referred to by counsel for the prosecution, *R v Sanderson*, did not purport to provide a definitive view on this question. It was principally concerned with the issue of what constituted disease of the mind. At page 336, however, the following obiter passage appears: -

> "Mr. Jones submitted that 'disease' in the phrase 'disease or injury' in section 2(1) meant 'disease of the mind' and was apt to cover mental illnesses which were functional as well as those which were organic. This interesting and difficult question does not, in our view, require an answer in this case. … We incline to the view that that phrase 'induced by disease or injury' must refer to organic or physical injury or disease of the body including the brain, and that that is more probable because Parliament deliberately refrained from referring to the disease of, or injury to, the mind, but included as permissible causes of an

> abnormality of mind 'any inherent cause' which would cover functional mental illness."

[40] In considering this passage we have taken 'functional' to mean a disorder without structural change and 'organic' to mean constitutional in the structure of the brain. In as much as this section of the judgment suggests that there must be some physical or structural changes to the brain in order that the effect on the mind can qualify as an injury capable of amounting to an abnormality for the purposes of the relevant sections, we cannot agree with it. It appears to us that the emphasis must lie on the degree of abnormality and the effect that this has on the mental capacity of the individual affected, rather than the species of injury or the cause of it.

[41] In the Journal of Criminal Law (June 2000) G Mousourakis provided examples of abnormalities of mind that were sufficient for the defence of diminished responsibility to be put to the jury. These included "a disorder of personality induced by psychological injury, reactive depression caused by marital difficulties". In *Ireland* and *Burstow* neither of the victims had suffered any physical damage to the brain but both were deemed to have sustained psychiatric injury. Likewise, it seems to us that the psychological injury to the applicant (which both psychiatrists appear to agree he suffered) as a result of years of abuse and neglect must be capable of amounting to an abnormality of the mind. Whether it did so in fact is for the jury to decide. In the present case they were denied that opportunity because of the judge's charge. We have concluded therefore that the conviction for murder cannot stand and must be quashed.

Conclusions

[42] Since the judge's charge expressly withdrew from the jury consideration of whether a psychological injury suffered by the applicant might be sufficient to amount to mental abnormality for the purposes of sections 1 and 5 of the 1966 Act and since, as we have decided, this was a matter that ought to have been left to the jury, the verdict cannot be regarded as safe. We will therefore grant the application for leave to appeal, allow the appeal and quash the verdict on the charge of murder. Plainly no assessment has been made as to whether the psychological injury that the applicant suffered did in fact amount to an abnormality of mind sufficient to justify a verdict of manslaughter. In those circumstances it is clear that a retrial of the applicant should take place.