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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

MICHAEL GERARD MAGEE

CARSWELL LCJ

The appellant Michael Gerard Magee was convicted on 21 December 1990 by Murray LJ sitting without a jury at Belfast Crown Court of a number of serious terrorist crimes, including conspiracy to murder, conspiracy to cause an explosion, possession of explosive substances and belonging to a proscribed organisation. The evidence against him consisted solely of oral admissions and a written statement made by him during police questioning in Castlereagh Police Office (Castlereagh), in which he made a comprehensive confession of the crimes with which he was charged. At the trial he contested the admissibility of the statement, claiming that he had suffered substantial physical ill-treatment from two of the interviewing detectives. The trial judge after a long *voir dire* rejected all of his allegations, finding that he was satisfied beyond reasonable doubt that the appellant had not been ill-treated and that the allegations were fabricated by him. He was sentenced to

concurrent terms of imprisonment, which amounted to an effective sentence of twenty years.

The appellant appealed to the Court of Appeal, which examined in detail the evidence and his allegations. In a written judgment delivered on 16 June 1993 the Court of Appeal dismissed the appeal, being satisfied that the appellant had not been ill-treated and that his conviction was neither unsafe nor unsatisfactory.

The appellant corresponded with the Northern Ireland Office about his conviction, and when the Criminal Cases Review Commission was set up the papers were referred to it for consideration. Meanwhile he instituted proceedings before the European Court of Human Rights (ECHR), claiming that his treatment in Castlereagh had given rise to breaches of the European Convention on Human Rights (the Convention). The ECHR held in a written decision given on 6 June 2000, that in the circumstances of his detention in Castlereagh there had been a violation of Article 6(1) of the Convention, in conjunction with Article 6(3)(c) as regards the denial of access to a solicitor. The Criminal Cases Review Commission then on 25 July 2000 referred the case to this court under section 10 of the Criminal Appeal Act 1995. Pursuant to section 10(2) of that Act the court is to treat the reference as an appeal.

On the morning of 15 December 1988 police discovered a large bomb hidden in a culvert under a road near Antrim. It was designed to be triggered by a signal from a radio transmitter. A party of soldiers had been due to pass over the culvert in a bus shortly after the time at which the bomb was found. A number of persons was arrested in connection with the incident, and a total of eleven were charged with

terrorist offences, of whom seven pleaded guilty. The Crown case was that the bomb was assembled at a farm near Lough Neagh at 36 Blackrock Road, Randalstown, and transported from there to the culvert in a green Datsun car. There was considerable forensic evidence concerning traces of Semtex found in that car and another car, a Vauxhall Astra, found in the yard of 36 Blackrock Road, and in the farmhouse and on items found therein. There was also evidence linking several defendants with the farmhouse.

The appellant was arrested in the early morning of 16 December 1988 and taken to Castlereagh. Between then and 18 December he was interviewed on ten occasions by two pairs of detectives. In the sixth interview, on the morning of 17 December, he made a number of verbal admissions in reply to questions, and in the seventh interview, which commenced at 2 pm on that day, he made a written statement of admission. The case against him was founded on the admissions made in these two interviews.

On arrival at Castlereagh the appellant was asked if he wanted to have a solicitor's advice and he said that he did, and gave the officer who carried out the admission procedure the name of his solicitor. An instruction was, however, given by a senior officer, pursuant to the terms of section 15 of the Northern Ireland (Emergency Provisions) Act 1987, authorising forty eight hours' delay in the appellant's access to legal advice. It was not challenged that the officer was entitled to give this authorisation, which had to be grounded on one or more of the reasons set out in section 15(8).

The appellant then had a medical examination, at which the doctor found him in good health. There followed ten interviews, which were held at the following times by the following officers:

Friday 16 December

Interview 1 10.55 am – 1.00 pm D/Sgt Morton and D/Con Robinson

Interview 2 2.00 pm – 4.00 pm D/Con Molloy and D/Con McCullough

Interview 3 4.00 pm – 6.00 pm D/Sgt Morton and D/Con Robinson

Interview 4 7.35 pm – 9.30 pm D/Con Molloy and D/Con McCullough

Interview 5 9.30 pm – 12.00 midnight D/Sgt Morton and D/Con Robinson

Saturday 17 December

Interview 6 9.30 am – 1.00 pm D/Con Molloy and D/Con McCullough

Interview 7 2.00 pm – 4.20 pm D/Sgt Morton and D/Con Robinson

Interview 8 7.30 pm - 12.00 midnight D/Con Molloy and D/Con McCullough

Sunday 18 December

Interview 9 10.00 am – 12.45 pm D/Con Molloy and D/Con McCullough

Interview 10 2.00 pm – 5.00 pm D/Sgt Morton and D/Con Robinson

The appellant claimed at his trial that he had been ill-treated by two of the interviewing officers, Detective Constable Molloy and Detective Constable McCulough. He gave detailed evidence of a catalogue of complaints about physical ill-treatment and verbal abuse which, if accepted, by the trial judge, would certainly have caused him to refuse to admit the confession. The judge rejected his allegations. He examined in detail all the evidence, from the appellant, the interviewing officers, the gaolers and the medical officers who had examined him on

several occasions. At the conclusion of his consideration he held that he was satisfied beyond reasonable doubt that the appellant's complaints were a fabrication and that he had not been ill treated in any respect. When the case went on appeal to the Court of Appeal the court again examined all of the material evidence in detail and came to the same conclusion as the trial judge. The evidence relating to the course of the interviews has now to be read in the light of these findings.

At the commencement of the first interview and regularly thereafter the appellant was cautioned in accordance with the terms of Article 3 of the Criminal Evidence (Northern Ireland) Order 1988. Paragraphs (1) and (2) of Article 3 provide:

> " **3.**-(1) Where, in any proceedings against a person for an offence, evidence is given that the accused –
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> (*a*) at any time before he was charged with the offence, on being questioned by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
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> (*b*) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,
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> being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, paragraph (2) applies.
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> (2) Where this paragraph applies –
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> (*a*) the court, in determining whether to commit the accused for trial or whether there is a case to answer;

(*b*) a judge, in deciding whether to grant an application made by the accused under Article 5 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (application for dismissal of charge where a case of fraud has been transferred from a magistrates' court to the Crown Court under Article 3 of that Order); and

(*c*) the court or jury, in determining whether the accused is guilty of the offence charged,

may –

(i) draw such inferences from the failure as appear proper;

(ii) On the basis of such inferences treat the failure as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material."

During the first four interviews the appellant remained silent and did not answer any question put to him. The detectives stated in evidence that he appeared extremely nervous, breathing heavily and sweating profusely. Towards the end of the fifth interview he did break his silence. According to the interviewing officers the questions and answers took the following course:

"Q. Gerry is there any point which you would like to ask us?

A. No reply.

Q. Is there something you are scare of?

A. No reply.

Q. Why are you so stubborn, we are only asking you to tell the truth and get yourself sorted out.

A. No reply.

Q. What was your full involvement in this intended bombing mission?

A. No reply.

Q. Gerry are you scared to talk because your involvement is so great?

A. No reply.

Q. Why can you not talk to us, do you not think you have a duty to sort out your own involvement?

A. Give me a while to think.

Q. Can we get you anything?

A. No thanks.

Q. We are glad that you are beginning to act with manners.

A. When will I be seeing my solicitor?

Q. The police authorities have deferred all visits from solicitors in this case for 48 hours. You will be allowed a solicitors visit on Sunday morning.

A. I'll wait until I see my solicitor."

The appellant denied that this account was accurate, claiming that his first remark was to ask "When will I be seeing my solicitor?" and denying that he asked for time to think. He said in evidence that he wanted to see his solicitor for two reasons: first, because he claimed that he was being ill-treated, and secondly, to obtain advice about the caution which had been administered to him.

The following morning he was visited by the doctor, to whom he made a complaint of ill-treatment by the interviewing officers during the second and third interviews. The doctor made some findings, which he described as "subjective", of

tenderness on movement and palpation. He said in evidence that there were no objective findings.

The appellant claimed that in the sixth interview, which commenced at 9.30 am on 17 December, he was assaulted to an even greater extent than on the previous day and that he was so worn down and intimidated by the ill-treatment and threats from the detectives that to obtain respite he responded to their questions with answers which he thought would satisfy them. He claimed that the answers which he gave were untrue and consisted of information garnered from the detectives' own previous questions. The police evidence was to the effect that he was responding freely and voluntarily to their questioning, giving answers in which he admitted his involvement in the preparation and transportation of the bomb. The appellant stated in evidence that when he was returned to his cell at lunch time after the conclusion of that interview he was very depressed, because, as he said:

> "I knew I answered questions which I didn't want to until I had legal advice from my solicitor".

In the seventh interview, which commenced at 2 pm on 17 December, the appellant made a written statement in which he set out in detail his part in the affair. He claimed at trial that this statement was "structured" by the police, that is, that they put it together and attributed the contents to him. The trial judge rejected this allegation, as did the Court of Appeal. The statement read as follows:

> "It was because of what has happened in this country that I blame for getting me involved. I grew up in it and learned my own history, the political circumstances. I have been working with Sinn Fein for about five years. I suppose it was the Hungerstrike campaign when I was

the age of sixteen that motivated me in that direction. It was just gradual and general meeting IRA men that got me involved with them during the last six months or so. There was never a particular point when I became a member of the provisional IRA I just considered myself part of it. I want to make it clear that the idea of this bombing did not originate from my head at all. The idea to attack soldiers at Springfarm had been circulating for about six months. My part in it was to keep an eye on the soldiers in the estate and to get details of their vehicles. I watched the soldiers and got a sighting of a red Dodge car on three occasions. I saw that they used the same road in the morning time between seven and eight o'clock. I just memorised it in my head. I am a bird watcher and I have binoculars which I used on one occasion. That was not relevant. I know a man from that estate but I don't want to name him. I was having a general talk with him one day and he told me about seeing the soldiers leaving the estate in the morning time. It was about a week before it that I was told to go to the Elver Inn outside Randalstown to a meeting with boys to pass on to them the details about the soldiers vehicle and the roads to use. I got the bus about seven o'clock from Antrim last Wednesday evening and I got off the bus at the stop near the bar, I got off and walked up into the bar. I went in and some of the men I was to see were playing pool so I joined in and played pool as well. I told someone who was not familiar with the roads the details of the roads in and out of Antrim and the estate. I passed this information on to one man who I believed was in the Provisional IRA. We all played pool until closing time. There was people coming and going all the time and I could not really put a figure on how many were there that was connected with this. When we left the bar I was given a lift in a car to a farmhouse in the Randalstown direction. I did not know the people who live there as I was never there in my life before. I went upstairs where there was about eight or nine boys. Some of them were like me just standing watching and there was some of them working at the bomb. They had batteries, wires and light bulbs and things. I went back outside and hung about for a while walking round the yard. There was about half a dozen cars about the yard. Sometime after this somebody in the house made tea and sandwiches. I had a cup and a sandwich. At some point I went with some others to the barn round the back. I helped them to

> carry the explosives out of the barn and down a field for a while. We were afraid of somebody coming. The three bags of stuff were brought back up later to the yard and later put in the boot of red coloured car. It was a good new car but I don't know the make, it was something the shape of a Sierra. We hung about for a while. I don't know what time it was but it was well after midnight. I went back into the living room of the house again and had another cup of tea. I read a newspaper and waited for the other boys, for the time to go. It was well into the early hours of the morning when I got into the front passengers seat of this red car with the bomb in the boot. The driver of the car was from the house but I did not know him. I told him the road to take to Antrim. I took him round the country roads but I don't know the names of them. When we got to the junction of the Niblock Road and the Steeple Road we stopped. The driver stayed in the car and I got out and helped some other men to lift the bomb stuff out of the boot of the car. It was in four bags all black plastic bags. I helped them to carry it into a field near the junction. I then carried one of the bags down to Springfarm through the fields. Some of the other boys carried the other bags down. I just stood and watched while the other boys planted the bomb at the road. I had nothing to do with planting the bomb. The men put the bomb into some pipe that was there but I didn't help them. I forgot to say that when I was at the house I saw a small rusty hand gun but I didn't touch it. When the men finished planting the bomb we all walked up the field and I got into the same red car again. The boy drove me up the road and I got out near my house and I went home that's it. They drove on. I knew the bomb was going to blow up a military vehicle. It wasn't my job to set it off. I had nothing further to do with this. Gerard Magee."

The appellant was interviewed again in the evening of 17 December and twice more on 18 December. He was seen by medical examiners in the morning of 18 December and again when he left Castlereagh that evening. He did not make any further allegations of ill-treatment and neither examiner found any evidence of

injuries. His solicitor saw him in private consultation at 1 pm on 18 December, the day after he made the verbal admissions and the written statement.

The interviews were monitored by closed circuit television, but it was proved that for a period on the morning of 17 December the duty inspector whose duty it was to watch the monitoring screens was out of the monitoring office on other duties. The judge held that this absence did not occur during the part of the sixth interview in which the appellant claimed to have been ill-treated. He was moreover of the opinion that it would have been impossible for the prolonged ill-treatment described by the appellant to have taken place without being observed at some time by the inspectors on duty in the monitoring room. He accepted their evidence that they had seen nothing of the kind at any stage.

The appellant's challenge to the admission of these verbal and written admissions was based primarily on section 8(2) of the Northern Ireland (Emergency Provisions) Act 1978, as substituted by section 5 of the 1987 Act, which read:

> " (2) Where in any such proceedings –
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> (a) the prosecution proposes to give, or (as the case may be) has given, in evidence a statement made by the accused, and
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> (b) prima facie evidence is adduced that the accused was subjected to torture, to inhuman or degrading treatment, or to any violence or threat of violence (whether or not amounting to torture), in order to induce him to make the statement,
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> then, unless the prosecution satisfies the court that the statement was not obtained by so subjecting the accused

> in the manner indicated by that evidence, the court shall do one of the following things, namely –
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> (i) in the case of a statement proposed to be given in evidence, exclude the statement;
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> (ii) in the case of a statement already received in evidence, continue the trial disregarding the statement; or
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> (iii) in either case, direct that the trial shall be restarted before a differently constituted court (before which the statement in question shall be inadmissible)."

The judge held that he was satisfied beyond reasonable doubt that the statements had not been obtained by so subjecting the appellant. The appellant also relied on section 8(3), which, as amended, provided:

> "(3) It is hereby declared that, in the case of any statement made by the accused and not obtained by so subjecting him as mentioned in subsection (2)(b) above, the court in any such proceedings as are mentioned in subsection (1) above has a discretion to do one of the things mentioned in subsection (2)(i) to (iii) above if it appears to the court that it is appropriate to do so in order to avoid unfairness to the accused or otherwise in the interests of justice."

The ground on which the appellant's counsel asked the trial judge to exercise his discretion under section 8(3) was because ESDA tests showed that some of the interview notes had been altered or rewritten and because they had not all been authenticated in the prescribed manner by a senior officer. The judge held that the ESDA evidence threw no doubt on the authenticity of the notes and that the failure to authenticate them properly was no more than incompetence or slapdash procedure, and that it did not reflect on the authenticity of the notes. He therefore declined to exercise his discretion under section 8(3) to exclude any of the appellant's

statements. The Court of Appeal held that he was entitled to reach the conclusions which he formed and to decline to exercise his discretion to exclude the statements. It accordingly held that the appellant's conviction was neither unsafe nor unsatisfactory and dismissed his appeal.

When the appellant's application came before the ECHR the issue was whether there had been a breach of Article 6 or Article 14 of the Convention. The Court ruled that there had not been a breach of Article 14, and we need not consider it. Article 6(1) provides, so far as material:

> "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."

Article 6(3)(c) goes on to provide that everyone charged with a criminal offence shall have the right to defend himself in person or through legal assistance of his own choosing. As the Court pointed out in paragraph 41 of its decision, it has been held that these provisions may apply to pre-trial stages as well as to the actual hearing.

The Court decided to deal with it on the papers before it and not to hold a hearing on the merits. It received in evidence before it a report from the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment (CPT) dated July 1993 concerning conditions which it then found to exist in Castlereagh. The CPT was strongly critical of those conditions. The matters which gave it especial concern were the lack of natural light in the detainees' cells, the lack of natural light in one block of interview rooms (not that in which the appellant was interviewed) and the lack of exercise facilities. On

the basis of these facts the CPT expressed the following conclusion in paragraph 109 of its report:

> "109. … Even in the absence of overt acts of ill-treatment, there is no doubt that a stay in a holding centre may be – and is perhaps designed to be – a most disagreeable experience. The material conditions of detention are poor (especially at Castlereagh) and important qualifications are, or at least can be, placed upon certain fundamental rights of persons detained by the police (in particular, the possibilities for contact with the outside world are severely limited throughout the whole period of detention and various restrictions can be placed on the right of access to a lawyer). To this must be added the intensive and potentially prolonged character of the interrogation process. The cumulative effect of these factors is to place persons detained at the holding centres under a considerable degree of psychological pressure. The CPT must state, in this connection, that to impose upon a detainee such a degree of pressure as to break his will would amount, in its opinion, to inhuman treatment."

The Court, after recording the submissions of the parties, expressed its conclusions in paragraphs 38 to 46 of its decision:

> "38. The Court notes at the outset that it is not required to pronounce on the compatibility in general of the drawing of adverse inferences under Article 3 of the 1988 Order with the requirements of a fair hearing contained in Article 6 of the Convention. As in the above-mentioned *John Murray* case, the Court will confine itself to the particular facts of the instant case. It notes in this respect that the trial judge was not called on to exercise his discretion under Article 3 of that Order since the applicant admitted to the police during detention that he had been involved in terrorist offences. It would further observe that although the applicant chose not to testify following the hearing on the *voir dire*, no inferences were drawn on that account. Accordingly, the applicant's silence was not an issue before the domestic courts, despite a cursory warning emitted by the trial judge regarding the applicant's failure to testify.

39. The Court accepts that the administration of a caution to an accused pursuant to Article 3 of the 1988 Order may place the latter in a dilemma at the beginning of interrogation. On the one hand, if he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him. Under such conditions the concept of fairness requires that the accused have the benefit of the assistance of a lawyer already at the initial stages of the police interrogation (see the *John Murray* judgment, loc. cit., p. 55, § 66). Unlike Mr Murray, the applicant did opt to break his silence. No adverse inferences were drawn from his silence prior to that decision and the Court cannot speculate as to whether the applicant would have maintained his silence if he had been permitted to consult his solicitor at any stage prior to the 6th interview at which he began to confess.

40. The Court considers that the central issue raised by the applicant's case is his complaint that he had been prevailed upon in a coercive environment to incriminate himself without the benefit of legal advice. It will examine the complaint in that context.

41. The Court recalls that, even if the primary purpose of Article 6, as far as criminal matters are concerned, is to ensure a fair trial by a 'tribunal' competent to determine 'any criminal charge', it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 – especially paragraph 3 – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see the *Imbrioscia v. Switzerland* judgment of 24 November 1993, Series A no. 275, p. 13, § 36). The manner in which Article 6 §§ 1 and 3(c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. In its *John Murray* judgment the Court also observed that, although Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police

interrogation, this right, which is not explicitly set out in the Convention, may be subject to restriction for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing (*ibidem*, pp. 54-55, § 63).

42. The Court notes that the applicant made a specific request to see a solicitor on arrival at Castlereagh Police Office. However, the decision was taken to delay his access to a solicitor and he was questioned from 10.55 a.m. on 16 December 1988 to 12.45 p.m. on 18 December 1988 – more than forty-eight hours – without access to legal advice. He began to confess to his involvement in the conspiracy to bomb army personnel at 9.30 a.m. on 17 December 1988. He signed a confession statement at his seventh interview which began at 1 p.m. [this should be 2 p.m.] on 17 December 1988. The applicant was eventually able to consult his solicitor at 1 p.m. on 18 December 1988.

43. The Court observes that prior to his confession the applicant had been interviewed on five occasions for extended periods punctuated by breaks. He was examined by a doctor on two occasions including immediately before the critical interview at which he began to confess. Apart from his contacts with the doctor, the applicant was kept incommunicado during the breaks between bouts of questioning conducted by experienced police officers operating in relays. It sees no reason to doubt the truth of the applicant's submission that he was kept in virtual solitary confinement throughout this period. The Court has examined the findings and recommendations of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment ('CPT') in respect of the Castlereagh Holding Centre (see paragraph 30 above). It notes that the criticism which the CPT levelled against the Centre has been reflected in other public documents (see paragraph 35 above). The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent. Having regard to these considerations, the Court is of the opinion

> that the applicant, as a matte of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confide in his interrogators. Irrespective of the fact that the domestic court drew no adverse inferences under Article 3 of the 1988 Order, it cannot be denied that the Article 3 caution administered to the applicant was an element which heightened his vulnerability to the relentless rounds of interrogation on the first days of his detention.
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> 44. In the Court's opinion, to deny access to a lawyer for such a long period and in a situation where the rights of the defence were irretrievably prejudiced is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6 (see, *mutatis mutandis*, the above-mentioned *John Murray* judgment, p. 55, § 66).
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> 45. It is true that the domestic court found on the facts that the applicant had not been ill-treated and that the confession which was obtained from the applicant had been voluntary. The Court does not dispute that finding. At the same time, it has to be noted that the applicant was deprived of legal assistance for over forty-eight hours and the incriminating statements which he made at the end of the first twenty-four hours of his detention became the central platform of the prosecutions case against him and the basis for his conviction.
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> 46. Having regard to the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3(c) thereof as regards the denial of access to a solicitor."

Following the decision of the ECHR, the Criminal Cases Review Commission gave further consideration to the appellant's case. It concluded that there was a real possibility that this court would find that, taking into account the nature and extent of the breach of Article 6, the evidence of confession should have been excluded as a

matter of discretion. It accordingly referred the conviction to us under section 10 of the Criminal Appeal Act 1995.

Under section 2(1) of the Criminal Appeal (Northern Ireland) Act 1980, as amended by the Criminal Appeal Act 1995, the Court of Appeal is to allow an appeal against conviction if they think it was unsafe, and dismiss the appeal in any other case. In this reference we have to consider the effect of the argument now put before us, which was not advanced to the trial judge, that he should have exercised his discretion to refuse to admit the statements made by the appellant on the ground that it was unfair in all the circumstances of the case, and taking into account the atmosphere of Castlereagh, to decline to allow him access to legal advice for the period of forty eight hours after his arrest. Such an argument could not have succeeded if made at the time of the appellant's trial in 1990 or his appeal to this court in 1993. Parliament had by enacting section 15 of the Northern Ireland (Emergency Provisions) Act 1978 and its successor section 45 of the 1991 Act specifically authorised the deferment of access to legal advice in certain circumstances for a maximum period of time. The courts therefore could not interpret section 8(3) of the 1978 Act or its successor as giving authority to exclude a statement made by the person detained, which would have defeated the will of Parliament: see *Re Russell's Application* [1996] NI 310 at 323 and 336, per Hutton LCJ. Since the trial judge was not asked to exercise his discretion to exclude the statements on the ground of denial of access to legal advice, this court as an appellate tribunal has now to exercise the discretion conferred on him: see, eg, *R v Docherty* [1999] 1 Cr App R 274 at 281. If the law applying in 1990 had remained

unchanged to the present time, we should be bound to reach the same conclusion that we could not exclude the statements on that ground.

The legal landscape has, however, been fundamentally changed by the enactment of the Human Rights Act 1998, which is now in force. By section 7(1)(b) the appellant is entitled to rely on his Convention right set out in Article 6 in any legal proceedings (which by section 7(6) include an appeal against the decision of a court). By section 22(4) section 7(1)(b) applies to proceedings brought by or at the instigation of public authority whenever the action in question took place. Section 2(1)(b) requires the court determining a question which has arisen in connection with a Convention right to take into account any judgment of the ECHR.

In determining this appeal now against the appellant's conviction we have to judge its safety by applying the standards of today, as we held in *R v Gordon* (2000, unreported), accepting the correctness of the decisions in *R v Bentley* [1999] Crim LR 330 and *R v Johnson* (2000) *The Times*, 21 November. Mr Weatherup QC submitted on behalf of the DPP that in accordance with the decision in *R v King* [2000] Crim LR 835 we should disregard subsequent statutory provisions in determining the safety of the conviction, including section 22(4) of the Human Rights Act 1998, which establishes the retrospective effect of the Act. We are unable to accept that submission. We consider that it was the clear intention of Parliament that the standards incorporated into our law by the 1998 Act should be applied from the time when it came into force, and that one cannot in this manner except appeals against pre-Act convictions from the process of application of the Convention.

Mr Treacy QC for the appellant submitted that the statement in paragraph 7-51c of the 2001 edition of Archbold is correct, that a conviction which does not match up to the requirements of Article 6 of the Convention cannot ever be anything but unsafe. In support of his submission he referred to the decision of the Privy Council in *Darmalingum v The State* (1999) *The Times,* July 18. In that case there had been an extremely long delay between the appellant's arrest and his trial and again between trial and the disposition of his appeal to the Supreme Court of Mauritius. The Privy Council quashed the conviction on the ground that the delay contravened the provisions of section 10(1) of the Constitution of Mauritius, which is in similar terms to those of Article 6(1) of the Convention. At page 7 of their judgment the Board stated that the normal remedy for a failure of the guarantee contained in section 10(1) would be to quash the conviction. Mr Treacy, following the view expressed by the editors of Archbold, submitted that this supported the proposition that the same result should follow when a breach of Article 6 of the Convention has been established. We regard this decision as an insufficient analogy. The Privy Council was there considering a constitutional provision of Mauritius, part of the corpus of its law, which applied directly to criminal trials in the state. The relationship between the safety of a conviction in our legal system and a determination by the ECHR of a breach of the Convention is in our view governed by rather different principles.

The issue was discussed by the Court of Appeal in England in *R v Davis* (2000) *The Times,* July 25. In that case the appellants were convicted in 1990 and their appeals were dismissed. Certain documents and facts relating to informers had not

been disclosed, in accordance with the practice accepted at the time. The appellant brought an application before the ECHR, which declared that there had been a violation of Article 6(1) of the Convention. In considering the relationship between the safety of the conviction and the finding of unfairness by the ECHR, the Court of Appeal said:

> "The duty of the ECHR is to determine whether or not there had been a violation of the European Convention or in this case, more particularly, of art 6(1). It is not within the remit of ECHR to comment upon the nature and quality of any breach or upon the impact such a breach might have had upon the safety of the conviction … We are satisfied that the two questions must be kept separate and apart. The ECHR is charged with inquiring into whether there has been a breach of a convention right. This court is concerned with the safety of the conviction. That the first may obtrude upon the second is obvious. To what extent it will do so will depend upon the circumstances of the case. We reject therefore Mr Blaxland's contention that a finding of a breach of art 6.1 by the ECHR leads inexorably to the quashing of the conviction. Nor do we think it helpful to deal in presumptions. The effect of any unfairness upon the safety of the conviction will vary according to its nature and degree. At one end of the spectrum Mr Perry cites the example of an appropriate sentence following a plea of guilty passed by a judge who for some undisclosed reason did not constitute an impartial tribunal. At the other extreme there may be a case where a defendant is denied the opportunity to give evidence in his own behalf. In both cases there might well be a violation of art 6. Is each to be treated in the same way? Not in the opinion of this court."

The court held that the failure to disclose the material was a material irregularity, which made the convictions unsafe. We would observe, however, that the court would on its reasoning have reached this conclusion independently of the finding by the ECHR once it investigated the issue of the failure to disclose the material.

The statement of the law in *R v Davis* which we have quoted was approved in subsequent decisions of the Court of Appeal, but with a degree of qualification which takes the law somewhat nearer the statement contained in Archbold, *loc cit.* In *R v Francom* (2000) *The Times,* October 24 Lord Woolf CJ accepted the correctness of the proposition set out in *R v Davis*, but went on to say:

> "In a case such as the present, we would expect this court to be approaching the issue of lack of safety in exactly the same way as the ECHR approaches lack of fairness."

He then said in *R v Togher* (2000, unreported) at paragraph 33 of his judgment:

> "We would suggest that, even if there was previously a difference of approach, that since the 1998 Act came into force, the circumstances in which there will be room for a different result before this Court and before the ECHR because of unfairness based on the respective tests we employ will be rare indeed. Applying the broader approach identified by Rose LJ, we consider that if a defendant has been denied a fair trial it will almost be inevitable that the conviction will be regarded as unsafe."

We respectfully agree with the statements of the law in these cases and adopt them as the proper approach to the relationship between a finding of unfairness under Article 6 of the Convention and the safety of a conviction.

Mr Treacy submitted that the finding of the ECHR under Article 6 should lead automatically to a conclusion that the conviction in the present case is unsafe. Mr Weatherup resisted this, on the ground that the court is only required, under section 2(1)(a) of the Human Rights Act 1998, to "take account of" the decision of the ECHR. He was critical of the reasoning of the Court and the conclusions which it reached. He pointed out that it did not receive any direct evidence of the conditions in Castlereagh when the appellant was detained there, but founded its decision on

the report of the CPT made in July 1993, four and a half years later. He relied strongly upon the argument that the appellant had based his case for exclusion of the statements solely on the ground that he had been coerced into making them by reason of ill-treatment, allegations which were rejected by the trial judge and the Court of Appeal as a false and lying case, and that he had not proved that the conditions in Castlereagh or his lack of legal advice had any causal connection with his making the statements of admission.

We acknowledge the force of these arguments, though it is probably fair to say that the appellant's advisers would have been well aware that to attempt at trial to found a case on lack of legal advice or conditions in Castlereagh would have had no chance of success and so did not advance such a ground for exclusion of the statements. There were, however, facts in this case which gave more support to the conclusion of the ECHR than might exist in some other cases. The appellant had asked on arrival and again in the fifth interview about seeing a solicitor, and gave specific evidence that he was unsure about the effect of the Article 3 caution and whether he should make any statement to the interviewers. His admissions were all made before he had access to any legal advice. Moreover, he showed symptoms of being materially more distressed and vulnerable than many other suspects in the same position.

The ECHR has made a direct finding on the facts of this case that the denial of access to a solicitor, against the background of the conditions in Castlereagh, constituted a violation of Article 6(1) in conjunction with Article 6(3)(c) of the Convention. We consider that we would not be justified in concluding that the

conviction was safe in the light of this finding. We note that the Court said in paragraph 38 of its decision that it was confining itself to the particular facts of the instant case.

If other cases come before us concerning admissions made in Castlereagh by persons detained whose access to legal advice was deferred, we shall take the ECHR's decision in the present case into account. It will then be a matter for consideration in each such case how far the Court's findings in this case are material in reaching a conclusion on the safety of the conviction.

For the reasons which we have given we shall allow the appeal and quash the appellant's conviction.

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

v

MICHAEL GERARD MAGEE

_____

JUDGMENT

OF

CARSWELL LCJ

_____