Neutral Citation No: [2020] NIQB 24 *Judgment: approved by the Court for handing down (subject to editorial corrections*	*Ref:* **McC11144** *Delivered:* **11/03/20**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY DERMOT QUINN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

CRIMINAL CASES REVIEW COMMISSION

_____

Before: McCloskey LJ and Huddleston J

_____

INDEX

Glossary

"*CMD*": Case Management Directions.

"*The Commission*": Criminal Cases Review Commission.

"*CCRC*": Criminal Cases Review Commission.

"*The European Commission*": European Commission of Human Rights.

"*ECHR*"/"*the Convention":* The European Convention on Human Rights and Fundamental Freedoms.

"*ECtHR*": European Court of Human Rights.

"*UKSC*": United Kingdom Supreme Court.

McCLOSKEY LJ (delivering the judgment of the court)

Introduction

[1] This judicial review challenge has proceeded by the so-called "rolled up" procedural mechanism. Dermot Quinn (hereinafter "*the applicant")* challenges the decision of the Criminal Cases Review Commission ("*the Commission")* whereby it refused to exercise its statutory power to refer his conviction in respect of terrorist offending in Northern Ireland to the Court of Appeal. While, following the hearing conducted on 05 December 2019, the court proclaimed its decision on 19 December 2019, promulgation of its final judgment and order were deferred in the circumstances elaborated below.

Procedural Classification

[2] The question of whether these proceedings attract the "*criminal cause or matter*" provisions of the Judicature (NI) Act 1978 (the "*1978 Act*") was raised proactively by the court at an early stage. The applicable provisions of the 1978 Act are section 41(1), section 120 and Schedule 2. This elicited competing contentions on behalf of the parties.

[3] This question arose in two recent decisions of the High Court, namely *Re McGuinness' Application (No 1)* [2019] NIQB 10 and *Re McGuinness' Application (No 2)* [2019] NIQB 76. In the first of these cases the decision impugned was that of the Secretary of State for Northern Ireland (the "*Secretary of State*") referring a prisoner's case to the Parole Commissioners for Northern Ireland for consideration, pursuant to Article 6(4)(a) of the Life Sentences (NI) Order 2001. In the second of these cases, involving the same challenging party and the same prisoner, the High Court determined that the criminal cause or matter provisions of the 1978 Act did not apply to decisions made by the Sentence Review Commissioners under a different statutory regime, namely the Northern Ireland (Sentences) Act 1998, notwithstanding the recognition of "*multiple criminal justice trappings*": see [38] – [40] and [45].

[4] In *McGuinness No 1*, following certification by the High Court under section 41 of and Schedule 2 to the 1978 Act and the ensuing grant of leave to appeal by the Supreme Court, the criminal cause or matter characterisation of those proceedings became an issue in consequence of an intervention by the Attorney General for Northern Ireland ("*AGNI*"). A matter of choreography arose, given that the Supreme Court heard the appeal in *McGuinness No 1* on 16 October 2019 and the hearing of the present case occurred on 04 December 2019. While the parties were informed of the court's decision on 20 December 2019, the court determined to postpone promulgation of its final, substantive judgment and order until the decision of the Supreme Court had been made available.

[5] The Supreme Court promulgated its decision in *Re McGuinness No 1* on 19 February 2020: see [2020] UKSC 6. The effect of that decision is that the instant case is not a criminal cause or matter.

Chronology

[6] We gratefully adopt the following chronology of material dates and events agreed between the parties.

13 April 1988	Incident giving rise to applicant's conviction
13 April 1988	Applicant stopped by RUC – applicant arrested after stating that he had been picking mushrooms at a friend's property and that

	he was on his way to his girlfriend's home - applicant arrested pursuant to section 12 of the Prevention of Terrorism Act 1984
14 – 10 April 1988	Applicant interviewed by RUC
27 September 1988	Preliminary Investigation held at Armagh Magistrates' Court – applicant discharged in absence of *prima facie* case
14 December 1988	Article 3 of the Criminal Evidence (NI) Order 1988 came into force
16 July 1990	Applicant arrested for a second time - arrested pursuant to section 14 Prevention of Terrorism (Temporary Provisions) Act 1989 – applicant requested access to a solicitor but was questioned without one – no comment interview given
27 November 1991	Applicant's trial commenced
23 December 1991	Applicant's convicted following trial before Hutton LCJ
17 August 1993	Appeal against conviction dismissed – Murray LJ delivering judgment on behalf of the Court
30 September 1993	Application to ECtHR lodged
11 December 1997	Report of European Commission of Human Rights issued
10 July 1998	Interim Resolution of Committee of Ministers
19 January 2001	First application to CCRC lodged on behalf of the applicant
25 January 2002	Submissions lodged with the CCRC on behalf of the applicant
28 March 2002	Preliminary decision concerning first application issued by CCRC
29 April 2002	Further submission lodged on applicant's behalf addressing CCRC's preliminary decision concerning first application
6 August 2002	CCRC's Statement of Reasons concerning first application issued
22 November 2002	Leave granted by Kerr J in judicial review proceedings concerning CCRC's decision of 6 August 2002 – Notice of Motion indicates that application for judicial review to be made to a Divisional Court

9 March 2005	Judgment given by Kerr LCJ in *Re Quinn's Application* [2005] NIQB 21
27 November 2008	Grand Chamber decision in *Salduz v Turkey* (2009) 49 EHRR 19
26 October 2010	Judgment in *Cadder v HM Advocate* [2010] UKSC 43
26 September 2013	Second application to CCRC
2 May 2017	Preliminary decision issued by CCRC
1 June 2017	Supplementary submissions lodged on applicant's behalf concerning preliminary decision by CCRC
3 July 2017	Second CCRC Statement of Reasons
17 August 2017	PAP letter issued on behalf of applicant
25 August 2017	PAP response issued on behalf of CCRC
2 October 2017	Judicial review proceedings lodged with the Court
13 October 2017	CMD issued by Senior Judicial Review Judge
9 November 2017	Amended Order 53 lodged with the Court on the 10 November 2017
2 January 2018	Further CMD issued by Senior Judicial Review Judge concerning grant of leave

[7] This court is therefore, reviewing a lengthy series of factual, judicial and juridical events spanning a period of 31 years. This is far from atypical in the jurisdiction of Northern Ireland. These events in the applicant's case combine to form a single equation. It is convenient to examine them in chronological sequence.

Trial and Conviction of the Applicant

[8] On 23 December 1991 at Belfast Crown Court the applicant was convicted by the Rt Hon Sir Brian Hutton LCJ on two counts of attempted murder and a related count of possession of firearms and ammunition with intent, by means thereof, to endanger life. The details of the charges as set out in the Indictment are as follows:

"**FIRST COUNT**

STATEMENT OF OFFENCE

> Attempted Murder, contrary to Article 3 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Common Law.

PARTICULARS OF OFFENCE

Dermot Quinn, on the 13th day of April 1988, in the County Court Division of Armagh, attempted to murder Ian Monteith.

SECOND COUNT

STATEMENT OF OFFENCE

Attempted Murder, contrary to Article 3 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and Common Law.

PARTICULARS OF OFFENCE

Dermot Quinn, on the 13th day of April 1988, in the County Court Division of Armagh, attempted to murder Stephen Swan.

THIRD COUNT

STATEMENT OF OFFENCE

Possession of firearms and ammunition with intent, contrary to Article 17 of the Firearms (Northern Ireland) Order 1981.

PARTICULARS OF OFFENCE

Dermot Quinn, on the 13th day of April 1988, in the County Court Division of Armagh, had in his possession firearms and ammunition with intent by means thereof to endanger life or cause serious injury to property or to enable some other person by means thereof to endanger life or cause serious injury to property."

On each of the first two counts the applicant was sentenced to imprisonment for 25 years and on the third Count for 20 years, all sentences to run concurrently: in effect, therefore, he was sentenced to 25 years imprisonment.

[9] What follows in this paragraph and in paragraphs [10] – [14] is drawn mainly from the Commission's initial (2002) report. On 13th April 1988 at about 8:30 pm, two detective constables in the Royal Ulster Constabulary were driving along Ballygasson Road in County Armagh when they were ambushed by two gunmen. A considerable number of shots were fired and the two officers were wounded during the incident. 2. The gunshots were heard by members of the O'Hagan family who

lived nearby in Knockaconey Road. Shortly afterwards a green Datsun stopped outside their house. They were then approached by masked gunmen in a car and their own car, a brown Peugeot 505, was stolen. Both cars were then driven away.

[10] The security forces immediately began a search of the local area for the two cars. The police later found the cars abandoned some 2-3 miles from the O'Hagan's house. They found two balaclava helmets in the Peugeot car taken from the O'Hagan's house. The balaclavas were sent to the Northern Ireland Forensic Laboratory on 15 April 1988.

[11] Mr Quinn was stopped at a police roadblock, a few miles away from the scene of the shooting, one hour after the incident outside the O'Hagan house. When questioned at the roadblock, Mr Quinn stated that he had been at a friend's home picking mushrooms and that he was on his way to his girlfriend's house in Dungannon. Mr Quinn was arrested under section 12 of the Prevention of Terrorism Act 1984 for the attempted murder of the two detective constables and taken to Gough Barracks, Armagh.

[12] Detective officers interviewed the applicant from 14 – 19 April 1988. In the course of these interviews he was asked to account for his movements on 13 April 1988. He made no replies to the questions repeatedly put to him by the officers

[13] The applicant was remanded in custody. A preliminary investigation hearing in the Magistrates' Court was listed six months later. This required the attendance of the three witnesses from the O'Hagan household. Following non-compliance with summonses, they had to be arrested in order to attend. Upon attending they refused to make depositions protesting fear of the consequences. At this stage there was no forensic evidence. The applicant was discharged by the Magistrates' Court on 29 September 1988.

[14] Chronologically the next two material developments were legislative in nature. On 26 October 1988 the Criminal Justice (Evidence, Etc) (NI) Order 1988 came into operation. This made provision for the admission of the written evidence of a witness refusing to give oral evidence due to fear of reprisals. On 14 December 1988 the Criminal Evidence (NI) Order 1988 ("the Evidence Order") came into operation. This provided for the making of an inference adverse to the accused by reason of his failure to convey to the police anything later invoked in his defence.

[15] Some 18 months later, on 16 July 1990, the applicant was arrested again in respect of the index offences. When cautioned he made no reply. In custody he also received the "Article 5" specific caution, warning him of the possible consequences of his failure to account for the firearms residue found on his jacket and the fibres in his head hair said to match those of a mask found in the hijacked vehicle. This and other evidence was put to the applicant during interview. He made no reply. He was prosecuted for the index offences and committed for trial subsequently.

[16] The applicant's trial ensued, in November and December 1991. Once again the O'Hagans refused to give evidence. The prosecution case was based primarily on the two aforementioned items of forensic evidence. In addition the trial judge was invited to draw inferences adverse to the applicant by reason of his failure to account for either. The court was also invited to draw inferences adverse to him arising from his failure to answer questions during police interviews. The prosecution case further relied on the written statements of the O'Hagan family members which were admitted in evidence.

[17] The applicant gave evidence on his own account. The thrust of his testimony was that at the time of the shootings on 13 April 1998 he was at a farm owned by an identified friend helping to pick mushrooms. His explanation for failing to make this case upon receipt of the relevant cautions was that he had been arrested for something very serious and preferred to remain silent pending the arrival of his solicitors. In his evidence the applicant further identified possible sources for the gun residue, including working with tools in an engineering works and handling shotguns when hunting. The farm owner gave alibi corroborative testimony.

[18] The trial judge convicted the applicant of both counts on the indictment. The several interlocking strands in the guilty verdicts were the following:

(i) The very strong probability that the 39 acrylic fibres found in the applicant's hair had originated from the balaclava helmet recovered from the vehicle.

(ii) The firearm residue found in one of the pockets of the jacket which the applicant was wearing when arrested in the aftermath of the offences.

(iii) The geographical location and timing factors, namely that the applicant was apprehended in a vehicle at a distance of some five – six miles from the location of the offences and about one hour after their commission.

(iv) The trial judge's assessment that both the applicant and his "alibi corroboration" witness had lied in their evidence.

(v) The "*very strong*" inferences adverse to the applicant which the judge determined to make arising from his failure to advance his alibi defence following arrest when questioned by the police, something which the judge considered "*… would have been the easiest thing in the world for him …*" to have done.

In respect of the last mentioned matter the trial judge drew upon the following passage from the Criminal Law Revision Committee 11th Report, paragraph 35:

> "*In a straightforward case of interrogation by the police where the accused has no reason for withholding his story (apart from the fact that he has not had time to invent it or that he hopes to spring it on the court at his trial) an adverse inference will clearly be proper and, we think, should be readily drawn.*"

Finally, the judge declined to make any inference adverse to the applicant arising from his failure to account timeously for the fibres in his hair, the firearm residue on his jacket and the glass found in the balaclava helmet, the latter supposedly originating from the smashed front door window pane of the victim's home.

The Appeal

[19] The appellant appealed, unsuccessfully. Murray LJ, delivering the judgment of the Court of Appeal, noted the following:

> "*There was no dispute about the final series of relevant events which took place almost exactly one hour after the events at the O'Hagan home. At 9.27 pm approximately Constable Carlton stopped a blue Peugeot car (registration number GIB 4276) at Goak Hill crossroads, Benburb, about 5/6 miles distant from the Ballygassoon Road. The car was being driven by Mrs Mary McCartan and the sole passenger was Dermot Quinn the appellant. The constable asked Mrs McCartan where she was going and she replied that she was taking the appellant to his girlfriend's house in Dungannon. Constable Carlton then asked the appellant where he was coming from and he replied that he had been working at mushrooms for the McCartans and he was going to his girlfriend's. The constable then carried out a body search of the appellant by frisking him but he did not put his hands into any of the appellant's pockets. He then arrested the appellant under s.12 of the Prevention of Terrorism Act and put paper bags on his hands. Mrs McCartan was also arrested and both were taken to the police office in Gough Barracks, Armagh.*"

Murray LJ continued:

> "*The main evidence against the appellant was given by two forensic scientists viz. "fibre" evidence by Lawrence Brian Marshall, a senior scientific officer at the Northern Ireland Forensic Science Laboratory with ten years experience in this kind of scientific work, and firearms residues evidence by James Smyth Wallace, a principal scientific officer on the staff at that laboratory with twenty years experience of the latter kind of scientific work*"

[20] In a later passage Murray LJ collated the central evidential strands of the prosecution case and the associated grounds of appeal as:

"(i) The forensic evidence.

(ii) The admission in evidence by the trial judge of the O'Hagan statements under the 1988 Order.

(iii) The drawing of the inference by the learned trial judge adverse to the appellant under Art.3 of the Evidence Order.

(iv) Other matters."

[21] Regarding the challenge based on the forensic evidence the court stated *inter alia*:

> *"… the learned trial judge did not advert in his judgment to the build-up of fibres which could follow from repeated pulling over the head of a pullover, but we regard these matters as peripheral. The basic and undeniable fact is that there was found in the appellant's hair fibres which were identical with the constituent fibres in the helmet. Mr Harvey also established that the selection of the 6 fibres for the full range of testing could not be said to have been a truly "random" selection, because they were selected for their length, but we do not regard this as a point of any real weight since the method of selection was chosen for no reason except the technical convenience of the laboratory: we can see no basis for saying that it was in any way weighted against, or unfair to, the appellant….*
>
> *In our view the learned trial judge was fully entitled to take the attitude that there was a "very strong probability" that the 39 black acrylic fibres came from the helmet."*

[22] The challenge to the admission in evidence of the O'Hagan family members' witness statements was dismissed in brusque terms:

> *"We take the view that the learned trial judge was entirely right in admitting the O'Hagan statements since it was abundantly established by proper evidence that the O'Hagans refused to give evidence in accordance with their statements because of the fear that had been induced in them - a fear as to the consequences to themselves if in fact they entered the box and gave evidence. We are satisfied that the learned judge fully considered the relevant statutory provisions and quite properly decided that the case was one in which the statements should in the interests of justice be admitted in evidence."*

[23] The court then addressed the discrete ground of appeal relating to the drawing of an adverse inference under Article 3 of the Evidence Order:

> *"In our view, however, it is important to look at the history of this case and particularly at the interviews during the first arrest period. During those earlier interviews after his first arrest the appellant was made completely aware of the forensic case which the police had against him - about the fibres and also the firearms residues - and as the learned judge said, it would have been the easiest thing in the world for him, after the second arrest and after he had been warned clearly by the detectives of the consequences of his not saying anything on which he wished to rely later in his defence - it was the easiest thing in the world for him to say "I can explain those fibres because I was wearing an acrylic hat a few hours before I was arrested". As regards the firearms residues where was the difficulty in his saying to the interviewers that he was often out with uncles who used sporting guns and often picked up spent cartridges? He had had nearly two years to think out his position. Moreover the matter does not stop there: from the statement of D/C McAteer (page 111) it emerges after the appellant had been given a forceful explanation at the McAteer interview of the fibre evidence against him he was to see his solicitor and the detectives actually advised him to discuss the fibre evidence with the solicitor because of its serious implications for him. Some indication of his attitude to the evidence against himself can be seen however from his action in laughing and whistling at the interview when this evidence was explained to him … he made no request whatever for a postponement of the interview when it started at 10 am. Moreover … there had been no deferral of the appellant's right to see a solicitor and if the appellant had asked for a postponement he would immediately have stopped the interview. In the result we take the view that there is no question of unfairness in what the learned judge did and that he was entirely right in drawing the inference he did."*

[24] With regard to the "other matters" raised in the applicant's grounds of appeal the court stated:

> *"Mr Harvey submitted that the learned trial judge erred in holding at the end of the Crown case that there was a prima facie case against the appellant. We reject this submission: we take the view that the forensic evidence was sufficiently strong to constitute a prima facie case. The point referred to by the trial judge about the appellant being in the vicinity at the time of the crime was not of course intended by him to be treated as a <u>positive</u> piece of evidence against the appellant of his having committed the offences charged; but it was hard evidence which negatived any possible defence by the appellant that, notwithstanding the*

forensic evidence, he was so far away from the area in question at the relevant time that he could not possibly have committed the offences, and therefore clearly relevant. Phipson on Evidence (14th Ed) at p.15-02 states:

> *"The fact that the accused was in the neighbourhood about the time of the act or had the opportunity of committing the act ... is relevant"."*

The omnibus conclusion of the Court of Appeal was expressed in these terms:

> *"In the result we find that the convictions are neither unsafe nor unsatisfactory and the appeals against the convictions are dismissed."*

Report of the European Commission of Human Rights

[25] The applicant, invoking the machinery of the European Convention of Human Rights and Fundamental Freedoms ("*the Convention*"), made an application to the European Commission of Human Rights ("*the European Commission*"): Application number 23496/94). The European Commission published its report on 11 December 1997. The applicant's case was founded on asserted breaches of Article 6(1), (2), (3), (c) and (d), focusing on three particular aspects of his prosecution, trial and conviction namely the adverse inference made against him, his restricted access to a solicitor following arrest and the admission in evidence of the statements of witnesses. At this juncture it is appropriate to set reproduce Article 6 ECHR:

> *"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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
>
> *2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
>
> *3. Everyone charged with a criminal offence has the following minimum rights:*

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[26] The Strasbourg application was partially successful. The Commission concluded that the making of strong inferences adverse to the applicant in circumstances where the relevant caution had been administered to him in the absence of his solicitor gave rise to breaches of Article 6(1) and Article 6(3)(c) ECHR, taken together. The other two elements of the applicant's Article 6 complaint were unsuccessful.

[27] Addressing the specific issue of the forensic evidence the European Commission said the following, at [62]:

"*The Commission notes that the forensic evidence combined with the statements of the O'Hagans constituted important circumstantial evidence against the applicant …. (and at [63]) …*

The Commission considers that the forensic evidence relating to gun powder traces and linking him to the car used in the offence could be regarded, on a common sense basis, as a situation attracting considerable suspicion and reasonably allowing inferences to be drawn in light of the nature and extent of any explanations provided by the applicant. The inference drawn from the applicant's silent was thus only one of the elements upon which the judge found the charge proven beyond reasonable doubt. The Commission considers that by taking this element into account the judge did not go beyond the limits of fairness in his appreciation of the evidence in the case."

This analysis gave rise to the discrete conclusion that the trial judge's making of inferences adverse to the applicant arising out of his silence did not infringe Article 6

ECHR. Finally the European Commission found no merit in the applicant's complaint relating to the admission of the written witness statements.

The Commission's First Determination (2002)

[28] The applicant has made two applications inviting the Commission to exercise its statutory power to refer his case to the Court of Appeal. The first was made in 2001. By its determination dated 6 August 2002 the Commission rejected this application. Its reasoning and conclusions may be summarised thus:

(i) Access to a solicitor in custody is not an absolute right. It has been held that the safety of a conviction was not compromised in circumstances where the wrongful withholding of access to a solicitor and an ensuing confession did not entail any element of oppression or any identifiable nexus between the withholding of access and the confession made by the accused: *R v Alladice* [1988] 87 Cr App R 380.

(ii) The guiding principle is that the safety of a conviction in a case where the accused did not have access to a legal adviser will invariably be a fact sensitive question.

(iii) By virtue of the decisions of the House of Lords in *R v Lambert* [2001] 3 WLR 206 and *R v Kansal (No 2)* [2002] 1 All ER 257 it was not possible as a matter of law for the applicant to assert a breach of Article 6 ECHR having regard to the operative date of the Human Rights Act 1998 ie 02 October 2000 (and see also *R – v – Walsh,* an unreported decision of this court dated 11 January 2002).

(iv) Having regard to all the circumstances of the applicant's case the unavailability of a legal adviser to him at the material time did not compromise the safety of his conviction.

[29] The following passages in the Commission's determination are of particular note:

> *"8.18 In Mr Quinn's case, the key factors appear to the Commission to be as follows:*
>
> - *it is not in dispute that the police proceeded to interview Mr Quinn before his solicitor had arrived;*
>
> - *the Commission notes however, that Mr Quinn appears not to have objected or asked for a postponement of his interviews until his solicitor had arrived;*

- *Hutton LCJ interpreted the legislation in such a way that he felt himself free to draw adverse inferences from Mr Quinn's failure to answer, notwithstanding the absence of a solicitor, and he did not accept counsel's submission that section 15 of the Northern Ireland (Emergency Provisions) Act 1987 precluded him from doing so;*

- *he stated the specific reasons why he considered there to be such a clear, common sense basis for drawing adverse inferences and why he did not consider – on the facts of the case - that Mr Quinn's failure to give the explanations (that he was to give at trial) could be explained or excused by the absence of a solicitor;*

- *it appears to the Commission to be inherent in the reasoning for the trial judge's decision to draw inferences that he would have considered the matter differently had Mr Quinn been able to show cause why he needed legal advice before putting his account to police officers."*

8.19 The Commission notes and endorses the considerations referred to by Hutton LCJ at page 68 of his judgement (as noted in paras. 2.14 and 8.12. above) as to which he stated why "it would have been the easiest thing in the world" for Mr Quinn to have provided to police officers the explanations which he relied upon at trial, irrespective of the presence or absence of a solicitor.

8.20 The Commission considers that the Court of Appeal would undoubtedly conclude that lack of access to a solicitor is a factor, but no more than a factor, which ought to be taken into account by a judge when deciding how he should properly exercise his discretion to in the matter of drawing inferences. In Mr Quinn's case the Commission considers that, having regard to all the relevant evidence and circumstances, there is such a clear, common sense basis on the facts for the drawing of adverse inferences that the absence of a solicitor makes little, if any, difference. This was clearly the trial judge's view on the facts. Accordingly, even if the Court of Appeal was to conclude that the trial judge, as a matter of legislative interpretation, discounted the absence of legal advice as a factor to be taken into account, there is no real possibility that the Court of Appeal would regard the exercise of his discretion as flawed to the point of affecting the safety of the conviction."

The 2002 Judicial Review

[30] The applicant challenged the Commission's 2002 determination by an application for judicial review. This was dismissed by the judgment of the High Court delivered on 09 March 2005: see *Re Quinn's Application* [2005] NIQB 21. With specific reference to the merits of the Commission's decision, the following passages in the judgment of the Lord Chief Justice are especially noteworthy. First, at [26]:

> *"In the event, I consider that the Commission's analysis of the legal principles involved cannot be faulted. It is well established, in my opinion, that the absence of a solicitor during interview, while it may represent a violation of the interviewee's article 6 rights, does not inevitably lead to an unsafe conviction. This is but one of the factors to be taken into account. The present case well exemplifies that proposition. The ECmHR, although it held that there had been a violation of article 6.1 in conjunction with article 6.3 (c) of ECHR regarding the applicant's not having a solicitor present during interview, concluded that there had not been a violation of article 6.1 in relation to the drawing of an adverse inferences in the case. At paragraph 63 of its opinion ECmHR said:*
>
> > *'63. The Commission considers that the forensic evidence relating to gunpowder traces and linking him to the car used in the offence could be regarded, on a common sense basis, as a situation attracting considerable suspicion and reasonably allowing inferences to be drawn in light of the nature and extent of any explanations provided by the applicant. The inference drawn from the applicant's silence was thus only one of the elements upon which the judge found the* charge proven beyond reasonable doubt. *The Commission considers that by taking this element into account the judge did not go beyond the limits of fairness in his appreciation of the evidence in the case'."*

Second, at [27]:

> *"The fact that an inference is wrongly drawn will, in any event, not lead inexorably to the conclusion that the verdict is unsafe. In R v Walsh* [2002] NIJB 90 *the Court of Appeal concluded that the trial judge had been wrong to draw an inference against the appellant under Article 3 of the 1988 Order. It*

> *decided, however, that this did not render the finding of guilt unsafe.*"

Third, at [28]:

> "*The conclusion of the Commission that the failure of the applicant to give any explanation for his refusal to give police an account of his movements, taken in conjunction with the fact that he did not did not object to being interviewed nor did he ask that the interviews be postponed until his solicitor arrived and that he was unable to relate his failure to answer questions to the absence of his solicitors, meant that the Court of Appeal would not have decided that the conviction was unsafe is an entirely tenable one in the circumstances. I have concluded that the Commission's decision that there was no real possibility that the conviction would not be upheld were the reference to be made is unimpeachable.*"

[31] The Lord Chief Justice next considered the issue of the retrospectivity of the Human Rights Act at [31]ff concluding at [33]:

> "*Applying this reasoning to the present circumstances the Court of Appeal could not find that the trial judge's drawing of an adverse inference was unfair on account of its failure to comply with article 6 of ECHR because the applicant's trial, occurring as it did before 2 October 2000, did not attract the protection of the Convention. The Court of Appeal could not apply the Convention retrospectively to the conduct of the trial and could not therefore have found that there was an unfairness in the trial process, much less that the verdict was unsafe*"

Subsequent Jurisprudential Developments

[32] Continuing the chronology, at this juncture it is appropriate to consider certain material jurisprudential developments, both European and domestic. The assessment of these in chronological sequence is instructive.

The Grand Chamber Decision in <u>Salduz v Turkey</u>

[33] In *Salduz v Turkey* [2009] 49 EHRR 19 the applicant was arrested by police on suspicion of having participated in an unlawful demonstration. Having been informed of his rights *qua* arrested person, including his right to remain silent, he was interviewed in the absence of a lawyer and made admissions. He was prosecuted, convicted and punished by imprisonment. The invoking Article 6(3)(c) ECHR he complained of a violation of his fair trial rights on account of having been denied access to a lawyer in police custody. The Grand Chamber of the ECtHR found in his favour. A separate breach of Article 6(1), constituted by the suppression of the Principal Public Prosecutor's written opinion, lodged with the appellate court,

submitting that the first instance judgment should be quashed, was also established. In its judgment the Grand Chamber, having reiterated its earlier jurisprudence that in criminal cases Article 6 applies to pre-trial proceedings – at [50] – continued at [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. Nevertheless, art.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."*

[34] At [51] the Court noted, uncritically, the phenomenon of national laws attaching consequences to the "*attitude*" of a suspect at the initial stages of police interrogation which can be decisive at a later trial, continuing:

> "*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 the police investigation. 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.***"
>
> [Emphasis added.]

[35] At [54] the Court, noting that an accused person is often "*in a particularly vulnerable position*" at the early investigative stage, continued:

> "*In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help ensure respect of the right of an accused not to incriminate himself. …*
>
> *Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining*

> *whether a procedure has distinguished the very essence of the privilege against self-incrimination.*"

Adding at [55]:

> "*… The Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective', Article 6(1) requires that,* ***as a rule****, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to justify this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6.* ***The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.***"
>
> [Our emphasis.]

[36] Some commentary is appropriate at this juncture. In our view the highlighted words in the immediately preceding quotation make clear that the Grand Chamber declined to promulgate a general rule, or principle, that a finding of an unfair trial in contravention of Article 6(1) ECHR will follow inexorably in cases where a suspect does not have the services of a lawyer from the stage of the first police interrogation. In the jurisprudence of the ECtHR, both in this specific sphere and in others, the formulation of general principles of this kind is one of the recurring features. This technique is unsurprising when one reflects on three considerations. The first is the multiplicity of Contracting States who are members of the Council of Europe and the variety of legal systems which this entails. The second is that the ECHR protects very few absolute rights. Article 6 establishes powerful protections in the context of both criminal and civil proceedings but they are not couched in the terms of absolute or inflexible rights. The final consideration worth highlighting is that balance is one of the stand out features of the Convention machinery.

The Decision in Cadder

[37] In ***Cadder v HM Advocate*** [2010] UKSC 43, the appellant, who was detained in police custody, having been cautioned about his right to silence and informed of his right to a lawyer, which he did not exercise, made certain admissions when interviewed by police. This evidence was adduced at his trial and he was convicted. In allowing the appellant's appeal the Supreme Court gave extensive consideration to the decision in ***Salduz v Turkey***: see [30] – [35] especially. Lord Hope, in the main opinion of the unanimous Court, stated at [41]:

> *"The statement in para 55 that article 6(1) requires that, "as a rule", access to a lawyer should be provided as from the first interrogation of a suspect must be understood as a statement of principle applicable everywhere in the Council of Europe area. The statement that the rights of the defence will "in principle" otherwise be irretrievably prejudiced must be understood in the same way. It is true that the use of such expressions indicates that there is room for a certain flexibility in the application of the requirement, as the Lord Justice General said in* ***HM Advocate v McLean****, para 24. But they do not permit a systematic departure from it, which is what has occurred in this case under the regime provided for by the statute. The area within which there is room for flexibility is much narrower. It permits a departure from the requirement only if the facts of the case make it impracticable to adhere to it. The reference in that paragraph to its being demonstrated in the light of the particular circumstances of the case that there are compelling reasons to restrict the right reinforces this interpretation. It is the particular circumstances of the case, not other guarantees that are available in the jurisdiction generally, that will justify such a restriction."*

[38] The Supreme Court determined to follow ***Salduz***, noting that it had been applied in a large number of subsequent ECtHR decisions. The unanimous conclusion of the Court was expressed by Lord Hope in the following terms, at [63]:

> "*I would allow the appeal on the ground that leading and relying on the evidence of Cadder's interview by the police was a violation of his rights under Article 6(3)(c) read in conjunction with Article 6(1) of the Convention.*"

Both Lord Hope and Lord Rodger, at [62] and [103] respectively, noted that the Supreme Court's decision could in principle give rise to referrals by the Scottish Criminal Cases Review Commission. Pausing, it can be readily seen that the decisions in ***Salduz*** and ***Cadder*** belong to the same wavelength.

[39] We consider that *Cadder* confirms the correctness of our analysis of *Salduz* in [36] above. The symmetry is unmistakeable having regard to the long passage extracted from the opinion of Lord Hope, reproduced in [37] above.

[40] The Supreme Court had some months previously promulgated its decision in *McInnes v HM Advocate*. The Article 6(1) issue in this case arose out of the failure of the prosecution to disclose certain witness statements to the defence. The Court held that the test for disclosure was satisfied, with a resulting breach of the accused person's Article 6 rights: see [19]. However, a second question had to be addressed – per Lord Hope at [20]:

> "*A trial is not to be taken to have been unfair just because of the non-disclosure. The significance and consequences of the non-disclosure must be assessed. The question at the stage of an appeal is whether, given that there was a failure to disclose and having regard to what actually happened at the trial, the trial was nevertheless fair ….*
>
> ***The test that should be applied is whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict.***"
>
> [Our emphasis.]

The Grand Chamber Decision in <u>Ibrahim</u>

[41] In *Ibrahim and Others v United Kingdom (Application No 50541/08 and others)* there were four conjoined applications which had their origins in the notorious terrorist suicide bombings in London on 07 July 2005 causing 52 fatalities. The first three applicants were convicted of conspiracy to murder. The fourth applicant was convicted of the lesser offences of assisting one of the others and failing to disclose information. In all four cases the prosecution relied upon statements made by the applicants in police interviews in circumstances where access to a lawyer had been formally deferred for specified reasons. All of the applicants were convicted and their ensuing appeals were dismissed. The Grand Chamber of the ECtHR dismissed the first three applications, holding that there had been a violation of Article 6(1) and (3)(c) ECHR in respect of the fourth applicant only.

[42] At [255]ff the Grand Chamber considered its previous case law. At [257] it said the following:

> "*The test set out in Salduz for assessing whether a restriction on access to a lawyer is compatible with the right to a fair trial is composed of two stages. In the first stage the Court must assess whether there were compelling reasons for the restriction. In the second stage, it must evaluate the prejudice caused to the rights of the defence by the restriction in the case in question. In other words, the Court must examine the impact of the restriction on the overall fairness of the proceedings and decide whether the proceedings as a whole were fair. This test has been cited and applied on numerous occasions by the Court. However, the Court considers that the application of the Salduz test in its subsequent case-law discloses a need to clarify each of its two stages and the relationship between them.*"

Continuing at [267]:

> *"It is important to recognise that the privilege against self-incrimination does not protect against the making of an incriminating statement per se but, as noted above, against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected. For this reason, the Court must first consider the nature and degree of compulsion used to obtain the evidence …. to obtain the evidence …. (see Heaney and McGuinness v. Ireland*, no. 34720/97, §§ 54-55, ECHR *2000-XII; O'Halloran and Francis, cited above, § 55; and Bykov, cited above, § 92). The Court, through its case-law, has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6. The first is where a suspect is obliged to testify under threat of sanctions and either testifies in consequence (see, for example, Saunders, cited above; and Brusco v. France, no. 1466/07, 14 October 2010) or is sanctioned for refusing to testify (see, for example, Heaney and McGuinness, cited above; and Weh v. Austria, no. 38544/97, 8 April 2004). The second is where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or statements (see, for example, Jalloh, Magee and Gäfgen, all cited above). The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning (see Allan v. the United Kingdom, no. 48539/99, ECHR 2002-IX).*

[43] The Grand Chamber next turned its attention to the meaning of *"compelling reasons"*, at [258]:

> *"The first question to be examined is what constitutes compelling reasons for delaying access to legal advice. The criterion of compelling reasons is a stringent one: having regard to the fundamental nature and importance of early access to legal advice, in particular at the first interrogation of the suspect, restrictions on access to legal advice are permitted only in exceptional circumstances, must be of a temporary nature and must be based on an individual assessment of the particular circumstances of the case (see* ***Salduz****, cited above, § 54 in fine and § 55). It is of relevance, when assessing whether compelling reasons have been demonstrated, whether the decision to restrict legal advice had a basis in domestic law and whether the scope and content of any restrictions on legal advice were sufficiently circumscribed by law so as to guide*

> *operational decision-making by those responsible for applying them. To date, the Court has not provided guidance on what might be considered compelling reasons under this limb of the Salduz test."*

The judgment continues at [259]:

> *"The Court accepts that where a respondent Government have convincingly demonstrated the existence of an urgent need to avert serious adverse consequences for life, liberty or physical integrity in a given case, this can amount to compelling reasons to restrict access to legal advice for the purposes of Article 6 of the Convention. In such circumstances, there is a pressing duty on the authorities to protect the rights of potential or actual victims under Articles 2, 3 and 5 § 1 of the Convention in particular."*

[44] At [260] the Court began its examination of the following question:

> "*The question arises whether a lack of compelling reasons for restricting access to legal advice is, in itself, sufficient to found a violation of Article 6.*"

The Court answered this question at [262]:

> *"The Court accordingly reiterates that in order to establish a breach of the right to a fair trial it is necessary to view the proceedings as a whole, and the Article 6 § 3 rights as specific aspects of the overall right to a fair trial rather than ends in themselves (see paragraphs 250-251 above). The absence of compelling reasons does not, therefore, lead in itself to a finding of a violation of Article 6 of the Convention."*

The Court elaborated at [265]:

> *"Where there are no compelling reasons for restricting access to legal advice, the Court must apply a very strict scrutiny to its fairness assessment. The failure of the respondent Government to show compelling reasons weighs heavily in the balance when assessing the overall fairness of the trial and may tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (c) (see, for a similar approach with respect to Article 6 §§ 1 and 3 (d), Schatschaschwili, cited above, § 113). The onus will be on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction on access to legal advice. "*

[45] In its extensive treatise of the privilege against self-incrimination, the Court added at [266]:

> "*The right not to incriminate one's self is primarily concerned with respect to the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused …*
>
> *The right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 …*"

The judgment continues at [267]:

> "*It is important to recognise that the privilege against self-incrimination does not protect against the making of an incriminating statement per se but, as noted above, against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected. For this reason, the Court must first consider the nature and degree of compulsion used to obtain the evidence. "*

Elaborating, the Court distilled from its case law three particular situations generating concerns about improper compulsion in breach of Article 6:

(a) Where a suspect is obliged to testify under threat of sanctions and either does so in consequence or is sanctioned for refusing to do so,

(b) The procurement of real evidence or statements from the application of physical or psychological pressure, often in contravention of Article 3 ECHR and

(c) The use of subterfuge to elicit information which the authorities were unable to obtain during questioning.

[46] At [270]ff the Court considered the question of notification to a suspect of the right to a lawyer, the right to silence and the privilege against self-incrimination. The Court concluded, at [272] that –

> "*…. it is inherent in the privilege against self-incrimination, the right to silence and the right to legal assistance that a person 'charged with a criminal offence' for the purposes of Article 6 has the right to be notified of these rights.*"

At [273] the Court made clear, however, that where a failure of notification occurs it is necessary to "*… examine whether, notwithstanding this failure, the proceedings as a whole were fair.*" Extensive guidance follows in the next ensuing paragraph, at [274]:

> *"When examining the proceedings as a whole in order to assess the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings, the following non-exhaustive list of factors, drawn from the Court's case-law, should, where appropriate, be taken into account:*
> *(a) Whether the applicant was particularly vulnerable, for example, by reason of his age or mental capacity.*
> *(b) The legal framework governing the pre-trial proceedings and the admissibility of evidence at trial, and whether it was complied with; where an exclusionary rule applied, it is particularly unlikely that the proceedings as a whole would be considered unfair.*
> *(c) Whether the applicant had the opportunity to challenge the authenticity of the evidence and oppose its use.*
> *(d) The quality of the evidence and whether the circumstances in which it was obtained cast doubt on its reliability or accuracy, taking into account the degree and nature of any compulsion.*
> *(e) Where evidence was obtained unlawfully, the unlawfulness in question and, where it stems from a violation of another Convention Article, the nature of the violation found.*
> *(f) In the case of a statement, the nature of the statement and whether it was promptly retracted or modified.*
> *(g) The use to which the evidence was put, and in particular whether the evidence formed an integral or significant part of the probative evidence upon which the conviction was based, and the strength of the other evidence in the case.*
> *(h) Whether the assessment of guilt was performed by professional judges or lay jurors, and in the case of the latter the content of any jury directions.*
> *(i) The weight of the public interest in the investigation and punishment of the particular offence in issue.*

> *(j) Other relevant procedural safeguards afforded by domestic law and practice."*

The Grand Chamber Decision in <u>Beuze v Belgium</u>

[47] In *Beuze v Belgium (Application No 71409/10)* the applicant was convicted of murder in circumstances where he had not had access to a lawyer while in police custody or during police interviews or at other stages of the ensuing judicial investigation and he had not been sufficiently notified about his right to remain silent and his right not to incriminate himself. The Grand Chamber held unanimously that a violation of Article 6(1) and (3)(c) ECHR had been established. At [120] the Court, referring to *Ibrahim and Others*, stated:

> "*The fairness of a criminal trial must be guaranteed in all circumstances. However, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case …*
>
> *The Court's primary concern, in examining a complaint under Article 6(1), is to evaluate the overall fairness of the criminal proceedings.*"

Continuing, at [121] – [122] the Court observed that the minimum rights guaranteed by Article 6(3) –

> "*… are, nevertheless, not ends in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole …*"

(referring again to *Ibrahim*.)

[48] There follows an extensive treatise of a detained person's right of access to a lawyer, from [124] – [150]. The Court *inter alia* reviewed its decisions in *Salduz* and *Ibrahim and Others*. At [141] it stated that in *Ibrahim* the Court had "*… consolidated the principle established by the **Salduz** judgment, thus confirming that the applicable test consisted of two stages and providing some clarification as to each of those stages and the relationship between them ….*" At [145] the Court repeated what it had said at [265] of *Ibrahim*. At [150] it repeated verbatim the extensive list of "*fairness assessment*" factors contained in [274] of *Ibrahim*.

[49] Applying the governing principles to the case specific context, at [184]ff, the Court noted in particular that the trial jury had received no directions or guidance whatever on how to assess the applicant's statements and their evidential value in circumstances where they had been made in the absence of a lawyer and with insufficiently clear information about his right to remain silent: see [188] – [189].

[50] The diligent researches of Mr Ronan Lavery QC (with Mr Terence McCleave of counsel), representing the applicant, brought to the attention of the court the "*Case Comment*" of 'Fair trial: Beuze v Belgium ….' (Crim L R 2019, 3, page 233). The author, Lewis Graham, criticises the decision in *Beuze* on three grounds: first, the Grand Chamber overruled the earlier authority of *Salduz* by stealth, appearing to jettison it without saying so explicitly with adverse consequences for legal certainty; second, whereas *Salduz* has been praised by commentators, *Ibrahim* had been treated with caution: whereas *Salduz* had held that the State must demonstrate "*compelling reasons*" to justify the deprivation of access to a lawyer, *Ibrahim* espoused an approach emphasising the overall fairness of the process and effectively relegating the "*compelling reasons*" requirement to something desirable rather than necessary; third, *Beuze* is excessively deferential to State agencies. Finally, the author complains that the consistent European judicial decision making stimulated by *Salduz* (*Cadder* being a paradigm example) has been "*thrown into disarray*" by *Beuze*.

[51] It is unnecessary for this court to enter the fray of academic debate concerning the inter-relationship among, and possible reconciliation of, the three Grand Chamber decisions in *Salduz, Ibrahim* and *Beuze*, interesting though this exercise would be. That said, we consider it far from clear that the "*compelling reasons*" criterion applicable to restricting or denying a detained suspect access to a lawyer was abandoned in either *Ibrahim* or *Beuze:* see the passage in [265] of *Ibrahim* reproduced in [44] above, where the phrase is used twice and, notably, in conjunction with the words "*convincingly*" and "*exceptionally*". As regards the decision in *Beuze*,). The test of "*compelling reasons*" features explicitly in the judgment, at [142] – [143]. In these passages the Court cites both *Salduz* and *Ibrahim*. At [160] – [163] the Court examines the question "*Whether there were compelling reasons*" in the particular case, concluding at [164] that there were none. Furthermore the summary on the HUDOC website contains a separate paragraph entitled "*Existence of Compelling Reasons*" (see Information Note Number 223, November 2018.

[52] It may be noted that in a subsequent Grand Chamber decision involving similar issues, promulgated some six weeks later, the decision in *Beuze* does not feature in the context of a judgment containing references to some 130 previous decisions of the ECtHR and other courts: see *Murtazaliyeva v Russia* [2018] 47 BHRC 263. We note that the "*compelling reasons*" test was applied by the English Court of Appeal in its recent decision in *R v Shepherd* [2019] EWCA Crim 1062 at [61] – [62]. It is also of note that in *Doyle v Ireland* [Application No 51979/17), a decision of very recent vintage, a Chamber of the ECtHR had no interpretation or reconciliation difficulties in its consideration of the three earlier decisions and, furthermore, both acknowledged and applied the "*compelling reasons*" test: see [67] – [84]. *Ditto* in *Akdag v Turkey* (Application No 75460/10) at [44] – [63] and in *Farrugia v Malta* (Application No 63041/13) at [96] – [119]. Most recently, the decision of the English Court of Appeal in *R v Abdurahman* [2019] EWCA Crim 2239 (promulgated three days ago), which concerned the appeal against conviction of one of the "*others*" in *the Ibrahim*

and Others case, illustrates aspects of the live scope for debate in this sphere. It is, moreover, a striking illustration of the legal principle that an Article 6 unfair trial does not *ipso facto* equate to an unsafe conviction.

[53] It is therefore, as a minimum, debateable whether Mr Graham's critique of *Beuze* is sustainable. We decline further comment. We reiterate that this court, by virtue of the doctrine of precedent, is bound to follow *Cadder*. Any re-calibration of *Cadder* will be a matter for the Supreme Court in some appropriate future case

Challenging Commission Determinations: the Legal Standard

[54] At an early stage of the Commission's existence the High Court provided guidance, which has proved to be enduring, on the legal standard applicable to judicial review challenges to its determinations. In *R v Criminal Cases Review Commission, ex parte Pearson* [1999] 3 ALL ER 498, the applicant challenged a decision of the Commission not to exercise its statutory power of referral of her conviction to the Court of Appeal. Lord Bingham CJ, delivering the judgment of the Divisional Court, analysed the operative statutory provisions in the following way, at 505c:

> "*Thus the Commission's power to refer under section 9 is exercisable only if it considers that if the reference were made there would be a real possibility that the conviction would not be upheld by the Court of Appeal. The exercise of the power to refer accordingly depends and it cannot be too strongly emphasised that this is a judgment entrusted to the Commission and no-one else. ….*
>
> [and at 505h]
>
> *The Commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not.*"

The Lord Chief Justice continued at 505I:

> "*The judgment required of the Commission is a very unusual one, because it inevitably involves a prediction of the view which another body (the Court of Appeal) may take. In a case which is likely to turn on the willingness of the Court of Appeal to receive fresh evidence, the Commission must also make a judgment how, on all the facts of a given case, the Court of Appeal is likely to resolve an application to adduce that evidence under section 23, because there could in such a case be no real possibility that the conviction would not be upheld where the reference to be made that there were also a real possibility that the Court of Appeal would receive the evidence in question.*"

[55] In *Re Quinn's Application* (*supra*), the test applied by the Lord Chief Justice of Northern Ireland was whether the impugned decision of the Commission was "*tenable*" see [25]. What the court then stated at [28] is of evident importance:

> "*The conclusion of the Commission that the failure of the Applicant to give any explanation for his refusal to give police an account of his movements, taken in conjunction with the fact that he did not object to being interviewed nor did he ask that the interviews be postponed until his solicitor arrived and that he was unable to relate his failure to answer questions to the absence of his solicitors, meant that the Court of Appeal would not have decided that the conviction was unsafe* is an entirely tenable one in the circumstances. *I have concluded that the Commission's decision that there was no real possibility that the conviction would not be upheld where the reference to be made is unimpeachable.*"
>
> [Our emphasis.]

Pearson has been followed in subsequent cases: see *R (Gilfoyle) v Criminal Cases Review Commission* [2017] EWHC 3008 (Admin) at [24] and [28] – [29] especially and *R (Cleeland) v Criminal Cases Review Commission* [2009] EWHC (Admin) 474 at [48].

[56] Neither *Pearson* nor *Quinn* explicitly mentions the *Wednesbury* principle. However the language of both judgments is redolent of this entrenched public law doctrine. In certain judicial review challenges to Commission determinations the court will apply the principle of *Wednesbury* irrationality. In others the principal focus of enquiry may be whether the Commission's determination can be shown to be infected by the omission of some material fact or factor or permitting the intrusion of something alien or immaterial (each an offshoot of the central *Wednesbury* principle). In still others the focus of the reviewing court's attention may be whether the Commission misunderstood or misapplied some legal rule or principle in a material respect. In the latter species of challenge the court in *Quinn* suggested, at [25], that the test would be whether "*… the assessment of the legal issues (and therefore the likely outcome of a reference) taken by the Commission is a tenable one …*" We consider that this is an *obiter* passage. Furthermore, in any given case the Commission's view of the law and its assessment of the likely outcome of a reference might in principle be quite separate, distinct questions. We confine ourselves to the observation that [25] of *Quinn* could foreseeably be the subject of more detailed examination in some appropriate future case. This court has no need to rely upon it in the instant case and it featured in neither party's arguments.

The Impugned Determination of the Commission

[57] In its decision the Commission records that it had been asked to reconsider the safety of Mr Quinn's conviction on the basis of the decision in *Cadder* (*supra*). It appears from the summary of the submissions received which follows that the

application to the Commission was based on the main contention that by virtue of the decision in *Cadder* there was an absolute legal rule or principle that Article 6(1) ECHR would be violated in circumstances where a court of trial had relied on inferences adverse to the accused arising out of events in custody occurring when the accused was not accompanied by a legal representative. The submission consequentially formulated was that the applicant in this case had been denied a fair trial contrary to Article 6(1) and his conviction was unsafe in consequence.

[58] The Commission noted uncritically the assessment of the Lord Chief Justice in the 2005 *Quinn* judgment that as the applicant's trial and conviction had predated 02 October 2000 they did not attract the protection of Article 6 ECHR via the Human Rights Act 1998. Notwithstanding, the Commission, in its language, "*… has nonetheless gone on to consider the test outlined in* ***Cadder***".

[59] The Commission then posed the following question "*Is an unfair conviction always unsafe?*" Referring obliquely to its initial (2002) report, it supplied the following answer:

> "*… where there has been a breach of human rights, the Commission stands by its conclusion that whether this renders the conviction unsafe depends on all the circumstances of the case. This is clearly the approach articulated in* ***Cadder*** *and subsequent cases.*"

The Commission then determined to accept at its zenith the submission that the Court of Appeal would be "*bound to*" decide that the applicant's Article 6(1) rights had been violated, proceeding to "*… consider whether such a breach would affect the safety of the conviction*".

[60] Having reviewed the decisions in *Cadder*, *McInness* and *Fraser v HM Advocate* [2011] UKSC 2, the Commission stated:

> "*It is clear to the Commission that the Supreme Court and the Court of Appeal do not accept the suggestion that a violation of Article 6 must render a conviction unsafe.*"

In its reflections on this issue, the Commission noted inter alia the pithy statement of Lord Clyde in *R v Lambert* (*supra*) at [49]:

> "*No doubt in many cases an unfair trial in contravention of Article 6 will constitute an unsafe conviction …*
>
> *But unfairness is not always fatal to a conviction.*"

The Commission further drew attention to the statement of Laws LJ in *Dowsett v CCRC* [2007] EWHC 1923 Admin at [23 - 24]:

> "*While any breach of Article 6 is plainly a cause of concern, and instances of such breaches in cases where the conviction is nevertheless safe may be few and far between, in this area one would not expect to see a rigid rule with no exceptions but a case by case approach with much emphasis laid on the gravity and effect of a particular violation.*"

[61] The Commission next posed the following question:

> "*Had it not been for the adverse inference, is there a real possibility that the Lord Chief Justice would have reached a different verdict in Mr Quinn's case?*"

The Commission then proceeded to consider the strength of the <u>other</u> evidence adduced by the prosecution against the applicant. It made the following assessment:

> "*The CCRC has concluded that there was sufficient evidence to justify a conviction and there is no real possibility that the judge would have reached a different verdict, if it were not for the adverse inference being drawn against Mr Quinn.*"

[62] The Commission elaborated upon and illuminated this conclusion by reference to (a) the trial judge's muscular rejection of the sworn evidence of the applicant and his alibi witness as unworthy of belief; (b) the strength of the expert opinion evidence of the forensic scientist relating to the provenance of the indistinguishable fibres from the applicant's head hair and the constituent fibres of the balaclava hat recovered from the vehicle which had been stolen at the scene of the attack; (c) the further expert evidence of the clear nexus between the broken glass caused by smashing the front door of the O'Hagan's house (*supra*) and that recovered from the balaclavas found in the stolen vehicle; and (d) the expert evidence relating to the firearm residue detected on the two balaclavas and that found in one of the pockets of the jacket worn by the applicant when arrested.

[63] Having completed this exercise the Commission expressed its omnibus conclusion at [73] – [74] of its report:

> "*The trial judge clearly set out in his judgment the evidence which led him to be satisfied of Mr Quinn's guilt. He had regard to the fibre evidence, the firearm discharge, the fact Mr Quinn was in the area at the relevant time, his observation of both Mr Quinn and Mr McCartan giving evidence, and the drawing of an adverse inference in relation to Mr Quinn's failure to give an alibi at his police interview. It is important to note that he specifically did not draw an adverse inference from the failure of Mr Quinn to account for the fibres, firearm residue and glass forensic evidence at interview.*

…

> *Leaving aside the difficulties with the retrospective effect of the Human Rights Act, the CCRC has assessed the evidence in conjunction with the test in Cadder and has concluded that there is no real possibility that the judge would have come to a different verdict, if it were not for the one adverse inference being drawn. There was ample evidence to justify a conviction, and as such, there is no real possibility that the Court of Appeal would consider the conviction unsafe, if the CCRC were to refer it."*

[64] The Commission, in careful observance of procedural fairness rights, initially prepared its impugned report in draft form and provided this to the applicant's legal representatives with an invitation to make further representations, which was duly accepted. In the final section of its final report the Commission considered these further representations. It noted in particular the passage in paragraph 7-53 FF of Archbold 2017 (now paragraph 7-53 of Archbold 2020). This contains the following statement:

> "*The first question which arises in the context of criminal appeals is whether a conviction at the end of a trial which fails to match up to the requirements of Article 6 can ever be anything other than unsafe. It is submitted that the answer must be in the negative …*"

The Commission rejected this contention.

[65] It is convenient to interpose here our observation that the Commission's rejection of this contention is unimpeachable. The opinion expressed by the author in the Archbold passage is incompatible with, indeed confounded by, the relevant jurisprudence, in particular *Cadder*, in tandem with other domestic decisions of the highest authority which we have considered above. To this list one may add the decision of the Privy Council in *Taylor (Bonnet) v The Queen* [2013] 2 Cr App R 18. Stated succinctly, we consider that paragraph 7-53 of Archbold incorrectly states the law.

The Governing Principles Applied

[66] As these proceedings progressed the Order 53 statement underwent successive, and welcome, refinements in response to the urgings of the court. The terms of its final incarnation make clear that this is predominantly an illegality judicial review challenge. The applicant contends that the impugned determination of the Commission is vitiated by error of law in the following respects:

(a) A failure to give effect to the *Cadder* decision that the defence of an accused person will in principle be irretrievably prejudiced by the denial of access to legal advice during police questioning.

(b) A failure to examine the safety of the applicant's conviction through the prism of the breach of Article 6(1)(c) occasioned by the absence of a legal advisor during police interviews.

(c) A failure to recognise the finding of one breach of Article 6 ECHR by the European Commission (see [25] – [26] above).

(d) Treating the breach of the applicant's rights under Article 6(3)(c) as "*cured*" by his legal representation at trial and in subsequent proceedings.

(e) Treating the absence of legal advice and the subsequent adverse inference as a discrete matter rather than assessing whether the proceedings as a whole and taking all circumstances into account were unfair.

There is, finally, one unvarnished *Wednesbury* ground of challenge:

(f) The impugned decision was "*… irrational in the* ***Wednesbury*** *sense …* [by virtue of the Commission's failure] *… to have sufficient regard to the prejudicial impact of the said violation and the drawing of 'strong adverse inferences' by the trial judge in convicting the Applicant*".

[67] Mr Lavery QC developed these grounds in both written and oral submissions. The following passage in *Dowsett v Criminal Cases Review Commission* [2007] EWHC 1923, which Mr Lavery cited, draws together many of the inter-related strands of the applicant's grounds as amended. Per Laws LJ at [24]:

> "*While any breach of Article 6 is plainly a cause for concern, and instances of such breaches in cases where the conviction is nevertheless safe may be few and far between, in this area one would not expect to see a rigid rule with no exceptions but a case by case approach with much emphasis laid on the gravity and effects of a particular violation.*"

[68] In determining this challenge we accept the submission of Mr Sean Doran QC (with Mr Donal Sayers of counsel) that this court must be alert to the *Pearson* test and, in applying same, take into account the grounds of appeal which were rejected by the Court of Appeal (in 1993), the limited nature of the breach of Article 6 found by the European Commission (1997) and the resounding dismissal of the applicant's first judicial review challenge (2005). The main significance of this latter

consideration, we would observe, is the strong parallels between the Commission's two reports and the essentially unchanged underlying factual matrix.

[69] Mr Doran's central submissions may be summarised thus:

(i) Given the decisions of the House of Lords in *Lambert* and *Kansal* (both noted above) the Human Rights Act did not apply retrospectively to the applicant's trial and conviction, with the result that he cannot now complain of a breach of his Article 6 rights in those processes.

(ii) In the alternative to (i), the applicant's right to a fair trial under Article 6 was not breached in any event. The decision in *Cadder* does not support the applicant's contention to the contrary.

(iii) The post - *Cadder* decisions of the Grand Chamber further undermine the applicant's contention that his deprivation of access to a lawyer gave rise to a breach of his Article 6 fair trial rights.

(iv) Even assuming that the applicant can invoke Article 6 and can further demonstrate a breach of his fair trial rights thereunder it does not follow inexorably that his conviction was unsafe. The Commission correctly recognised this.

(v) The legal threshold for interference with the Commission's application of the "*real possibility*" statutory test is not overcome.

[70] Mr Doran's first submission is in our judgement unanswerable. The incontestable proposition is that a person who was prosecuted, tried and convicted prior to the operative date of most of the provisions of the Human Rights Act, being 02 October 2000, cannot in legal proceedings complain that the legal process was conducted in contravention of his fair trial rights under Article 6 ECHR as the statute does not have retrospective effect of this kind. The consideration that in certain more recent decisions the Supreme Court has recognised specified elements of retrospectivity in Article 2 ECHR cases does not alter this juridical reality. No argument to the contrary was advanced on behalf of the applicant.

[71] There are several references to the notional Court of Appeal in the operative passages of the Commission's determination. Furthermore the text of the Commission's determination includes an unerring summary of, together with references to, the statutory test for referral (the "*real possibility*") test prescribed by section 13 of the Criminal Appeal Act 1995. This analysis demonstrates that the Commission did not stray from its central task of applying the statutory test.

[72] The applicant's case relies heavily on *Cadder*. This being a decision of the United Kingdom Supreme Court we remind ourselves that by virtue of the doctrine of precedent it is binding on this court. Furthermore, neither section 3 nor any other provision of the Human Rights Act empowers or requires this court to adopt an approach differing from *Cadder* on the basis of the two later decisions of the ECtHR Grand Chamber in *Ibrahim and Others* and *Beuze*, or otherwise: and see further [51] – [53] above.

[73] The applicant's core grounds of challenge focus on the text of the impugned decision of the Commission. We refer to, and do not repeat, our analysis and summary of this in [53] – [59] above. It is trite to observe that the Commission's determination must be read (a) as a whole and (b) in tandem with its 2002 determination. It is equally true that the Commission was neither required to quote *in extenso* from the *Cadder* judgment nor obliged to undertake a microscopic examination of its impact. We consider this consonant with the *Pearson* principles considered in [54] – [55] above.

[74] The decision in *Cadder* features prominently in the Commission's determination. This is appropriate given the submissions on behalf of the applicant which were being considered, as rehearsed in the text. The Commission, while noting at the outset of its reasoning the ruling of the Lord Chief Justice in *Re Quinn* that the applicant's trial did not attract the protection of the Convention, nonetheless proceeded to consider "*the test outlined in* ***Cadder***". Next the Commission in substance made the assumption that in the event of a referral to the Court of Appeal the asserted breaches of the applicant's Article 6 rights would be established. From this platform the Commission proceeded to examine the question of whether such breaches would be likely to induce a judicial decision that the applicant's conviction was unsafe.

[75] The Commission's consideration of the decision in *Cadder* included reference to the related decisions of the Supreme Court in *McInnes* and *Fraser* (see [36] above). We can identify no error of law on the part of the Commission in the relevant passages. The Commission considered not only the three Supreme Court decisions but also a series of decisions of other courts on the same theme. All of its quotations were appropriate and pertinent. The Commission correctly analysed the two non-disclosure Supreme Court decisions – *McInness* and *Fraser* – as holding that the prosecutor's breach of the relevant legal rule – or right – of which the accused was the beneficiary did not *per se* render the ensuing convictions unsafe. In passing, if the Commission had adverted to the decision of the Northern Ireland Court of Appeal in *R v Brown and Others* [2012] NICA 14 it would have found an illustration of the principle in action, in a decision that certain convictions were not considered unsafe notwithstanding that they were based on statements made by young people generated in breach of the Judge's Rules on account of the absence of a solicitor.

[76] Duly analysed, the Commission posed for itself the specific question of whether the assumed breaches of the applicant's Article 6 rights flowing from the

unavailability to him of a legal adviser during interviews which ultimately had adverse consequences for him at his trial gave rise to a "*real possibility*" that upon referral the Court of Appeal would find his conviction to have been unsafe. This approach betrays no error of law. Furthermore, we accept Mr Doran's submission that one effect of the decision in *Cadder* was that the legal rules and principles to be considered and applied by the Commission in making the impugned (2017) determination were broadly unchanged from its first determination (2002) which, of course, had withstood judicial review challenge. This disposes of the first of the applicant's discrete grounds of challenge.

[77] The next of the applicant's discrete grounds appears to complain that the Commission failed to consider how the assumed breach of the applicant's Article 6 fair trial rights could impact upon the safety of his conviction. In our view, the text of the impugned determination makes clear that the Commission did indeed consider this question. Furthermore, the Commission, having devoted substantial attention to the abstract question of law of whether an unfair trial invariably taints the safety of an ensuing conviction then turned to consider, at some length, concrete aspects of the evidential case against the applicant. This discrete exercise yielded the following conclusion:

> "*… there is no real possibility that the judge would have come to a different verdict if it were not for the one adverse inference being drawn. There was ample evidence to justify a conviction and as such there is no real possibility that the Court of Appeal would consider the conviction unsafe, if the CCRC were to refer it.*"

We consider that the exercise conducted by the Commission confounds this discrete ground of challenge. We conclude further that these were matters of evaluative judgement for the Commission manifestly harmonious with the *Pearson* principle.

[78] The third of the applicant's grounds – ground (c) – complains in substance that the Commission failed to have regard to the single finding of a breach of Article 6 ECHR by the European Commission (see [25] – [26] above. We consider that this ground has no purchase having regard to the express reference by the Commission in the text of its determination to the European Commission's decision. There is no basis upon which it can be tenably concluded that this was in some way overlooked by the Commission. Furthermore and in any event this specific finding by the European Commission did not impel the Commission to any particular course or conclusions. Finally the Commission conducted its key exercise on the assumed acceptance of the Article 6 breaches asserted by the applicant.

[79] The next discrete ground of challenge – ground (d) - complains about a passage in its determination in which the Commission noted the decision of the ECtHR in ***Doorson v The Netherlands*** [1996] 22 EHRR 330, commenting in this context that "*… later proceedings can cure a defect which occurred at first instance*". In

this discrete passage the Commission was simply reacting to what it understood to be one of the further representations made on the applicant's behalf in response to receipt of the Commission's report in draft. The Commission was also addressing the passage in Archbold which this court has considered and rejected in [61] above. Irrespective of whether its citation of *Doorson* was correct, the Commission committed no error in its resume of the legal representation which the applicant actually enjoyed at various stages. Furthermore, as already highlighted, the whole of the operative section of the Commission's report is predicated on the assumption that the applicant's complaint of Article 6 breaches is established. We reject this ground accordingly.

[80] We turn to ground (e). This ground overlooks that the Commission assumed the breaches of Article 6 asserted by the applicant and simultaneously assumed that these would be accepted or established in the event of a referral to the Court of Appeal. Having done so the Commission then examined extensively the issue of whether such breaches rendered the applicant's convictions unsafe, applying the statutory test at the same time: see [59] ff and elsewhere above. We can identify no merit or substance in this ground.

[81] The last of the applicant's grounds complains that the Commission failed to have "*sufficient*" regard to the prejudicial impact of the assumed breaches of the applicant's Article 6 rights, with particular reference to the "*strong adverse inferences*" drawn by the trial judge. This ground is in essence complaining that the Commission failed to have sufficient regard to this aspect of the trial judge's decision. This is confounded by the text of the Commission's determination. Furthermore, as the "*sufficient regard"* formulation makes clear, this is in substance a Wednesbury challenge, which in our view falls measurably short of satisfying the *Pearson* principles. Additionally, as already highlighted, the operative section of the Commission's determination is formed on the assumption that the applicant's asserted breaches of Article 6 would be established in the event of a referral of his conviction by the Commission to the Court of Appeal.

[82] Insofar as the applicant also complains of a failure on the part of the Commission to acknowledge, as a matter of law, a "*presumption*" that his trial had been unfair by reason of the breach of Article 6(3)(c) found by the European Commission (noted in [26] above). The short answer is that there is no such "*presumption*" in law. It is to be found neither in the jurisprudence of the ECtHR nor in the relevant decisions of the Supreme Court. Furthermore there was no obligation on the Commission to undertake the exercise of comparing and contrasting the established breach of Article 6(3)(c) as found by the European Commission and other different ("*procedural"*, in the language of the applicant's pleading") breaches of Article 6. Independently, this ground would appear to be a re-working of ground (a). We can identify no merit in this ground

Conclusion

[83] For the reasons given the applicant's challenge must fail. We consider that the threshold of arguability is not overcome in respect of any of the applicant's grounds and, accordingly, our order is a dismissal of the application for leave to apply for judicial review.