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Judgment: approved by the Court for handing down | *Delivered:* **14/02/2003**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

LORD SAVILLE OF NEWDIGATE

Appellant

and

TOBY HARNDEN

Respondent

Before: Carswell LCJ, Nicholson and Campbell LJJ

CARSWELL LCJ

[1] The appellant is the chairman of a tribunal, known as the Bloody Sunday Tribunal, set up to inquire into the events which took place in Londonderry on 30 January 1972, in the course of which thirteen civilians were shot dead by members of the Armed Forces. The respondent is a journalist on the staff of The Daily Telegraph, who was summoned by the Tribunal to give evidence about matters within his knowledge concerning the identity of soldiers who had given him information about those events. He declined to give the Tribunal that evidence, on the ground that he felt an obligation to protect sources who had given him information in confidence. The Tribunal sought to have him punished by the High Court for contempt. The respondent sought discovery of certain documents from the Tribunal. He contended at a hearing before Coghlin J that the contempt proceedings were criminal in nature and that the nature and extent of discovery was different from that which obtains in civil matters. Coghlin J at the parties' request decided the issue of the nature of the proceedings as a preliminary issue and

ruled in favour of the respondent's contention. The appellant appealed to this court, with the leave of the judge, against his ruling.

[2] Since the question to be considered by this court is limited to that single issue, and since the extent of discovery and the main question of contempt remain to be dealt with at a future date, we shall say as little as possible about the case itself, for we do not wish to be taken to express any opinion about matters which have yet to be decided by the High Court. We propose accordingly to give as brief as possible an outline of the factual material relevant to the issue before us.

[3] The Tribunal was set up in 1998 and on 13 June 1999 the Secretary of State for Northern Ireland determined that the Tribunals of Inquiry (Evidence) Act 1921 (the 1921 Act) should apply to it. The effect of that determination was that under section 1 the Tribunal has the same powers as the High Court in respect of enforcing the attendance of witnesses, examining them on oath, affirmation or otherwise and compelling the production of documents. Section 1(2) provides:

> "(2) If any person –
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> *(a)* on being duly summoned as a witness before a tribunal makes default in attending; or
> *(b)* being in attendance as a witness refuses to take an oath legally required by the tribunal to be taken, or to produce any document in his power or control legally required by the tribunal to be produced by him, or to answer any question to which the tribunal may legally require an answer; or
> *(c)* does any other thing which would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court;
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> the chairman of the tribunal may certify the offence of that person under his hand to the High Court, or in Scotland the Court of Session, and the court may thereupon inquire into the alleged offence and after hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in

like manner as if he had been guilty of contempt of the court."

[4] On 6 April 2000 the appellant signed a certificate under section 2(1) of the 1921 Act, certifying –

> "the offence of Mr Harnden in refusing to answer questions to which the Tribunal was legally entitled to require answers, namely to identify to the Tribunal the name of source X referred to in the Tribunal's rulings of 12 October 1999 and 7 February 2000, and to give to the Tribunal a full account of what X said to him about the events of 30 January 1972 in Londonderry."

[5] The certificate sets out in detail the circumstances in which it was issued. The Tribunal by summons dated 29 July 1999 required the respondent to produce to it accounts given to the Daily Telegraph by two former members of the Parachute Regiment of the events on 30 January 1972 and the notes recording these accounts. The respondent gave oral evidence in September 1999, in which he stated that he had intentionally destroyed his notes and recorded over his tapes. He was unwilling to give evidence which would reveal the identity of the two soldiers, whose account had been given to him on the "strict understanding" that he would not disclose their identities to anyone. A witness summons was served on the respondent, which he applied to set aside, but the application was refused by the Tribunal. After further inquiries and extensive correspondence the position was reached that the Tribunal still required the respondent to answer questions about the identity of one of the soldiers, while he continued his refusal to do so. By agreement between the Tribunal and the respondent the appellant completed his certificate on the basis of the refusal contained in a letter from the respondent's solicitors, without requiring the respondent to attend in person to repeat his refusal to answer the questions.

[6] By a summons dated 5 July 2001 the respondent sought discovery of a number of classes of documents which he claimed were material to the issues dealt with in the certificate. At the hearing on 18 October 2001 the parties asked the judge to give a preliminary ruling on the question whether the proceedings for contempt on foot of the certificate were civil or criminal in nature. It was argued on behalf of the respondent that they were criminal and that it followed that he was entitled to wider disclosure than if they were civil in nature, as the appellant contended. In a reserved judgment given on 19 April 2002 the judge expressed the conclusion that the domestic classification was equivocal and of little assistance, but that for the purposes of Article 6 of the European Convention on Human Rights the proceedings should be

regarded as criminal. He did not make any formal order following this ruling.

[7] During the course of the hearing before us we raised the question of our jurisdiction to entertain an appeal from the judge's ruling and received submissions from both parties on that question. We resolved that we did have jurisdiction, for the reasons which we shall now set out.

[8] Appeals in cases of contempt of court are governed exclusively by section 44 of the Judicature (Northern Ireland) Act 1978. The material portions for present purposes are subsections (1), (2), (3) and (5)(*a*), which provide:

> "**44.**-(1) Subject to the provisions of this section, an appeal shall lie under this section from any order or decision of a court in Northern Ireland in the exercise of jurisdiction to punish for contempt of court (including criminal contempt); and in relation to any such order or decision the provisions of this section shall have effect in substitution for any other statutory provision relating to appeals in civil or criminal proceedings.
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> (2) An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant; and the appeal shall lie –
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> *(a)* from an order or decision of any inferior court (including a county court) or of a single judge of the High Court, or of any court having the powers of the High Court or a judge of that court, to the Court of Appeal;
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> *(b)* from an order or decision of the Court of Appeal (including an order or a decision of that court on an appeal under this section) and from an order or decision of the High Court, other than an order or decision of a single judge thereof, or of the Courts-Martial Appeal Court, to the House of Lords.

(3) The court to which an appeal is brought under this section may reverse or vary the order or decision of the court below, and make such other order as may be just; and, without prejudice to the inherent powers of any court referred to in sub-section (2), provision may be made by rules of court for authorising the release on bail of an appellant under this section.

* * * * *

(5) In this section `court' includes any tribunal or person having power to punish for contempt; and references in this section to an order or decision of a court in the exercise of jurisdiction to punish for contempt include references –

(a) to an order or decision of the High Court or a county court under any statutory provision enabling that court to deal with an offence as if it were contempt of court;"

Provision is made in RSC (NI) Order 52, rule 1 for the procedure to be adopted on applications for committal for contempt:

"**1.**-(1) The power of the High Court or Court of Appeal to punish for contempt of court may be exercised by an order of committal.

(2) Where contempt of court –

(a) is committed in connection with-

(i) any proceedings in the High Court, or
(ii) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court, or
(iii) proceedings in an inferior court, or

(b) is committed otherwise than in connection with any proceedings,

> then, subject to paragraph (3) and rule (5), an order of committal may be made only by a court of the High Court consisting of two or more judges, and in this Order the word `Court' shall be construed accordingly save where the context or paragraph (4) otherwise requires.
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> (3) Where civil contempt of court is committed in connection with any proceedings in the High Court, an order of committal may be made by a single judge.
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> (4) Where contempt of court is committed in relation to the Court of Appeal or in connection with any proceedings therein, an order of committal may be made by that Court as well as by the Court under paragraph (2).
>
> (5) Every order of committal may be directed to any police officer or to such other person as the Court may order."

The effect of these provisions, taken together with section 1(2) of the 1921 Act, is that if the contempt alleged is properly classed as civil contempt, then a single judge could make an order of committal and an appeal would lie to the Court of Appeal. If it is not civil contempt, then the order can be made only by a Divisional Court and an appeal must go to the House of Lords.

[9] We considered the question whether in ruling that the contempt was criminal in nature the judge may in effect have been declining jurisdiction, though he did not expressly so hold or make an order in those terms. In so ruling, however, he was not making an order of committal, which, if it was not a civil matter, could only be done by a Divisional Court. In these circumstances section 16(5) of the Judicature (Northern Ireland) Act 1978 authorises a single judge to exercise the jurisdiction of the High Court, which would enable him to make an order for discovery and, *a fortiori*, to give a ruling anterior thereto. In any event, the High Court, being a court of unlimited jurisdiction, has jurisdiction to decide the existence and limits of its own jurisdiction: *Canada Trust Co v Stolzenberg* [1997] 4 All ER 983 at 988-9, per Millett LJ.

[10] Under section 44(1) of the 1978 Act an appeal lies from an "order or decision" of the High Court in the contempt jurisdiction. The term "decision" is variable in meaning, which generally is governed by the context in which the word is used. In the present context we consider that it is intended to be a word of wide import, capable of including a ruling which would determine

how the application should be heard. The case of *Loade v Director of Public Prosecutions* [1990] 1 All ER 36, which was cited to us, can in our view be distinguished. That case concerned the issue whether appeals by way of case stated from decisions of the Crown Court could be brought against preliminary rulings or should only be entertained when a final decision has been reached by the court. A Divisional Court held that in the context and in the light of the legislative history and the practice on appeals from magistrates the latter was the correct construction. If a formal order of the court was required under RSC (NI) Order 42, rule 2 in order to found the present appeal, its absence could be regarded under Order 2, rule 1 as an irregularity which does not nullify the proceedings and it could be belatedly drawn up and filed. We accordingly concluded that we had jurisdiction to enter upon the appeal.

[11] The approach to determining whether these contempt proceedings are civil or criminal is a twin-track process, in which it is necessary to consider both domestic law, in so far as it has been established with sufficient clarity, and the jurisprudence of the European Court of Human Rights. This approach, which was adopted by the judge in the present case, appears clearly from the judgment of Lord Phillips MR in the Court of Appeal in *R (McCann) v Manchester Crown Court* [2001] 4 All ER 264. The court in that case had to consider whether the making of anti-social behaviour orders under the Crime and Disorder Act 1998 constituted civil or criminal proceedings. Lord Phillips MR said at paragraph 16 of his judgment:

> "The question of whether particular proceedings are criminal or civil in character is one that has arisen often at Strasbourg in the context of art 6. The first question that the European Court asks is how the relevant domestic law of the country concerned classifies the proceedings? Conversely, under the Human Rights Act, it is the duty of this court to interpret the CDA in accordance with the convention and to have regard to the Strasbourg jurisprudence in so doing."

We have to adopt the same approach and carry out a similar task in interpreting section 1(2) of the 1921 Act.

[12] The traditional distinction in domestic law between civil and criminal contempts is set out in *Arlidge, Eady & Smith on Contempt,* 2nd ed paras 3-1 to 3-3:

> "… a criminal contempt is an act which so threatens the administration of justice that it requires punishment from the public point of

> view; whereas, by contrast, a civil contempt involves disobedience of a court order or undertaking by a person involved in litigation. In these cases, the purpose of the imposition of the contempt sanction has been seen as primarily coercive or `remedial'.
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> In an American Supreme Court decision on the nature of the distinction , it was said:
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> > `it is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.'
>
> The distinction thus described, however, has never been rigidly maintained, and the desire to retain flexibility to cope with a variety of circumstances continued to give rise to difficulties, not only in England but also in other common law jurisdictions."

The learned authors state at para 3-25:

> "… it is clear that, for largely historical reasons, different forms of contempt have been allocated to one or other of the two traditional broad categories. Most examples of conduct classified as contempt are established as `criminal'. They include contempts in the face of the court; publication of matter scandalising the court; acts calculated to prejudice the fair trial of a pending cause; reprisals against those who participate in legal proceedings for what they have done; impeding service of, or forgoing, the process of the court; and also most contempts in relation to wards of court."

[13] The nature of contempt has been described as protean and the distinction between the two forms has been criticised variously as being "academic" (Sedley J in *Guildford Borough Council v Valler* [1993] TLR 274 at

275), "unhelpful" or "largely meaningless" (see the opinion of Lord Oliver in *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191 at 217). Despite the criticisms, the time-honoured distinction has persisted and is described in Miller, *Contempt of Court,* 3rd ed, para 1.04 as being "of continuing importance." The difficulty of classifying any given type of contempt is very well recognised. Breaches of court orders and injunctions are generally ranked in domestic law as civil contempts: see *Scott v Scott* [1913] AC 417. The overlap between the coercive and punitive considerations may, however, make classification difficult. As Arlidge, Eady & Smith state (*op cit,* paras 3-5 and 3-6:

> "3-5 Although the distinction between civil and criminal contempt continues to be made, and has to be considered carefully, the two categories have rather more in common than their traditional separation would imply. The considerations of public policy underlying the contempt jurisdiction generally are the protection of the administration of justice and the maintenance of the court's authority. There lies at the heart of both civil and criminal contempt the need for society both to protect its citizens' rights and to maintain the rule of law.
>
> 3-6 Thus, although `civil contempt' is concerned with breaches of court orders or undertakings in civil litigation, for the benefit of parties, the court may wish primarily in such cases to coerce parties into compliance with its orders; or alternatively, even in this context, it may be primarily concerned to punish disobedience (for example, where the time for compliance has passed). In such circumstances as these, deterrence clearly has a role to play. It is therefore possible, in many examples of civil contempt, to discern these two considerations in operation alongside one another."

[14] In his judgment the judge referred to *Attorney-General v Mulholland and Foster* [1963] 2 QB 477, in which two journalists who had refused to give evidence about their sources were sentenced to terms of imprisonment. Although it did not overtly classify the nature of the contempt, the tone of the

court's consideration of the matter was that it was essentially criminal. By contrast, he cited the observation of Sir John Donaldson in *Goad v AUEW (No 3)* [1973] ICR 108, when he described the policy of the AUEW in disobeying the order of the court as "unlawful, but in no way criminal" (though we think that that remark should be seen in the context of the case and the attempts of the court to defuse a sensitive situation). He concluded that the domestic law classification of contempts was not likely to provide much assistance. One further case came to our attention, however, which does not appear to have been cited to the judge. In his opinion in *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339 Lord Diplock discussed section 10 of the Contempt of Court Act 1981, which deals with disclosure of sources of information. At page 347 he stated:

> "… the disclosure of sources of information with which the section deals is not, like the old `newspaper rule' at common law, limited to disclosure upon discovery where disobedience to the order for discovery would fall into the category of a civil contempt; it applies also to disclosure in response to a question put to a witness at the trial, where a refusal to answer the question if ordered to by the judge to do so would constitute a contempt committed in the face of the court and thus a criminal contempt."

Although this may be regarded as *obiter,* it is a considered expression of opinion by high authority which must carry substantial weight. We therefore agree with the judge to the extent that he did not regard the domestic classification as conclusive, but we consider that the better view is that contempts of the kind in the present case should be regarded as criminal rather than civil.

[15] It is necessary then to have regard to the Strasbourg jurisprudence in order to ascertain how the European Court of Human Rights would classify contempt proceedings under the Convention, since a conclusion on this issue would be material to our duty to interpret section 1(2) of the 1921 Act in such a way as to give it effect in a way which is compatible with Convention rights. The material provision of the Convention is Article 6(1), which reads:

> "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."

[16] In *Engel v Netherlands (No 1)* (1976) 1 EHRR 647 at para 82 the ECtHR laid down three criteria for determining whether a matter is to be classified as criminal, the domestic classification, the nature of the offence and the severity of the potential penalty which the person concerned risked incurring. These factors are considered cumulatively in determining the issue. The domestic classification is relevant, but only a starting point; the second and third factors carry greater weight, and the third factor has been described as the most important: *R (McCann) v Manchester Crown Court* [2002] 4 All ER 593 at para 30, per Lord Steyn.

[17] Mr McCloskey cited the leading decisions of the ECtHR on the issue, giving us what Lord Steyn described at paragraph 31 of the *McCann* case as a tour d'horizon. Like Lord Steyn, we would refer to the judgment of Potter LJ in *Han v Commissioners of Customs and Excise* [2001] 4 All ER 687 at paragraphs 55-64 for a review of this case-law. Those decisions provide a group of examples of varying kinds of the application of the *Engel* principles, but none is concerned with contempt of court. We observe, however, that in *Benham v United Kingdom* (1996) 22 EHRR 293 at paragraph 56 the ECtHR regarded liability to a penalty of three months' imprisonment for failure to pay the community charge as "relatively severe" and sufficient to constitute a pointer towards its classification as a criminal charge. The "colouring" of the matter may be of importance, as the ECtHR said in *Ezeh and Connors v United Kingdom* (2002) 35 EHRR 28 at paragraph 70, where it was held that the adjudication of disciplinary offences committed by prisoners was to be classed as a criminal charge rather than a merely disciplinary matter. Mr McCloskey pointed to the series of cases in which it has been held that confiscation orders do not constitute criminal charges within Article 6: see *McIntosh v Lord Advocate* [2001] 2 All ER 638; *R v Benjafield* [2001] 2 All ER 609 and *R v Rezvi* [2002] 1 All ER 801. These may, however, be distinguished as relating to a proceeding which is consequent on a conviction and form part of the sentencing process: *R v Rezvi* at paragraph 13, per Lord Steyn.

[18] The availability of contempt proceedings, by holding a threat over the heads of witnesses summoned to give evidence, is designed to compel them to obey the command of the court and give the evidence within their knowledge and not to withhold it. If a witness persists in his refusal to answer questions on relevant matters, and proceedings are commenced to commit him for contempt, then he becomes liable to be punished by the court, as section 1(2) of the 1921 Act provides. In our judgment that takes on the colouring of a criminal rather than a merely coercive matter. Taking into account also the nature and amount of the penalty which may be involved, we conclude, in agreement with the judge, that those proceedings are essentially punitive. We therefore hold that he was correct in classifying the present proceedings as being criminal in nature and dismiss the appeal.