The Judicial Committee of the Privy Council Decisions

McLean & Anor v. Procurator Fiscal (Scotland) [2001] UKPC D3 (24 May 2001)

DRA. No. 4 of 2000

(1) Norman McLean and

(2) Peter McLean *Appellants*

v.

(1) Procurator Fiscal, Fort William and

(2) Her Majesty's Advocate General *Respondents*

FROM

THE HIGH COURT OF JUSTICIARY

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 24th May 2001

Present at the hearing:-

Lord Nicholls of Birkenhead

Lord Hope of Craighead

Lord Clyde

Lord Hobhouse of Woodborough

Lord Millett

Lord Nicholls of Birkenhead

1. I agree with my noble and learned friends Lord Hope of Craighead and Lord Clyde that, for the reasons they give, these appeals should be dismissed. The relevant obligation of the State under article 6.3(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms is to provide a defendant with effective legal assistance. Currently, both appellants are represented by competent solicitors. There is no suggestion that, so far, either appellant has lacked for proper, effective legal assistance. Nor has either solicitor stated that he intends to withdraw from the case. Thus, as matters stand, there is no good reason for believing that, if the pending prosecutions continue, the appellants will lack proper and effective legal assistance and, for that reason, they will not receive a fair trial. As Lord Hope has indicated, there are respects in which these solicitors, remunerated in accordance with the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, (SI 1999 No 491) will not receive reasonable remuneration for the work done by them in this case. This cannot be regarded as a satisfactory state of affairs. But this does not, of itself, afford a sufficient ground for supposing that, if the solicitors continue to act, they may fail properly to discharge their professional responsibilities towards their clients.

2. Different considerations would arise if the solicitors were to withdraw, and the appellants were unable to find replacement solicitors because of the inflexibility of the 1999 fixed payment regulations. But at present this is no more than a speculative possibility. I will therefore say nothing further about the position which might then arise, especially as the Convention Rights (Compliance) (Scotland) Bill is currently before the Scottish Parliament. Clause 7 provides that the Scottish Ministers may make regulations for the purpose of enabling the Scottish Legal Aid Board to ensure that a person to whom fixed payment criminal legal assistance is provided is not, by reason of the amount of the fixed payments, deprived of the right to a fair trial. Clause 8 provides that these regulations may operate retrospectively, and apply to pending proceedings as well as proceedings commencing after the regulations are made or come into force.

Lord Hope of Craighead

3. This is an appeal under paragraph 13(a) of Schedule 6 to the Scotland Act 1998, with leave of the High Court of Justiciary, against the determination of two devolution issues by that court. It is concerned with the effect of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (SI 1999/491) on the appellants' right to a fair trial under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The issues are described in the appellants' statement of facts and issues in these terms:

> "1. Whether the act of the Lord Advocate in continuing to prosecute the appellants is unlawful by virtue of section 57(2) of the Scotland Act 1998, being incompatible with the rights accorded to them under article 6 of the Convention.

> 2. Whether the failure of the Scottish Executive to repeal or amend the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (SI 1999/491) is unlawful by virtue of section 57(2) of the Scotland Act 1998, being incompatible with article 6 of the Convention."

The parties to the appeal are agreed that these two issues disclose devolution issues within the meaning of paragraph 1 of Schedule 6 to the 1998 Act, for the reasons explained in *Brown v Stott* [2001] 2 WLR 817.

Background

4. The appellants are both resident in Mallaig. On 28 April 1999 they were charged on summary complaint in the Sheriff Court at Fort William that on 21 April 1999 on the MFV "Fiona Thomsen", New Pier, Mallaig, District of Lochaber, while acting with others whose identities were unknown, they did (1) assault Jose Sandos, punch and kick him repeatedly on the head and body and strike him repeatedly on the head with a pool cue all to his injury and (2) conduct themselves in a disorderly manner, shout and swear at Jose Sandos and commit a breach of the peace. At the end of each charge it was stated that it would be proved in terms of section 96 of the Crime and Disorder Act 1998 that the offence was racially aggravated. The effect of those statements was that the appellants were liable in the event of conviction to a sentence of imprisonment of up to six months.

5. The appellants pled not guilty at the first diet, and the case was adjourned for trial. They applied for and were granted criminal legal aid under section 24 of the Legal Aid (Scotland) Act 1986. The certificates which were granted to them by the Scottish Legal Aid Board were effective from 5 and 10 May 1999 respectively. A diet of trial was then fixed for 29 July 1999 in the Sheriff Court at Fort William. They instructed two firms of solicitors whose offices are in Glasgow to conduct their defence. The solicitors, who carry on business as sole practitioners, are both eligible to provide criminal legal assistance. The payments to which they are entitled for conducting summary proceedings in the Sheriff Court at Fort William are those described in the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999.

6. On 29 July 1999 the solicitors lodged pleas in bar of trial on the appellants' behalf. They founded upon minutes which they had lodged under the Act of Adjournal (Devolution Issues Rules) 1999 (SI 1999/1346) raising the two issues previously mentioned as devolution issues under and in terms of section 98 and Schedule 6 to the Scotland Act 1998. Leave had to be given under section 144(5) of the Criminal Procedure (Scotland) Act 1995 for the pleas in bar to be lodged at this stage, as they had not been stated at the first diet. Leave also had to be given for the pleas of not guilty to be withdrawn. After granting leave and hearing submissions on various dates in September and October 1999 the sheriff (Sheriff Colin McKay) continued the diet to 5 November 1999. On that date he sustained the pleas in bar of trial by each of the appellants and dismissed the complaints. He held that the imposition of a financial limit on the fees and outlays that would be paid to the solicitors under the 1999 Regulations produced an inequality of arms amounting to a breach of the appellants' right to a fair trial under article 6 of the Convention. He also held that the failure of the Scottish Executive to amend the regulations upon the coming into force of section 57(2) of the Scotland Act 1998 was incompatible with the appellants' Convention rights. He granted leave to appeal his decision to the High Court of Justiciary. The Scottish Legal Aid Board informed the solicitors by letters dated 22 December 1999 and 10 and 17 January 2000 that all the work in connection with the appeal, as well as that in the sheriff court, fell within the fixed payment provided by the 1999 Regulations.

7. On 15 June 2000 the High Court of Justiciary (Lords Prosser, Milligan and Morison) allowed the appeal, reversed the decision of the sheriff and remitted the case to him with a direction to fix a trial diet: *Buchanan v McLean*, 2000 JC 603. The opinion of the court was delivered by Lord Prosser. He said at pp 624-625 that it had not been asserted that there was a real risk of detriment in this particular case and that, while the 1999 Regulations might be unfair to solicitors in particular circumstances, he was not persuaded that every accused person was disadvantaged by the Regulations to such a degree that his legal assistance was not effective for the purposes of article 6(3)(c) of the Convention.

8. On 22 June 2000 the High Court granted leave to appeal to the Judicial Committee. An appeal to the Judicial Committee is a distinct proceeding for the purposes of Part IV of the Legal Aid (Scotland) Act 1986: see section 21(1)(c), inserted by SI 1999/1042. Their Lordships were informed that fresh legal aid certificates have been issued for the purposes of this appeal. The fees and outlays to which the solicitors are entitled under those certificates for these proceedings are not subject to the 1999 Regulations.

The Legal Aid Scheme

9. The Legal Aid (Scotland) Act 1986 provides that legal aid may be made available in criminal proceedings in two ways. The first is by way of advice and assistance under Part II of the Act. The second is by way of criminal legal aid under Part IV. Although this case is concerned with the provision of criminal legal aid, it should be noted that the provision of advice and assistance under Part II of the Act includes assistance by way of representation, known as ABWOR: see section 6(1). Regulation 6(1)(a) of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 1997 (SI 1997/3070) provides that the assistance by way of representation which may be provided under Part II of the Act in relation to summary criminal proceedings under the Criminal Procedure (Scotland) Act 1995 shall be the representation of an accused who is not in custody:

> "at any diet (other than a diet which has been preceded by a plea of not guilty) at which a plea to the competency or relevancy of the complaint or proceedings, or a plea in bar of trial, is tendered on his behalf, and thereafter until that plea has been determined by the court and any related appeal to the High Court of Justiciary under section 174(1) of the 1995 Act has been disposed of or withdrawn."

Section 21(3) of the 1986 Act provides that, subject to certain provisions which are not in point in this case, criminal legal aid shall not be available until the conclusion of the first diet at which the accused has tendered a plea of not guilty.

10. Two regimes are in force for the payment of fees and outlays for work done in connection with the provision of criminal legal aid. The first ("the principal regime") is that which is described in the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (SI 1989/1491). These regulations regulate the fees and outlays allowable to solicitors, and the fees allowable to counsel, from the Legal Aid Fund in respect of criminal legal aid under the 1986 Act in all cases other than those to which the other regime applies: see regulation 3. This regime is however subject to the provisions of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, which describe the regime ("the fixed payments regime") that is in issue in this case.

11. The system of payments which applies under the principal regime provides for payments to be made for fees and outlays which, broadly speaking, remunerate the solicitor according to a prescribed scale for work done and time spent, including travelling to and from court and waiting time, and reimburse him for expenses actually and reasonably incurred, due regard being had to economy: see regulations 7 and 8 of and Schedule 1 to the 1989 Regulations. Separate provisions in the 1989 Regulations deal with the payment of fees to counsel according to a prescribed scale.

12. The fixed payments regime, which came into force on 1 April 1999, was introduced in the exercise of powers to prescribe fixed fees given to the Secretary of State by section 33(3A) of the 1986 Act, which was inserted by section 51 of the Crime and Punishment (Scotland) Act 1997. It applies only to "relevant criminal legal aid", which means criminal legal aid provided by a solicitor in relation to summary proceedings, other than the various proceedings which are described as "excluded proceedings". These include any reference on a devolution issue under paragraph 9 of Schedule 6 to the Scotland Act 1998: SI 1999/1820 Schedule 2 paragraph 168. It provides for fixed payments to be made in respect of the professional services provided by the solicitor and the outlays specified in regulation 4(2) ("the prescribed outlays") in accordance with a table of figures set out in Schedule 1 to the 1999 Regulations: see regulation 4(1). Outlays other than the prescribed outlays are recoverable under the 1989 Regulations. Where appropriate an amount may be added equal to the amount of the VAT chargeable by the solicitor: regulation 4(8).

13. Regulation 4(2) describes the prescribed outlays which are covered by the fixed fee mentioned in paragraph 4(1) in these terms:

"(2) The outlays specified in this paragraph are all outlays in connection with –

(a) the taking, drawing, framing and perusal of precogitions;

(b) the undertaking by another solicitor of any part of the work; and

(c) photocopying."

14. Schedule 1 to the 1999 Regulations provides separate lists of fixed payments for (1) proceedings in the district court (other than those before a stipendiary magistrate), (2) proceedings in the sheriff court (other than the courts specified in Schedule 2) or in the district court (where they are before a stipendiary magistrate) and (3) proceedings in the sheriff court (where they are brought in the courts specified in Schedule 2). Schedule 2 contains a list of the more remote sheriff courts, to which the sheriff court at Fort William was added by SI 1999/48 with effect from 1 October 1999. So it is the third of the three lists that is relevant in this case.

15. Nine different categories of work are specified in the Schedule. The first category provides that, for proceedings in the third list, a fixed payment of £550 is to be paid for:

"All work up to and including:

(i) any diet at which a plea of guilty is made and accepted or plea in mitigation is made;

(ii) the first 30 minutes of conducting a proof in mitigation other than in circumstances where paragraph (2) below applies; and

(iii) the first 30 minutes of conducting any trial

together with any subsequent or additional work other than that specified in paragraphs 2-9 below."

The relevant item of work in the present case, as the appellants have pled not guilty, is that which relates to the first 30 minutes of conducting any trial. In that connection it should be noted that the third, fourth and fifth categories provide for additional fixed payments of £100, £200 and £400 for conducting a trial for the first day (after the first 30 minutes), for the second day and for the third and subsequent days respectively.

16. Their Lordships understand that the fixed fee regime was arrived at after consultation with the Law Society of Scotland. The annual spending on criminal legal aid in summary cases in the district court and in the sheriff court was aggregated, and the annual figure was then weighted in favour of the amount spent in the sheriff court where the more important work was done. The results were then examined according to areas of spending and the relative importance of the work done in each case. The Advocate Depute, Mr Drummond Young QC, said that the objective was to design a scheme where the total amount expended on summary criminal legal aid annually equated with the amount expended under the old scheme in the previous year. It was perceived that a fixed fee system would have the advantage of simplifying accounts and taxation. It was recognised that some cases were likely to be more complex than others, hence the provision for increased payments to be made for the second and third days of a trial. He accepted that it would be open to a solicitor who was in dispute with the Scottish Legal Aid Board about the application of the scheme to his case to apply to the Court of Session for judicial review: see, eg, *Drummond & Co v Scottish Legal Aid Board*, 1992 SLT 337.

17. Among the other provisions in the 1999 Regulations is one which deals with the case where there is a change of solicitor. Regulation 17 of the Criminal Legal Aid (Scotland) Regulations 1996 (SI 1996/2555) provides that the Scottish Legal Aid Board may authorise a change of solicitor when the nominated solicitor decides or is told by the assisted person that he should cease to act or the assisted person desires that another solicitor should act for him. Regulation 4(7) of the 1999 Regulations provides that, where the Scottish Legal Aid Board grants an application for a change of solicitor under regulation 17(3) of the 1996 Regulations, there is to be paid to each of the solicitors who act for the assisted person in the relevant proceedings an equal part of the total amount that is payable for those proceedings under regulation 4(1).

18. Further amendments to the scheme for the provision of criminal legal aid which were introduced by the Crime and Punishment (Scotland) Act 1997 are to be found in Part IVA of the 1996 Act. These comprise a system for the registration on a Criminal Legal Assistance Register of solicitors who are eligible to provide criminal legal assistance, which section 41 of the 1996 Act as amended by section 62(1) of and Schedule 1 to the 1997 Act defines as meaning criminal legal aid and advice and assistance in relation to criminal matters. Only solicitors whose names appear on the register may provide criminal legal assistance: section 25A(3). Provision was made in section 25B for the preparation of a code of practice in relation to the carrying out by solicitors of their functions with regard to the provision of criminal legal assistance. The code includes provisions regarding standards of conduct and the manner in which a solicitor should conduct a case and represent his client, including the taking of such precognitions as may be necessary. Section 25D provides for the removal of a solicitor's name in the event of a failure to comply with the code.

19. The Law Society of Scotland has also promulgated codes of conduct for Scottish solicitors. These codes, as is pointed out in the introduction to the general code, are not intended to be exhaustive of all the detailed practice rules and detailed obligations of solicitors. But they may be referred to for guidance in assessing whether or not a solicitor's conduct meets the standards required of a member of the profession. Among these codes is a code of conduct for criminal work which sets out the professional and ethical standards to be adhered to by all members of the profession in Scotland in the preparation and conduct of business in the criminal courts. Paragraph 3 of this code states that a solicitor is under a duty to prepare and conduct criminal legal aid cases by carrying out work which is actually and reasonably necessary and having due regard to economy. Where it appears that a solicitor has been guilty of professional misconduct a complaint may be made to the Scottish Solicitors' Discipline Tribunal under section 51 of the Solicitors (Scotland) Act 1980. A departure from the standards that would be regarded by competent and reputable solicitors as serious and reprehensible may properly be regarded as professional misconduct: *Sharp v Law Society of Scotland*, 1984 SC 129, 135 per Lord President Emslie.

20. The overall context in which a solicitor undertakes criminal legal aid work such as that with which this case is concerned is therefore one which is closely regulated. This is so not only with regard to the payments which he may recover from the Scottish Legal Aid Fund for his services and prescribed outlays, but also with regard to his standards of conduct. It is appropriate in the light of this background to approach this case by making two important assumptions.

21. The first assumption is that a solicitor whose name is on the register can expect to be instructed in a variety of cases, some of which may involve more work and the incurring of more outlays than others. An advantage of the fixed fee regime is that the cost and delay of taxation is avoided. A disadvantage is that the solicitor may not be fully remunerated for his work and his prescribed outlays in all the cases which he undertakes. But he is expected to take the rough with the smooth or, as the Advocate Depute put it, the good with the bad. It can be assumed that from his point of view what matters is his overall return over a given period. The second assumption is that a solicitor whose name is on the register can be expected to fulfil his duties to his client according to the standards of conduct which are expected of his profession. It would be wrong to proceed upon the assumption that the solicitor will consciously reduce his standards just because, in a given case, the overall return which he is likely to receive for his fees and outlays is less than he would regard as profitable.

22. Lastly, to complete this review of the legal aid scheme, mention should be made of the remedy which is available to the accused in the event of failure by his solicitor or counsel to present his defence to the court. Section 106 of the Criminal Procedure (Scotland) Act 1995 provides that a person may bring under review of the High Court any miscarriage of justice in the proceedings in which he was convicted. In *Anderson v H M Advocate*, 1996 JC 29 it was held that a miscarriage of justice can be said to have occurred where the conduct of his counsel or solicitor deprived the accused of his right to a fair trial. That would be so if the conduct was such that his defence was not presented to the court: see also *McIntosh v H M Advocate*, 1997 SCCR 389.

Application of this Scheme to these proceedings

23. The appellants in the present case were not in custody when the pleas in bar of trial were tendered on their behalf in the sheriff court. But for the fact that they had already pled guilty, they would have been entitled to ABWOR throughout the proceedings for the determination of their pleas in bar of trial in both the sheriff court and the High Court of Justiciary and their solicitors would have been entitled to payment of their fees and outlays under that scheme. The 1999 Regulations would not have taken effect until after their pleas had been disposed of by the High Court of Justiciary, whereupon they would have become entitled to criminal legal aid. As it is, the fact that they had already pled guilty and been granted criminal legal aid had the effect of bringing the system of fixed payments under the 1999 Regulations into operation before the pleas in bar were tendered on their behalf. This is why the Scottish Legal Aid Board have taken the view that all the work in connection with the pleas in bar, including the appeal to the High Court of Justiciary, fell within what it has described as the core fixed payment.

24. Considerable hardship is likely to have been suffered by the solicitors in this case because the payments for fees and outlays to which they would have been entitled to date but for the application of the 1999 Regulations already exceeds by far the amount of the core fixed payment. The appellants' solicitors say that under the principal regime set out in the 1989 Regulations the approximate amounts payable for all the work done for the appellant Norman McLean in the sheriff court up to the date of the sheriff's interlocutor of 5 November 1999 and in the High Court of Justiciary would have been £3,700 plus £360 outlays and £4,480 plus £340 outlays respectively, and that the equivalent figures in the case of the appellant Peter McLean would have £3796 plus £468 outlays and £3860 plus £151.60 outlays respectively. But it is clear that this hardship would not have arisen if the appellants' pleas in bar of trial had been lodged at the first diet, as is normally done under section 144 of the Criminal Procedure (Scotland) Act 1995, before they pled not guilty. In this respect the situation which has arisen in this case is unlikely to be typical. In the typical case the 1999 Regulations will not come into operation until after the pleas in bar have been disposed of.

25. The possible impact of the 1999 Regulations in comparison with the principal regime on the payments which the solicitors will be able to recover for preparation for and attendance at the trial is indicated by the fact, according to information provided in the appellants' statement of facts and issues, that the minimum sums payable under the principal regime for all work up to and including the first 30 minutes of attendance at the trial in the case of each appellant would have been £1,500 plus £475 outlays. It was pointed out however that, as the case is to be heard in Fort William Sheriff Court and their offices are in Glasgow, the solicitors will incur a substantial amount of travelling time for which payment would be made under the principal regime but is not allowable under the 1999 Regulations. In regard to the cost of taking precognitions, there are said to be 12 witnesses on the Crown list, including one witness who lives in Wick and the complainer who lives in Spain.

26. Another possible point of comparison is provided by the average figures for payments made under the principal regime during the last year before the fixed payments regime was introduced which are given in Appendix 3 to the 1998-1999 Report by the Scottish Legal Aid Board. Among these is a total figure of £843 for fees and outlays for cases taken under summary procedure in the sheriff court which stop short of going to trial. Some adjustment has to be made for the fact that this figure includes sums, although, relatively small, payable to counsel and solicitors acting as solicitor advocate and that, unlike the amount of the fixed fee, it is inclusive of VAT. The Advocate Depute said that after making the appropriate adjustments an appropriate figure for the purposes of the comparison might be taken after the deduction of VAT to be £700. But, as he pointed out, the fixed fee regime provides for uplifts in increasing amounts should the trial proceed beyond the first 30 minutes and into a second or a third day.

27. The most important fact of all however is that in the case of neither of the appellants has the solicitor indicated that he proposes to withdraw from acting in the case. Mr Bovey QC for the appellant Peter McLean said that neither solicitor had said that they would continue to act. But the fact is that they are both still acting. Furthermore regulation 17(1) of the 1996 Regulations provides that where a solicitor nominated by an assisted person determines that he should cease to act for him he shall notify the Scottish Legal Aid Board and shall supply to the Board a statement of his reasons for ceasing to act. It was not suggested that the solicitors were in a position to take that step or that they were contemplating doing so. As matters stand therefore the position of the appellants is that they have the benefit of criminal legal aid. And they have instructed solicitors of considerable experience whose names appear on the Criminal Legal Assistance Register to act for them at the trial.

The appellants' Convention rights

28. The rights under the Convention which are in issue in this case are those which are set out in articles 6(1) and 6(3). Article 6(1) states that in the determination of a 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. This article sets out the fundamental and absolute right to a fair trial. The respects in which the appellants' right to a fair trial is said to be prejudiced by the 1999 Regulations are to be found in article 6(3). This article states that everyone charged with a criminal offence has the following, among other, minimum rights:

> "(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."

29. In *Artico v Italy* (1980) 3 EHRR 1 at paragraph 32 the European Court of Human Rights explained the relationship between article 6(1) and article 6(3) in this way:

> "Paragraph 3 of article 6 contains an enumeration of specific applications of the general principle stated in paragraph 1 of the article. The various rights of which a non-exhaustive list appears in paragraph 3 reflect certain of the aspects of the notion of a fair trial in criminal proceedings. When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten, nor must it be severed from its roots."

30. Of the three rights in article 6(3) which I have mentioned, the principal one which is in issue in this case is that set out in paragraph (c). The essence of the right to free legal assistance which is set out in that paragraph, as the Court emphasised in *Artico v Italy* at paragraph 33, is that the assistance which is provided should be "practical" and "effective", not "illusory" or "theoretical": see also *Kostovski v Netherlands* (1989) 12 EHRR 434, paragraphs 38-39. As the Court said in *Artico*, this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial. The right to adequate time and facilities for the preparation of the appellants' defence referred to in paragraph (b) will be satisfied if they receive effective legal assistance from their solicitors. So too as regards their rights to examine the witnesses against them and to obtain the attendance and examination of witnesses on their behalf on the same conditions as the witnesses against them referred to in paragraph (d). It will be their solicitors' responsibility when conducting the defence to ensure that these rights are fully satisfied. It was not suggested in the course of the argument that, if the appellants were provided with effective legal assistance under the criminal legal aid scheme, there were any separate grounds on which it could be said that their rights in paragraphs (b) and (d) were at risk of being prejudiced due to the effects of the 1999 Regulations. I agree with my noble and learned friend Lord Clyde, for the reasons he gives, that paragraphs (b) and (d) are only indirectly engaged in this case.

31. The question which lies at the heart of the case therefore is whether the effect of the 1999 Regulations is to create a real risk that the appellants will be denied a fair trial because they will be deprived of the effective legal assistance to which they are entitled to be given free under article 6(3)(c) of the Convention. In *Imbrioscia v Switzerland* (1993) 17 EHRR 441, paragraph 38 the Court observed that article 6(3)(c) leaves to the Contracting States the choice of the means of ensuring that the right mentioned in that paragraph of the article is secured in its judicial system. The law of Scotland recognises that it will be oppressive for the

Crown to proceed with a summary prosecution where there is a risk of prejudice to the accused's right to a fair trial which is so grave that no sheriff can be expected to reach a fair verdict in all the circumstances: *Normand v Rooney*, 1992 JC 93, 97 per the Lord Justice General; see also *Sturmann v H M Advocate* 1980 JC 111, 123; *Montgomery v H M Advocate* [2001] 2 WLR 779, 807-809. If that is the situation a plea in bar of trial will be upheld. The critical question is whether the appellants have shown that the effect of the 1999 Regulations on the performance of their duties by their solicitors is such that the proceedings as a whole will be unfair.

The second issue

32. Although the issue as to whether the failure of the Scottish Executive to repeal or amend the 1999 Regulations was unlawful under section 57(2) of the Scotland Act 1998 as being incompatible with the appellants' Convention rights appears as the second of the two issues mentioned in the appellants' statement of facts and issues, it is convenient to deal with it first. This is because, although the sheriff upheld the argument, very little was made of it in the High Court of Justiciary. Neither Mr Bovey for Peter McLean nor Mr McSherry for Norman McLean attached much weight to it in the course of the argument which they presented to the Committee.

33. The first question is whether there was a determination of the issue in the High Court of Justiciary. This is because the Committee does not have an original jurisdiction in these matters. It can deal under paragraph 13 (a) of Schedule 6 to the Scotland Act 1998 only with devolution issues which have been determined by that court: *Follen v H M Advocate*, 2001 GWD 12-409. It was necessary for the High Court of Justiciary to deal with the issue, as the sheriff had upheld the argument which was presented to him on this point as well as on the point raised by the first issue. For this reason counsel appeared for the Lord Advocate in relation to his non-prosecution responsibilities to argue the point in that court. He submitted that there was essentially only one question in the case, which was whether the Lord Advocate was in breach by continuing with the prosecution. If he was not, there could be no breach of the appellants' Convention rights by failure to amend the regulations. On the other hand, if he was in breach the plea in bar would be upheld and there would be no need for the executive to consider amendment. Lord Prosser, having narrated these arguments, said that counsel for neither of the appellants before the Committee, who were the respondents in that court, suggested that the Lord Advocate's wider responsibilities as a member of the executive required consideration: 2000 JC 603, 613H. He left the matter there, but the effect of the court's decision to repel the pleas in bar of trial was to determine the issues which were before the sheriff by allowing the appeal. Had it been necessary to do so therefore I would have held that the Committee had jurisdiction to examine the argument.

34. On the other hand it seems to me that the Advocate Depute was right to say, as he does in his printed case, that this issue would only arise in the event of the first issue being decided in favour of the appellants, in which event the appellants would have no interest in having the second issue determined. For this reason I would decline to deal with it. As my noble and learned friend Lord Clyde has explained in his judgment, the issue is academic. The only issue which needs to be decided in this case is the first issue. It should also be recorded that steps are now being taken by the Scottish Executive to amend the enactments relating to, among other things, legal advice and assistance which are or may be incompatible with the Convention. A bill for this purpose, entitled the Convention Rights (Compliance) (Scotland) Bill, is currently before the Scottish Parliament. The Advocate Depute said that it was likely to receive the Royal Assent in about June of this year. Among its provisions is a clause which, if enacted, will enable the Scottish Ministers to make provision by regulations to enable the Scottish Legal Aid Board to ensure that a person to whom fixed payment criminal legal assistance is provided is not, because of the amount of the fixed payment, deprived of the right to a fair trial: see clause 7. In these circumstances I do not think that any good purpose would be served by expressing a view on the matters raised by the second issue.

The first issue

35. The appellants' argument on the first issue was presented under three main heads. The first related to the extent to which it was necessary to show that some form of actual prejudice was likely to result to the appellants in consequence of the fixed fee regime. The appellants' argument was that actual prejudice was not required. The second was that the effect of the scheme was to produce an inequality of arms as between the defence and the prosecutor which would deprive the appellants of a fair trial. The third was that the effect of the scheme was to give rise to a conflict of interest between the solicitor's personal interest and that of his client. The result was that the solicitors would be unable to satisfy the requirement that the legal assistance to which the appellants are entitled under article 6(3)(c) must be effective. In support of the second and third heads it was submitted that the appearance of inequality and a conflict of interest was enough, on the principle that justice must be seen to be done.

36. In my opinion Mr Bovey's argument that it was not necessary for the appellants to show that any actual prejudice would result tended to confuse two things. On the one hand there is the so-called victim test which must be satisfied to show that a person has a title and interest to raise a devolution issue. On the other there is the test that must be satisfied to support a plea in bar of trial on the ground of an incompatibility with the accused's Convention rights. On the first point it does not seem to me that there is any room for argument. An accused person who complains that the prosecutor is acting in a way that is incompatible with his Convention rights clearly has a title and interest to bring the issue before the court. As the Advocate Depute said, that point is not in dispute. The critical question in this case relates to the second point. Cases such as *Artico v Italy* (1980) 3 EHRR 1 can be distinguished, as the prejudice which arose in that case was a total failure to act by the defence lawyer. In such as case, as the Court explained in paragraph 35, it is not necessary for the accused to go so far as to show that he would have been acquitted if there had been no such failure.

37. What does have to be shown however, to support a plea in bar of trial, is that some form of actual or inevitable prejudice will result so that the sheriff cannot be expected to reach a fair verdict in all the circumstances. That was the basis of the decision in *Gayne v Vannet*, 2000 JC 51 where it was held, following *Normand v Rooney* 1992 JC 93, that the sheriff was right to repel the plea in bar of trial. The Lord Justice-Clerk (Cullen) said at p 54C-D that, as matters stood, it was little more than a speculation whether the fixed fee under the 1999 Regulations would have any practical effect on the extent and quality of the preparation for the trial, let alone anything that might put the fairness of the trial at risk. Although the argument in that case was not presented as raising a devolution issue under article 6 of the Convention, I consider that the same approach applies where an alleged incompatibility with that article is put in issue. It is by applying the same principle that the court gives effect at that stage to the accused's Convention rights: see *Imbrioscia v Switzerland* (1993) 17 EHRR 441, paragraph 41, where the Court said that under article 6(3)(c) the Contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or brought to their attention.

38. I am not persuaded that it has been shown that the fixed fee regime will give rise to any actual or inevitable prejudice at the appellants' trial. As I have already said, it would be wrong to assume that the solicitors who have been instructed in this case will reduce their standards of preparation simply because the consider that they will not receive adequate remuneration for their work when they are paid the fixed fee. The assumption must be, in the absence of any contrary evidence, that they will conduct the defence according to the standards which are expected of their profession as they are required to do by the codes. The fact that the solicitors have not indicated that they propose to withdraw from the case is also an important indication that, on the information which is available as this stage, the appellants are not being deprived of their right to a fair trial by the 1999 Regulations. But I would not attach any importance in this context to the final safeguard mentioned by the Advocate Depute that, should the solicitors' conduct be such that the appellants' defence is not presented to the court, an appeal against conviction will be available on the ground that there was a miscarriage of justice: *Anderson v H M Advocate*, 1996 JC 29. The fact that this safeguard exists is relevant to the question whether the court, as a public authority within the meaning of section 6 of the Human Rights Act 1998, is in a position to fulfil its obligation not to act in a way that is incompatible with a Convention right. It does not provide an answer to the question whether the 1999 Regulations are compatible with the Appellants' Convention right to a fair trial.

39. The principle that there must be an equality of arms on both sides is clearly established in the jurisprudence of the Strasbourg Court: see *Dombo Beheer BV v The Netherlands* (1993) 18 EHRR 213, paragraph 33. What this principle requires is that there must be a fair balance between the parties. In civil cases the accused must be afforded an opportunity to present his case under conditions which do not place him at a substantial disadvantage as compared with his opponent: *De Haes and Gijsels v Belgium* (1997) 24 EHRR, 1, paragraph 53. In criminal cases the requirement that there be a fair balance is no less important. As I said in *Montgomery v H M Advocate* [2001] 2 WLR 779, 809D-E, however, the purpose of article 6 is not to make it impractical to bring those accused of

crime to justice. It does not require the matters with which it deals to be resolved with mathematical accuracy. The essential question is whether the alleged inequality of arms is such as to deprive the accused of his right to a fair trial.

40. At first sight there is bound to be some measure of inequality of arms as between the prosecutor, who has all the resources of the state at his disposal, and an accused who has to make do with the services that are available by way of criminal legal aid. But in *M v United Kingdom*, App 9728/82, 6 EHRR 310, the Commission recognised that financial restraints may be necessary to ensure the most cost effective use of the funds available for legal aid. It can be assumed that, as the procurator fiscal service is funded by public money, there are pressures on that side also to ensure cost effectiveness. What has to be demonstrated is that the prosecutor in this case will enjoy some particular advantage that is not available to the defence or that would otherwise be unfair. In *Mowbray v Crowe*, 1993 JC 212, for example the police had obtained information about the defence case which they ought not to have obtained by putting questions to the appellant at interview after she had been cautioned and charged, and there was a clear case of actual prejudice. In *Goddi v Italy* (1984) 6 EHRR 457 the defence lawyer was at clear disadvantage because he was given neither the time nor the facilities which he needed to prepare the defence case.

41. It is far from clear that that is the situation in the present case. Mr Bovey said that the effect of the 1999 Regulations was that the solicitors would not be remunerated for the time and outlays that would require to be expended in the precognition of witnesses, quite apart from the time and outlays that they would have to expend in conducting the trial. For the reasons which I have already described, the time and outlays which the solicitors have expended on this case so far is already far in excess of the amount which they can expect to recover by way of a fixed fee. But the assumption has to be made that what matters to them is the effect of the 1999 Regulations across the whole spread of the work which they do by way of criminal legal assistance over a given period. I would reject the suggestion that there is an appearance of inequality such that justice could not be seen to be done in this case. What requires to be demonstrated is that any inequality that there may be is of such a character that the legal assistance which is provided will be ineffective and the trial will be unfair.

42. As for the work that has yet to be done by way of precognition, a list of the witnesses for the prosecution was made available to the solicitors according to the usual practice following the pleas of not guilty which were tendered at the pleading diet. The Advocate Depute said that the usual practice is for the prosecutor in summary cases to rely on the statements taken by the police before the case was reported to the procurator fiscal and not to precognosce the witnesses. The statements provided by police officers are always made available. In the case of civilian witnesses their statements may be made available on request. This does not remove the need for precognition by the defence, but various methods are available for this to be done without the undue expenditure of time and money. Local agents may be employed and instructions given by telephone. The fact that the complainer in this case lives in Spain may make it more difficult for a precognition to be taken from him. But their Lordships were not provided with any information which would make it possible to say that this would create an inequality of arms that was unfair.

43. As for the argument that the solicitors' work will be impeded by a conflict of interest, I consider that this is met by the two assumptions which I have already described. On the one hand there is the point that their interest is to look at the spread of the money which they derive from criminal legal assistance in all its forms over a given period. An examination of the return which is derived from each case taken one by one does not reflect the reality of the circumstances in which they do business. On the other hand there are the standards of conduct which they are required to observe. Lord Prosser said that he would regard the suggestion that the 1999 Regulation would have the effect of a departure from professional standards as quite unacceptably speculative and that, in the absence of any specific reason to fear that this would occur, it was quite unrealistic: 2000 JC 603, 624H-625A. I agree with these observations. The solicitors whom the appellants have instructed in this case are respected members of their profession. They are very experienced in the practice of the criminal law. I see no reason to doubt that, so long as they continue to act for the appellants, they will conduct the case for the defence according to the required standards.

44. It is plain, on the figures which have been given, that the solicitors are already seriously out of pocket in comparison with the amount of the fixed payments which they can expect to receive. As I have said, they are likely to have suffered considerable hardship in this case. This is due to the fact that the pleas in bar of trial were lodged after the appellants had pled guilty and they had become entitled to legal aid. Had the pleas in bar been argued under ABWOR, as would normally be done, the work to be covered by the fixed fee would not have begun until the pleas had been disposed of on appeal. It is by no means clear that, if that had been the situation, they would not have been remunerated adequately under the fixed payment regime for the time taken and their outlays. The fact is however that the solicitors accepted their instructions to defend the appellants in Fort William Sheriff Court on the basis that all the work done would be by way of legal aid. That was their choice, as they were not obliged by the codes to accept the instructions. For the reasons that I have given, I am not persuaded that the appellants will be prejudiced by the choice which the solicitors have made. What matters from the point of view of the appellants' right to effective legal assistance and to a fair trial is that the solicitors, who are still acting on their behalf and are obliged while doing so to adhere to the standards of conduct required by the codes, have not given any indication that they propose to withdraw from the case. There is no reason to think that, if they continue to act, the appellants will not be properly and effectively represented.

45. That all having been said, I share the concerns which my noble and learned friends Lord Clyde and Lord Hobhouse of Woodborough have expressed about the potential for injustice which is inherent in the fixed payment regime. A scheme which provides for various items of work and the associated outlays to be paid for in stages, for each of which a prescribed amount will be paid as a fixed fee, will not necessarily be incompatible with the Convention right to a fair trial. But the greater the inflexibility the greater is the risk that occasionally, especially in exceptional or unusual cases, the scheme will lead to injustice.

46. The rigidity of the present scheme is demonstrated by the fact that, despite the obvious hardship which the solicitors face in this case, no allowance can apparently be made under it for the work undertaken in connection with the pleas in bar which were advanced in the sheriff court or the appeal to the High Court of Justiciary. The point which they wished to raise on the appellants' behalf was responsibly taken on a matter of general public interest: see *McLeod (Procurator Fiscal, Perth) v Glendinning*, Perth Sheriff Court, February 2001, in which no solicitor could be found who was willing to act under the scheme. Section 114(5) provides for a plea in bar of trial to be lodged, with leave, notwithstanding the fact that it was not stated at the first diet at which the accused pled not guilty. The accused's right to a fair trial would be put at risk if the lack of provision in the fixed payment regime for work done in connection with a plea in bar and any consequent appeal to the High Court of Justiciary were to have the effect of discouraging the taking of such pleas at that stage. It would also be put at risk if the lack of provision in the scheme to enable the Board to remunerate work of an exceptional nature, such as the precognition of witnesses abroad where this was plainly necessary, were to result in incomplete preparation for the trial. The fact that no such risk has been demonstrated in this case should not be taken as an indication that the 1999 Regulations are beyond criticism on Convention grounds.

Conclusion

47. For these reasons the answer that I would give to the first issue is that the act of the Lord Advocate in continuing to prosecute the appellants is not incompatible with the appellants' Convention right to a fair trial. I would decline to give an answer to the second issue. I would dismiss the appeal.

Lord Clyde

48. The Procurator Fiscal at Fort William brought a complaint against both the appellants comprising charges of assault and of a breach of the peace. The offences were alleged to have been committed in Mallaig on 21 April 1999. On 28 April 1999 they appeared before the Sheriff at the Sheriff Court in Fort William and pled not guilty. They applied for and were granted legal aid under the Criminal Legal Aid (Fixed Payments)(Scotland) Regulations 1999 (SI 1999 No.491). Thereafter they sought to raise a devolution issue, or more precisely, as I shall later mention later, two devolution issues, under the Scotland Act 1998 by way of a preliminary plea. On 29 July 1999 they were allowed by the sheriff to withdraw their pleas of not guilty and state a plea in bar of trial. The plea was based on the alleged inadequacy of the award of legal aid to meet the requirements of the investigation, preparation and conduct of the defence. The award was said to be all the more inadequate as it made no allowance for the raising of the devolution issue. Not only did the State fail to provide the appellant's legal representatives with sufficient funds to conduct the defence, but it failed to provide funds to enable them to challenge the inadequacy of the funding. The principal point which

is advanced by the appellants is that the continuation of the prosecution in the face of the inadequacy of the amount prescribed under the legal aid scheme constituted a contravention of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

49. After hearing argument the sheriff in Fort William sustained the preliminary plea in each case and dismissed the complaints. That decision was taken to the High Court of Justiciary on appeal by the Crown. On 15 June 2000 the High Court allowed the appeal and directed the sheriff to fix a diet of trial. On 22 June 2000 the High Court gave leave to each of the accused to appeal to the Privy Council.

50. It is common ground that the continuation of the prosecution against the two appellants qualifies as a devolution issue and that it is competently before us. The procurator fiscal is acting with the authority of and under the instructions of the Lord Advocate and it is accepted that the continuation of the prosecution of the appellants is an "act" of the Lord Advocate for the purposes of section 57(2) of the Scotland Act 1998.

51. It is to be noticed at the outset that the question of the fairness of the proceedings should be judged in light of the entirety of the proceedings (*Imbrioscia v Switzerland* (1993) 17 EHRR 441 para 38). But here, as in other cases which have come before us raising devolution issues, we are asked to consider the issue in advance of the trial. A question of prematurity then arises. There are of course practical advantages of seeking a determination of the issue at an early stage and so avoiding the holding of a trial which may later be held to have been unlawful. But when the issue is raised for determination at the early stage the test has to be whether the act of the prosecutor in continuing with the prosecution will inevitably have the consequence of a breach of Article 6. Even if that question is answered in the negative at that stage, it does not follow that a breach may not occur later.

52. Provision is made for the allowance of "criminal legal aid", that is to say legal aid in connection with certain criminal proceedings, by section 21 of the Legal Aid (Scotland) Act 1986. Criminal legal aid in terms of section 21(4) shall consist of representation by a solicitor and, where appropriate, by counsel. Section 24 provides that subject to certain regulations criminal legal aid shall be available to an accused person in summary proceedings, such as those with which the present case is concerned, on application made to the Board if the Board is satisfied that after consideration of his financial circumstances the expenses of the case cannot be met without undue hardship to him or his dependants, and that legal aid should be made available in the interests of justice. Under section 25A the Board which administers the legal aid scheme is required to keep a register of solicitors eligible to provide criminal legal assistance. Such solicitors are required under section 25C(1) to comply with the requirements of the code of practice drawn up by the Board under section 25B. Failure to comply may lead under section 25D to removal of the solicitor from the register. Section 33(1) entitles the payment out of the legal aid fund of solicitors or counsel providing legal assistance in respect of fees and outlays which they have properly incurred. Section 33(2) empowers the Secretary of State to make regulations in respect of such fees and outlays and in particular section 33(3A) enables the regulations to prescribe fixed payments for professional services and for such outlays as may be prescribed. Section 33(3B) provides that in a case where a fixed payment has been prescribed a solicitor shall not be entitled to any other payment out of the fund in respect of such professional services and outlays "but shall be entitled to reimbursement of any other outlays which he has properly incurred".

53. The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (SI 1999 No. 491) were made under section 33 and 41A of the Act of 1986. Regulation 4(1) provides for the making of a fixed payment to a solicitor who provides criminal legal aid in summary proceedings. In respect of the professional services provided by him and the outlays specified in paragraph (2) the fixed payment is specified in Schedule 1. The outlays specified in paragraph (2) are:

> "all outlays in connection with –
>
> (a) the taking, drawing, framing and perusal of precognitions;
>
> (b) the undertaking by another solicitor of any part of the work; and
>
> (c) photocopying."

Schedule 1 prescribes a table of fixed sums under reference both to the court in which the work is done and the particular work done. The first category of work, other than in cases where the accused pleads guilty or a plea in mitigation is made, comprises "all work up to and including the first 30 minutes of conducting any trial, together with any subsequent or additional work other than that specified in paragraphs 2-9 below". The later paragraphs are not of relevance to the present case. The fixed fee in the present case in light of the particular court in which the proceedings have been taken is £550. The appellants claim that this sum is quite inadequate to meet the fees and outlays properly incurred in the present case.

54. I have already referred to the code of conduct which was to be drawn up under section 25B of the Act of 1986. It is convenient at this stage to note some of the rules of conduct which apply to the professional practice of solicitors in Scotland. The Code of Practice with which a registered solicitor must comply expects that solicitors will display ordinary professional competence. In particular (para 4.2.2.) they should only take such precognitions as may reasonably be expected to be necessary for the preparation of the client's case, to take advantage of facilities offered by, and available from, the prosecution to discuss cases and facilitate their efficient progress, and "to handle cases promptly and expeditiously, and with due regard to economy".

55. Solicitors in Scotland are subject to the Code of Conduct issued by the Law Society of Scotland for solicitors holding practising certificates. This code stresses the function of the solicitor in society, with obligations imposed on them to their clients, to the courts, to the public and to the legal profession. They are required by article 1 to preserve their independence; for example "they must not compromise their professional standards in order to promote their own interests ..." They must, to quote article 2, "always act in the best interests of their clients ... Solicitors must not permit their own personal interests ... to influence their actings on behalf of clients ...". Article 5 states that solicitors are under a professional obligation to provide adequate professional services to their clients:

> "Solicitors are free to refuse to undertake instructions, but once acting should withdraw from a case or transaction only for good cause and where possible in such a manner that the clients' interests are not adversely affected."

In the particular context of criminal work in the Code of Conduct prepared by the Law Society of Scotland it is stated in paragraph 3 that "a solicitor is under a duty to prepare and conduct criminal legal aid cases by carrying out work which is actually and reasonably necessary and having due regard to economy".

56. The rights said to be infringed in the present case are those contained in Article 6 of the Convention. More particularly the appellants sought to found upon Article 6(3) paragraphs (b), (c) and (d). It was recognised in the argument before us that the particular rights set out in Article 6(3) are all facets or non-exhaustive examples, of the over-arching right to a fair trial set out in Article 6(1). That point has been repeatedly made by the European Court of Human Rights (e.g. *Melin v France* (1993) 17 EHRR 1. In *Artico v Italy* (1980) 3 EHRR 1, para 32) it was observed that "when compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten, nor must it be severed from its roots"). But the argument which was presented is sufficiently focussed by reference to paragraph (c). Indeed the other two paragraphs seem to me to be of secondary importance in the context of the present case. So far as paragraph (b) is concerned, the right "to have adequate time and facilities for the preparation of his defence", I do not consider that the reference to facilities is simply satisfied by the provision of money. The paragraph is principally directed to the securing for an accused person the opportunity and the services necessary for the preparation of his defence. It strikes at the imposition of restraints on his freedom to organise the preparation of his defence. A refusal of access to his lawyer while he is detained pending trial would be an obvious example. But no limitations or restraints exist in the present case. The only complaint is that his solicitor is inadequately funded under the legal aid scheme. The provision of funding is not immediately a facility for the preparation of the defence, but it may be the means of providing those facilities. Only indirectly, as it seems to me, would paragraph (b) be engaged in the present case.

57. Correspondingly there is no direct complaint of any restraints upon the accused's right under paragraph (d) on the attendance and examination of witnesses, beyond the alleged inadequacy of the legal aid funding. Again an indirect connection may be seen between that complaint and a possible problem in the attendance or even the effective examination or cross-examination of witnesses. But the most appropriate paragraph seems to me to be paragraph (c).

58. Article 6(3)(c) gives the accused the right "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". The right is of fundamental importance. In *Pointrimol v France* (1993) 18 EHRR 130 it was stated (para 34):

> "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 a fair trial."

Several comments may be made about the paragraph.

59. First, as was recognised in *Pakelli v Germany* (1983) 6 EHRR 1, para 31 the paragraph identifies three distinct rights for the accused, namely, to defend himself in person, to defend himself through legal assistance of his own choosing, and on certain conditions to be given free legal assistance. The conditions for such free assistance are that the person has insufficient means and the interests of justice require that assistance be provided. It was observed in *Pakelli* that the three rights are not alternatives, so that the English text, which uses the word "or", is less accurate than the French text, which uses the word "et". In other words the accused cannot be forced to defend himself. Paragraph (c) "guarantees the right to an adequate defence either in person or through a lawyer, the right being reinforced by an obligation on the part of the state to provide free legal assistance in certain cases" (*Artico* para 33).

60. Secondly, the representation to which an accused is entitled under paragraph (c) must be an effective representation. "[T]he Convention is intended to guarantee not rights that are theoretical or illusory, but rights that are practical and effective" (*Artico*, para 33). So the mere nomination of a lawyer without any effective service to the defence will not suffice. In *Goddi v Italy* (1984) 6 EHRR 457 a contravention of the Article was found where the counsel appointed by the court was unprepared and was given no time to prepare. The right to an effective representation should be satisfied by the services of a lawyer actually exercising the ordinary professional skill and care in the interests of the defence of his client.

61. Thirdly, the principle of equality of arms:

> "requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."

(*De Haes and Gijsels v Belgium* (1997) 25 EHRR 1 para 53). Reference to that principle provides one way of formulating the breach of the Convention which can occur through the absence of a competent and effective representation. The essence of the right is that the accused may have the services of a representative, if he wishes to have that service, and that the representative does all that is required of him or her. If effective representation is provided, then there should be no inequality of arms in that respect, even if the representative is inadequately remunerated or is acting pro bono.

62. Fourthly, it is not necessary for a contravention of Article 6(3)(c) that the accused should have suffered injury as a result of the contravention (*S v Switzerland* (1991) 14 EHRR 670). He need not show that with an effective representative the trial would have gone differently or that the outcome would have been different. Where in a serious case an accused has no effective representation that fact may be enough to constitute a contravention (*Artico*, para 35). The appearance of fairness may be a relevant consideration in this context. That justice should not only be done but should be seen to be done is a principle often referred to in relation to cases of bias or partiality, but it may also be applied to an absence of effective representation. Sir John Freeland in his concurring opinion in *Boner v United Kingdom* (1994) 19 EHHR 246 recognised that justice should not only be done but should be seen to be done. There was a legal issue to be addressed, the sentence was severe and the lack of legal representation produced an appearance of injustice.

63. Fifthly, as was noted in the passage I have already quoted from *Pointrimol*, the right is not an absolute one. In the context of civil proceedings there may be reasonable grounds for refusing legal aid, for example because of the circumstances (*Thaw v UK* (1996) 22 EHRR CD 100) or because of the nature of the proceedings (*S & M v UK* (1993) 18 EHRR CD 172, where a legitimate exception was accepted in the case of defamation proceedings). In criminal proceedings consideration of the cost effective use of funds available for legal aid has been recognised by the Commission as an appropriate consideration in determining the work for which payments may be made (*M v UK* (1983) 6 EHRR 345). But in such proceedings, particularly where there is a risk of a loss of liberty, it would be far more difficult to find examples where legal aid might be refused, particularly at first instance. An example in relation to an appeal can be found in *Monnell & Morris v UK* (1987) 10 EHRR 205 where there had been a fair trial, no likelihood of success in an appeal, and the requirements of fairness would be satisfied by making written submissions. But the interests of justice may well require the state to grant legal assistance for an appeal in the light of such considerations as the severity of the sentence, the need for professional skill in handling the case, or the complexity of the issues (e.g. *Pakelli; Granger v UK* (1990) 12 EHRR 469. The interests of justice is rightly recognised as one of the considerations for the awarding of legal aid in section 24 of the Act of 1968 to which I have already referred.

64. Sixthly, at least in the context of legal aid, the accused may not be absolutely entitled to a representative of his own choice. As was stated in *Croissant v Germany* (1992) 16 EHRR 135, para 29 the right to be defended by counsel of his own choice is limited where free legal aid is concerned, and where the court decides in the interests of justice to appoint assistance.

65. Against that background the question is raised whether there has been demonstrated in the present case to be any unfairness in the proceedings. Undoubtedly in a criminal case such as the present, where there is a risk of the loss of liberty, some possibility of a degree of complexity in determining the parts allegedly played by each of the appellants, a victim who evidently resides in Spain, and an allegation of racial aggravation, an absence of representation would lead to an unfair trial. As I observed earlier, the issue is being raised at the outset of the proceedings. The precise question is not as to the adequacy of the funding provided under the legal aid scheme, but whether, albeit on account of an inadequacy in that respect there will inevitably be an absence of effective representation for the appellants in the preparation and presentation of their defences, thus depriving them of their right to a fair trial. I have not been persuaded that any unfairness exists so far as can be ascertained at the present stage. The accused have not been disabled in fact in the presentation of their respective defences so far. They have enjoyed the services of solicitors and counsel. Their solicitors have agreed to act for them and are still continuing to act for them. It has not been shown that they are contemplating withdrawing their services. It is said that a sum considerably in excess of the sum allowed under the regulations has been incurred in the proceedings to the present time. But that has not evidently deterred the solicitors from acting. Both the solicitors are on the Register set up under section 25A of the Act of 1986. There is no reason to expect that they will not comply with the codes of conduct to which I have already referred and to provide an effective representation for their clients.

66. It is said that the solicitors will be faced with a conflict between the interests of their clients and their own interests in being paid for the work which they have undertaken to do. The regulations prescribe a single sum to cover both their fees and their outlays. So, it is suggested, there is conflict of interest in so far as the more they spend for their clients the less will be left for their own remuneration. But that kind of potential conflict must often arise in professional practice and is effectively countered by reference to the standards of professional conduct expected of a solicitor. Counsel for the first respondent gave the example of an offer in settlement of a litigation where the solicitor is acting on the basis of a contingency fee. The temptation to secure his remuneration might seem to raise a potential conflict with his duty to secure a reasonable outcome for his client. But for the restraints of professional standards of conduct the temptation to create work in order to increase his remuneration might constitute a real risk. There is not the slightest suggestion that there is any threat of departure from the proper professional standards of conduct in the present case. Those standards give the effective answer to the alleged conflict of interest, both in the reality of the situation and on an objective approach of securing that justice is seen to be done.

67. It follows from this that the decision of the Court of Appeal was correct and the appeal should be dismissed so far as this principle point is concerned. But a second submission was made before the sheriff by the present appellants on the vires of the Regulations. The issue was not explored in argument before the Court of Appeal but counsel for the second appellants sought to revive it before us. The argument was to the effect that the Lord Advocate was guilty of a

continuing failure as a member of the Scottish Executive to amend the Regulations so as to remove the alleged breach of the appellants' Convention rights. This appears on a precise analysis to be a separate devolution issue, founding not upon an act of the Lord Advocate as prosecutor but on a failure to act by the Lord Advocate as a member of the Scottish Executive. But in my view this second issue is academic. If there is no breach established in the present case, there is no need to decide the more general issue. If the appellants were to succeed in this appeal on the ground that there is a breach, then the complaints should be dismissed and they have no interest to pursue the alternative argument. In these circumstances I do not consider it necessary to give a decision on it. One further difficulty about it is whether there has been "a determination of a devolution issue" by the Court of Appeal on this second point so as to give the Judicial Committee jurisdiction under paragraph 13 of Schedule 6 of the Scotland Act 1998. Before the Court of Appeal the Lord Advocate contended that essentially there was only the one issue, the first one, and that the court should limit itself to consideration of that point as being the only live issue. The court then recorded (para 25):

> "On that basis, he made no submissions on the wider point regarding the Lord Advocate's responsibilities as a member of the Executive, and counsel for neither respondent suggested that these matters required consideration."

In sustaining the appeal and reversing the sheriff's decision it can be argued that the court was proceeding solely on the first issue and was putting aside the second issue altogether. But since the court expressly held that the plea in bar ought to have been repelled I consider that they should be taken to have determined both of these issues which were before the Sheriff so that an appeal on both issues could competently have been taken to this Committee. However in the circumstances it is unnecessary to decide this matter or to consider precisely what is required to constitute a "determination" for the purposes of paragraph 13 and I prefer to reserve my opinion on that.

68. But I do not consider that it would be right to leave the case without making some observations on the present form of the regulations. While I have not been persuaded that they have caused, or on the present information are likely to cause, a contravention of Article 6 in the present case, it seems to me that there is a real likelihood that in another case a serious risk of a contravention may arise. If the result of the regulations is that no legal representative is available for an accused in a case where the Convention requires that he should be represented, then a breach will occur. This does not seem to me to be a fanciful possibility. We were informed that cases have occurred where as a result of the regulations no solicitor has been found to act for an accused person. The case of *Glendinning* in Perth Sheriff Court (February 2001) was quoted to us as an example.

69. There was some discussion before us about the amount of the sums prescribed under the regulations. I do not consider that any confident view can be formed as to their adequacy by any comparison with the figures prevailing under the earlier regulations. No precise comparison was possible on the information before us. It was said by counsel for the first respondent that the figures had been struck with an eye to the sums allowed under the earlier legislation but I am not able to make any comment upon the propriety or otherwise of the amount of the sums prescribed. One relevant consideration is the extent to which statements from witnesses could be obtained from the police or the prosecution. This has an obvious bearing on the amount of work which the solicitor will be required to undertake. There was, however, some lack of unanimity between the parties before us on the precise practice in this regard in summary cases. What can be said, however, is that the regulations do not evidently cover the situation which has arisen in the present case. The view taken by the Scottish Legal Aid Board and expressed in letters to the solicitor acting for the first appellant dated 10 and 17 January 2000 is that all work, including the appeal process in Scotland so far as the solicitor is concerned has to be covered by the fixed sum. That sum is clearly quite inadequate in such circumstances. The problem appears to have arisen because the devolution issue was only raised after the accused had pled not guilty. It seems that after that, and after a grant of legal aid had been made, the appellants were not able to seek alternative funding, in particular under the Advice and Assistance (Assistance by Way of Representation)(Scotland) Regulations 1997 (SI 1997 No.3070), even although they had been allowed to withdraw their pleas of not guilty and state the plea in bar of trial. The present case is in that regard somewhat special.

70. I see nothing wrong in principle in a scheme which proceeds upon a basis of fixed sums for specified work. Moreover in so far as the approach adopted recognises that different cases will require different amounts of work, and that different cases will have different degrees of profitability, the policy of adopting a basis of a fixed sum may not in itself be unreasonable if in its general operation the solicitors engaged in the work covered by the regulations, taking as it were the rough with the smooth, will find the amounts acceptable. And it is right to recognise that the scheme is not altogether rigid. In a rough and ready way account is taken of the extra costs involved in a long trial, reflecting the extra work involved. Moreover the outlays covered by the fixed sums are only the "prescribed outlays" and that phrase may be open to construction so as to allow for outlays, but not fees, which fall outside the scope of the definition. In that connection it is to be remembered that in deciding whether or not the regulations comply with the Convention every effort of construction has to be made in order to avoid such a contravention. Section 3 of the Human Rights Act 1998 requires subordinate legislation to be construed in a way compatible with the Convention "[S]o far as it is possible to do so". That approach may go some way to avoid a contravention, but if it is found to be impossible to find a compliance by any technique of interpretation, the consequence may be an invalidity in the regulations.

71. It appears that the danger has been recognised by the Scottish Executive, in that some provision for a remedy has been incorporated in the current Convention Rights (Compliance) (Scotland) Bill. This allows for the making of regulations to prevent a person being deprived of the right to a fair trial. No draft regulations were shown to us and it remains unclear what solution is to be devised. The most obvious, but perhaps not the only, risk may arise from the lack of flexibility in the present regulations. No allowance is made for any unusual or exceptional circumstances. The requirements of fairness in judicial proceedings are rarely, if ever, met by blanket measures of universal application. Universal policies which make no allowance for exceptional cases will not readily meet the standards required for fairness and justice.

72. These observations however go further than is required by the issue before us. For the reasons already given I would dismiss the appeal.

Lord Hobhouse of Woodborough

73. The appellants in this case were charged on 28th April 1999 with offences of racially aggravated assault upon a Spanish seaman Jose Sandos. The offences were alleged to have been committed on board a fishing vessel, the "Fiona Thomsen", lying at the New Pier, Mallaig, a week earlier. The cases were allocated to the Sheriff Court of Grampian, Highland and Islands at Fort William as summary proceedings. The appellants denied the charge and indicated that they would be pleading not guilty. They each instructed firms of solicitors with offices in Glasgow respectively to advise and represent them. It is accepted that the appellants were persons who wished to defend themselves through legal assistance of their own choosing and had not sufficient means to pay for it; it is likewise accepted that the interests of justice required that they be given such legal assistance free. Under the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, the legal aid available to the appellants was limited to £550 to cover all work done by the solicitor up to and including the first half hour of the trial (counting from the time when the first witness was sworn). Additional payments could be made for the first day of the trial after the first half hour (£100) and the second and subsequent days of the trial (£200 or £400 per day). The costs of taking, drawing, framing and perusal of precognitions, employing another solicitor to do any part of the work and photocopying have to be met by the solicitor out of the £550. (All these sums are higher than they would otherwise be as Fort William is a specified outlying court.)

74. The appellants' case is that the fixed payments scheme under the 1999 Regulations amounts to a contravention of their rights under Article 6.1 and 6.3. They submit that, as a result of the limitation of the remuneration and reimbursement to which their solicitors are entitled, they, the appellants, are being denied a fair trial and are not being given effective free legal assistance. This involves the proposition that the £550 is a patently inadequate sum to ensure a fair trial, properly prepared and with the properly effective right to challenge the witnesses to be called by the prosecution and adduce the witnesses and other evidence to rebut the prosecution allegations. (*Goddi v Italy* (1984) 6 EHRR 457) a feature of the Scottish system of summary criminal procedure is that the accused does not know what is the evidence which the prosecution say proves the charge against him. The accused has to decide how to plead to the charge without seeing any of this evidence. If he pleads not guilty he will be able to obtain a list of the witnesses which the prosecution propose to call, together with their addresses.

The Advocate Depute told your Lordships that it was also usual for the defence to be given copies of the statements of the police witnesses whom the prosecution would call. Under this scheme it is left to the defence solicitor to find out what the prosecution witnesses will say by taking precognitions from them. This is usually done through a local agent. The defence solicitor will also have to take a statement from his client and take precognitions from any potential defence witnesses who are not on the prosecution list. He will also have to try and obtain from the witnesses any documentary evidence which may assist the defence. Another feature of the scheme is that there will normally be a number of preliminary diets prior to the trial itself. In an outlying court, these hearings may often involve the solicitor in a considerable expenditure of time. It is accepted that in a proportion of cases the fixed fees will fall far short of adequate remuneration and reimbursement.

75. The appellants pleaded not guilty at the pleading diet. The prosecution list of witnesses disclosed that the prosecution intended to call 12 witnesses at the trial. One of these was the alleged victim, Mr Sandos, who would have to be interviewed in Spain where he now lives. The others came from a number of places in Scotland - Wick, Tarbet, Lochaber and Mallaig. The appellants have given their solicitors the names of 4 potential defence witnesses living in Mallaig. No estimate of the length of trial has been given nor was the Advocate Depute able to give your Lordships one. All this suggests that £550 is a distinctly inadequate figure to allow for the requisite work. The disproportion would appear to be such that, speaking for myself, I would be prepared to accept that it will quite probably have some effect upon the preparation of the appellants' defence and lead in some measure to an inequality of arms between the defence and the prosecution, the prosecution not being subject to such constraints and, no doubt, having been able to take advantage of the evidence gathered by the police before the decision to charge the appellants was taken. If all this is borne out, the appellants' trial will very possibly not be fair. Similarly if the appellants' solicitors should hereafter decide that they are not prepared to do the work for such inadequate remuneration, they would (unlike in England) be at liberty to withdraw from the case and the appellants would either be left without representation or have to find new solicitors prepared to do the requisite preparatory work on the basis that they should only receive half of the fixed fee (the original solicitors being entitled to receive the other half). I have in this paragraph said what inferences might be drawn from the uncontentious facts. However it is remarkable in this case that no evidence has been placed before the sheriff (or your Lordships) which actually asserts that the appellants will not have a fair trial or makes explicit any of the relevant matters. I have been unable to find out whether there is any procedural reason for this absence of specific evidence. As my noble and learned friend Lord Hope has said, it is remarkable that the case presented on behalf of the appellants appears to concentrate upon the expenditure involved in arguing the Devolution Issues and remains unspecific on the critical question of what expenditure would in fact be necessary properly to prepare for the criminal trial.

76. It is accepted that the relevant issues are Devolution Issues. They were raised by the appellants before the sheriff. Leave to withdraw the pleas of not guilty was given and pleas in bar were entered on behalf of each appellant. The Sheriff sustained the pleas in bar:

> "on the basis that the continued prosecution of the [appellants] at the instance of the Procurator Fiscal on behalf of the Lord Advocate constitutes a breach of the right of each accused to a fair trial as required by Article 6 of the ECHR; and in particular, a breach of Article 6.3 thereof in that there is, by reason of the arbitrary financial limitation imposed upon the investigation and preparation for trial in the defence of each accused in terms of the 1999 Regulations, an inequality of arms as between the prosecutor and the defence. No such limitation is placed upon the Prosecution in its investigation and preparation for trial." (p 19 of his report)

He made a report to the High Court of Justiciary following the appellants' appeal to that court under s.174 of the Criminal Procedure (Scotland) Act 1995. This report runs to some 34 pages in which he sets out fully the rival contentions and explains his conclusion that the appellants were entitled to a bar of trial. The appellants' convention rights to a fair trial were breached by the 1999 Regulations. Fatally the Legal Aid Board were left with no discretion to increase the allowable fees; the Scottish Executive had failed to secure the amendment of the Regulations. The appellants were 'victims' of these breaches.

77. The Appeal Court, in an opinion of the Court delivered by Lord Prosser, took a different view 2000 JC 603. The nub of the decision is in the concluding pages of the opinion. Whether or not there is a breach of Article 6.3 will depend upon the particular facts of particular cases. The argument of the accused did not take the form of asserting a "real risk" of the trial being unfair in a way which could not be corrected or avoided or averted:

> "It is the present situation itself which they describe as prejudicial or advantageous, not because of some apprehended future consequence, but simply on the basis that as matters stand (and will continue to stand) any accused person in their position must be seen as so disadvantaged that even if no specific detrimental event were ever to occur, the whole trial process, and in particular the legal assistance afforded to them, is so tainted by a flaw in their legal assistance that Article 6.3(c) is not being and will not be complied with, with consequential non-compliance with Article 6.3(b)." (p 624)

They rejected this argument. The Court declined to conclude that there would in fact be an unfair trial and therefore declined to find any breach of the appellants' rights under Article 6. They held that the pleas in bar ought to have been repelled.

78. The main difference between the decisions of the sheriff and the Appeal Court is therefore a difference between the view they took of the lack of any positive and specific evidence in support of the plea in bar. This is unfortunate since it disguises the substantial measure of agreement between the two courts on the questions of law and the points of principle; it turns upon the less than satisfactory manner in which the appellants' case on the plea was presented. In contrast one can refer to what happened in the case of *Glendinning* in the Sheriff Court Perth in February 2001, unreported. Sheriff Tierney dismissed the charges against the accused because it appeared to him:

> "standing the mandatory nature of the statutory fixed fee system, that there is no mechanism whereby the accused can be provided with a level of legal aid which will result in a solicitor being prepared to undertake the necessary work of preparation [in] breach of the accused's convention rights [and it] cannot be cured." (§50)

In that case there was express evidence from the solicitor of one of the accused, which the sheriff accepted, that the cost would be about ten times the fee allowed and that he "simply could not afford to undertake this case on the basis of the current Legal Aid regime". Another solicitor told the sheriff that he had approached a number of senior solicitors practising in the field of criminal law in Glasgow and none would be prepared to act in a case of that kind on legal aid nor would they expect any other solicitor to do so. It was not a case of swings and roundabouts as the disparity was too great. The sheriff rejected the contrary arguments of the prosecution which really amounted to no more than saying that the application for a dismissal was premature and included the remarkable argument, also advanced by the respondents before your Lordships, that "the solicitors should act under the fixed fee and if it was inadequate they could withdraw". The judgment of the sheriff merits attention and his conclusion may be regarded as inevitable having regard to the evidence which he accepted. If there had been similar evidence in the present case, I would be prepared to regard the success of the appellants' pleas in bar as equally inevitable. But the appellants do not have the evidence and on any view the present case is not as strong as *Glendinning*. There is not yet any problem about the appellants' representation. The disparity between that fixed fee and the reasonable remuneration is unlikely to approach a factor of 10.

79. There is much to be said for schemes of legal aid which reduce the bureaucracy involved provided that they do not undermine the principle that the lawyer should receive fair remuneration for the work which he is required to do. The duty of the solicitor is laid down in s.25B of the Legal Aid (Scotland) Act 1986 and the Legal Aid Board and professional codes. The solicitor's duty does not vary depending upon how he is to be remunerated. He must do all the work actually and reasonably required for the proper conduct of the defence and undertake the necessary expenditure for that purpose. In any event he may only charge what is reasonable. Under the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, regulation 7, the fees allowable to a solicitor are "such amount of fees as shall be determined to be reasonable remuneration for work actually and reasonably done, and travel and waiting time actually and reasonably undertaken or incurred due regard being had to economy" with similar provisions in regulation 8 covering outlays. The 1999 Regulations did not reduce the duties of the solicitor towards his client; they merely altered and restricted the basis and amount of his remuneration. Inevitably any such scheme contemplates that in a proportion of cases the solicitor will be acting without reasonable remuneration. This may lead to a situation such as that in *Glendinning* where there is

a direct breach of the convention because the requisite legal assistance is not being given to the accused or an indirect breach where the legal assistance is being given on a basis which negates the equality of arms. It is true that a fixed fee system does not necessarily have this effect in all cases; indeed, unless unduly parsimonious, it will probably involve an element of over-generous remuneration in a proportion of cases. So it will always be necessary to ask in any individual case whether it comes into the category equivalent to that in *Glendinning* where the disparity is such as to amount to a denial of equality of arms and a fair trial.

80. As has been pointed out, the critical defect in the 1999 Regulations is their inflexibility. A more sophisticated code for predefined fixed payments might avoid the pitfalls but the First Schedule to the 1999 Regulations is anything but sophisticated. If the 1999 Regulations are to be retained as the structure, they need to be amended to incorporate an element of flexibility to give the Legal Aid Board the power to avoid breaches of Article 6 of the convention. This is apparently also the view of the Scottish Executive. It has introduced into the Scottish Parliament the Convention Rights (Compliance) (Scotland) Bill to amend certain enactments, including those relating to legal advice and assistance and legal aid, which are or may be incompatible with the convention and to enable further changes in the law where there is or may be incompatibility. Clause 8 of the Bill would amend the 1986 Act, with retrospective effect, so as to enable the fixed payment regime to be amended so as to avoid accused persons being "deprived of the right to a fair trial". This is a welcome development even though the proposed revised regulations have not yet been published even in draft.

81. I am indebted to my noble and learned friends Lord Hope and Lord Clyde whose opinions I have had the benefit of reading in draft. Your Lordships all agree that these appeals should be dismissed being of the opinion that it is not self-evident that there will necessarily be a denial of a fair trial in the present case nor that the sheriff at Fort William will not be able to reach a fair verdict. If a trial is unfair and the accused has been convicted, the conviction can and should be set aside on appeal. A plea in bar should not be upheld where there is no more than a possibility that there might be some unfairness at the trial: *Gayne v Vannet* [2000] JC 51 . On the state of the evidence in the present case, I agree with this conclusion although I remain concerned about the probable disparity between the remuneration available to those upon whom the appellants are relying for legal assistance and the remuneration which would be reasonable and the effect this will have upon the preparation of the defence case for the trial and the ability of the defence to face the prosecution with something approaching an equality of arms. Similarly, I do not accept that the 1999 Regulations, as they stand, are fully compatible with Article 6; they require a proportion of cases to be dealt with in a manner which will deny the accused his rights under that article as occurred in *Glendinning*. However, having made these points clear, I agree that the evidence in the present case is different: I agree with my noble and learned friends Lord Hope and Lord Clyde that the appeals should be dismissed. These prosecutions will therefore have to continue as ordered by the Appeal Court. If at some later stage a breach of Article 6 can be demonstrated, appropriate remedies will then have to be granted.

Lord Millett

82. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Hope of Craighead and Lord Clyde. I agree with them, and for the reasons they give I too would dismiss these appeals.