Hilary Term
[2014] UKSC 4
On appeal from: [2013] NICA 57

JUDGMENT

In the matter of an application of Raymond Brownlee for Judicial Review (AP) (Northern Ireland)

before

Lord Neuberger, President
Lord Kerr
Lord Clarke
Lord Reed
Lord Hodge

JUDGMENT GIVEN ON

29 January 2014

Heard on 5 December 2013

Appellant
Ronan Lavery QC
Conan Fegan BL
(Instructed by McGuigan Malone Solicitors)

Respondent
John F Larkin QC,
Attorney General for Northern Ireland
David Scoffield QC
Peter Coll BL
(Instructed by Departmental Solicitor's Office)

LORD KERR (with whom Lord Neuberger, Lord Clarke, Lord Reed and Lord Hodge agree)

1. Following a trial before HHJ Miller QC and a jury at Belfast Crown Court, Raymond Brownlee was convicted on 1 June 2012 of a number of offences including false imprisonment, making threats to kill and wounding with intent. He had been represented by senior and junior counsel until the close of the prosecution's case. But at that stage in the trial, differences arose between Mr Brownlee and his legal team. Initially, senior counsel intimated to the trial judge that he felt professionally compromised and had to withdraw from his representation of the accused. When the judge put this to Mr Brownlee, he said that he did not want counsel to withdraw from representing him and that he believed that things had been perhaps "taken up … the wrong way". At this point his solicitor intervened to say that he felt that the situation was not irretrievable. On hearing this, the learned judge decided to give the solicitor the opportunity to consult with his client over the lunch adjournment.

2. After lunch, Mr Brownlee's solicitor informed the court that his client had dismissed his legal team. The judge asked Mr Brownlee if he was to take it that he wished to dispense with the services of the solicitor and the barristers who had been acting for him. Mr Brownlee replied that he did and the judge indicated that he intended to proceed with the trial. He did not permit the prosecution to close the case to the jury but asked the accused man whether there was anything that he wished to say. Having been informed that there was nothing which Mr Brownlee wished to say, the judge proceeded to charge the jury and, after deliberations, they returned the guilty verdicts. They also found the defendant not guilty on three further counts, on one of these by direction of the judge. The case was adjourned in order to permit the defendant to retain the services of new solicitors and counsel.

3. New solicitors came on record for Mr Brownlee on 29 June 2012. On 3 July 2012 the judge extended the legal aid certificate which he had granted in favour of the defendant to include senior counsel as well as junior counsel and solicitors. That decision was taken on foot of representations made to the judge that the sentencing exercise would be complex. The offences were grave and the pre-sentence probation report suggested that the accused man was a dangerous offender and it foreshadowed an indeterminate or extended sentence as the possible disposal.

4. Correspondence was then exchanged between the accused's solicitors and the Northern Ireland Legal Services Commission (LSC). The Department of Justice is the sponsor department of LSC. On 4 September 2012 the LSC wrote to Mr Brownlee's solicitors informing them that the fees payable for the sentencing hearing were fixed according to paragraph 15 of Part IV of Schedule 1 to the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (the 2005 Rules SR 2005/112), as amended by the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules

(Northern Ireland) 2011 (the 2011 Rules SR 2011/152). Despite the fact that counsel who then appeared for the accused was not counsel who had represented him at trial, only the fees stipulated in the 2011 Rules were payable. In this instance, these were £100 for solicitor, £120 for junior counsel and £240 for senior counsel. No fees were payable in respect of any preparatory work that counsel would be required to undertake.

5. It was pointed out that a substantial amount of preparation would be required in order to properly represent Mr Brownlee during the sentencing exercise. Consideration of the transcripts for five days of evidence and submissions would be necessary. A decision would have to be taken as to whether a consultant psychiatrist should be engaged. Detailed examination of the pre-sentence report was essential. Considerable legal research would be required. The LSC replied to the accused's solicitors and informed them that no exception could be made to the level of the fixed fees prescribed by the 2011 Rules. The exceptionality provision contained in the 2005 Rules had been expressly removed by the 2011 Rules and there was therefore no possibility of departing from the stipulated fees.

6. Following this exchange of correspondence, Mr Brownlee's solicitors tried to engage counsel to act for him on the sentencing hearing. This proved impossible. Despite approaching various counsel, the chairman of the Bar Council and the Bar's pro bono unit, the accused's solicitors have been unable to obtain the services of senior or junior counsel. They have been consistently informed that the absence of any allowance for preparation in the fixing of the fee level makes it unfeasible to act on behalf of the appellant for the payment specified.

The statutory scheme

7. Article 36(3) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (SI 1981/228 (NI 8)) contains the power to make rules for the purpose of carrying into effect Part III of the Order whose title is "Free Legal Aid in Criminal Proceedings". As amended, article 36(3) provides:

> "[The Department of Justice], after consultation with the Lord Chief Justice, the Attorney General and, where appropriate, the [relevant Rules Committee], and with the approval of [the Department of Finance and Personnel] may make rules generally for carrying [Part III of the 1981 Order] into effect and such rules shall in particular prescribe –
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> ...

(d) the rates or scales of payment of any fees, costs or other expenses which are payable under [Part III]."

8. Article 37 sets out, in a non-exhaustive list, the matters to which the rule making body must have regard. Again as amended, it provides:

"The [Department of Justice] in exercising any power to make rules as to the amounts payable under this Part to counsel or a solicitor assigned to give legal aid, and any person by whom any amount so payable is determined in a particular case, shall have regard, among the matters which are relevant, to-

(a) the time and skill which work of the description to which the rules relate requires;

(b) the number and general level of competence of persons undertaking work of that description;

(c) the cost to public funds of any provision made by the rules; and

(d) the need to secure value for money,

but nothing in this Article shall require him to have regard to any fees payable to solicitors and counsel otherwise than under this Part."

9. It can be seen, therefore, that a clear enjoinder is given to the rule making body to devise rules that will allow payment to be made which, among other things, reflects the time and skill necessary to carry out particular types of criminal legal aid work. It necessarily follows that rules which do not cater for payment on the basis of the skill and time required for such work are ultra vires the enabling power.

10. The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 contained provisions which permitted payment to be made above the standard rate if a case presented exceptional difficulty. Rule 11(4) provided:

"(4) Where an advocate considers that, owing to the exceptional circumstances of the case (or part of the case which is the subject-matter of the application), the amount payable by way of fees in accordance with

paragraphs (2) and (3) [which made provision for the payment of standard fees] would not provide reasonable remuneration for some or all of the work involved, he may apply to the Commission for a Certificate of Exceptionality and the Commission may, in its discretion, grant such application in accordance with paragraph (5)."

11. Rule 11(5) contained a list of matters to be taken into account in deciding whether a Certificate of Exceptionality should be granted. Again it was made clear that this was a non-exhaustive list. Rule 11(5) provided:

"When considering an application for a Certificate of Exceptionality, the Commission shall have regard, among the matters which are relevant, to-

(a) whether the issues involved were significantly more complex than other cases involving the same offence or Class of Offence;

(b) whether the volume of evidence (including any un-used evidentiary material) was significantly greater than that in other cases involving the same offence or Class of Offence;

(c) any novel issues of law which were involved in the case; and

(d) any new precedents established in the case ..."

12. Under the 2005 Rules, therefore, it would have been open to the new counsel who had been retained for the sentencing exercise to apply for a Certificate of Exceptionality on the grounds that the issues were significantly more complex for them by reason of the fact that they had not previously been involved in the case and that a substantial amount of preparation would be required on that account.

13. The exceptionality provision was swept away by the 2011 Rules. Rule 12 of these Rules provided that paragraphs (4) to (8) of rule 11 of the 2005 Rules were to be omitted. Paragraphs (4) and (5), whereby an uplift in fees could be applied for, were no longer available for that purpose.

The decision of Treacy J

14. Mr Brownlee applied for judicial review of the department's decision not to allow any modification of the standard fees to be paid for the sentencing hearing in his

case. It was argued that the refusal to allow any payment for the extensive preparatory work that would inevitably be required made it impossible for him to retain counsel. This amounted to a denial of access to justice. Treacy J agreed. At para 47 of his judgment he said:

> "It is clear to me that the inflexibility of the impugned aspect of the scheme is preventing the applicant from being able to make his right to legal aid effective. This is a consequence of a blanket measure which makes no allowance for the exceptional and unusual circumstances which have arisen. Whilst there is much to be said for a fixed payment scheme such a scheme must not undermine the principle that lawyers should receive fair remuneration for the work they are required to do. The critical defect here is the inflexibility of the Regulations and the inability of the scheme to enable adjustments to be made even in exceptional and unusual cases where the failure to do so would lead to injustice."

15. The judge made an order of mandamus requiring the respondent, the Department of Justice, to take all necessary steps to make the applicant's right to legal aid effective. He found that a modest adjustment to the scheme under the amended 2005 Rules was required or that some other provision had to be made to deal with the exceptional and unusual circumstances of the case and to avoid the injustice that would otherwise result.

The Court of Appeal decision

16. The Department of Justice appealed Treacy J's order. The Court of Appeal allowed the appeal. Morgan LCJ, delivering the judgment of the court, acknowledged that inadequate remuneration within a legal aid scheme can give rise to a breach of a defendant's right to a fair trial under article 6 of the European Convention on Human Rights and Fundamental Freedoms, if an accused consequently finds it impossible to obtain the services of an appropriate lawyer to represent him. At para 33 of his judgment, however, the Lord Chief Justice said this:

> "... the appellant was provided with legal representatives who conducted the trial on his behalf until it was near its end at which stage he dismissed them. There is nothing to indicate that those representatives would not have continued to act in the sentencing hearing if they had not been dismissed and they, unlike newly instructed counsel, had benefitted from the overall trial fee payable."

17. In fact, it is clear from a transcript of the hearing before HHJ Miller QC that it was senior counsel who had initiated the process of withdrawal from the case. He told the judge that he felt professionally compromised and could no longer act for Mr

Brownlee. At that stage, the appellant did not want counsel to withdraw. There can be no question of counsel having been dismissed by the appellant at that point. It was only after lunch, having been given time to consult with his solicitor, that Mr Brownlee said, in answer to the judge's direct question, that he wanted to dispense with counsel's services. There was no further investigation of the circumstances in which that decision had been reached. It is entirely possible that the appellant had concluded that he could no longer insist on counsel representing him when counsel had indicated that he was professionally compromised. Despite the Court of Appeal's finding to this effect, it is by no means clear that counsel would indeed have continued to act but for the fact that they had been dismissed by the appellant. As it happens, in para 36 of the judgment, (which is quoted below), the Court of Appeal foresaw that the sentencing judge might wish to explore further the reasons that the appellant had decided to dispense with the services of his legal team. It must be presumed that it was felt that such a further investigation might have borne directly on the question of whether, if the appellant was not legally represented, he could have received a fair trial.

18. Notwithstanding this, it appears that the Court of Appeal's conclusion that the appellant had dismissed his legal team for no good reason was central to their decision on the appeal, for at para 36 Morgan LCJ said this:

> "An accused who loses his legal representation in the course of a trial through no fault of his own should be given the opportunity to obtain alternative representation. Where he cannot do so because of the inadequacy of legal aid funding a breach of article 6 may well follow. The inflexibility of these Rules potentially raises the possibility of such an outcome. In this case, however, the material before us suggests that the accused dismissed his counsel and solicitors without any reasonable explanation at a late stage of his trial. Whether the circumstances of this case are such that even then a breach of article 6 would arise from the absence of an ability to secure further representation by counsel necessitates a careful review of the issues in the sentencing exercise. The learned trial judge will know the factual basis for the conviction, having heard the evidence. He will have the opportunity to hear from the author of the pre-sentence report and to see the psychiatric report prepared for the appellant if it is relied upon. He may wish to explore further the reasons for the decision by the appellant to dispense with his original legal team. He will be in a position to judge the materiality of previous convictions against the circumstances of the offence and the reports. All of those matters indicate that the decision as to whether the absence of legal representation gives rise to a breach of article 6 is a highly fact specific exercise which should be decided by the trial judge."

19. The Court of Appeal clearly had it in mind that the trial judge should determine whether the matters which came up during the sentencing hearing would give rise to a

breach of article 6 and that that determination should be made as and when those matters became apparent in the course of the hearing. But the judge had already decided that the issues in the case warranted the grant of a legal aid certificate for senior and junior counsel. This suggests that he had already concluded that, if the appellant was to have a fair hearing, it was essential that he be legally represented. In effect, therefore, the Court of Appeal's conclusion would have required the judge to revisit a decision which he had already made. Quite apart from this, it is not difficult to envisage difficulties that a trial judge would face if he or she had to decide, on an ad hoc basis, whether legal representation for the sentencing hearing was required, if that decision was to be made in the course of the hearing itself.

20. It is clear from the Court of Appeal's judgment that they also considered that the appellant's contesting of the department's refusal to adjust the standard fee constituted an impermissible collateral challenge to the criminal proceedings. In para 37 of his judgment the Lord Chief Justice referred to the decision in *R (Kebilene) v Director of Public Prosecutions* [2000] 2 AC 326 where the House of Lords had held that criminal proceedings should not be subjected to delay by collateral challenges, and that as a general rule the courts would refuse to entertain a judicial review application where the complaint could be raised within the criminal trial and appeal process.

21. The circumstances in *Kebilene* were, of course, markedly different from those in the present case. In *Kebilene* an application had been made to restrain a prosecution on the basis that its continuation would constitute a violation of article 6. The House of Lords held that this was an issue which could be dealt with at the trial and, if necessary, on appeal. Here the appellant does not seek to restrain completion of the criminal process. On the contrary, he wishes to have legal representation in order to bring the proceedings to a close. The trial judge is not in a position to undertake a judicial review of the Department of Justice decision to refuse to increase the fee payable for the sentencing hearing. Unlike the position in *Kebilene*, therefore, the violation of the article 6 right cannot be cured or catered for in the course of the sentencing hearing. I do not accept therefore that the judicial review proceedings constituted a collateral challenge to the criminal process.

22. It is, of course, true that the judge could have considered again the circumstances leading to the withdrawal of counsel who had originally represented the appellant. It is also true that, on that reconsideration, the judge could have confirmed his decision to grant a defence certificate for senior and junior counsel. But, from the point of view of the appellant, he was entitled to assert that the judge's earlier determination of this question was (and could only be) consistent with the conclusion that he had not forfeited the right to be legally represented. Indeed, in a case such as the present, where a defendant faces the prospect of a significant prison sentence (in the appellant's case an extended or even an indeterminate sentence is a distinct possibility) and where he wishes to be legally represented, a determination by a judge that the sentencing hearing

should take place without legal representation could only be made if he had concluded that the defendant had forfeited his right to such representation.

23. In allowing the Department of Justice's appeal, the Court of Appeal relied on the decision in *R v Ulcay* [2007] EWCA Crim 2379. That case was concerned with regulation 16 of the Criminal Defence Service (General) (No 2) Regulations 2001 (SI 2001/1437) which provides that any application for a change of representative may be refused or granted by the court to whom it is made on grounds which are set out in the regulation. One of the consistent requirements of regulation 16(2) (a)(i) - (iv) is that a legal representative should provide details of the nature of the duty which he believes requires him to withdraw from the case, or the nature of the breakdown in the relationship between him and his client. At para 31 of the judgment the President of the Queen's Bench Division said:

> "The purpose of this part of the Regulations is to ensure that the client does not manipulate the system, seeking to change his lawyers for dubious reasons which include, but are not limited to, the fact that the lawyer offers sensible, but disagreeable advice to the client. Claims of a breakdown in the professional relationship between lawyer and client are frequently made by defendants, and they are often utterly spurious. If the judge intends to reject an application for a change of legal representative he may well explain to the defendant that the consequence may be that the case will continue without him being represented at public expense. The simple principle remains that the defendant is not entitled to manipulate the legal aid system and is no more entitled to abuse the process than the prosecution. If he chooses to terminate his lawyer's retainer for improper motives, the court is not bound to agree to an application for a change of representation …"

24. It is implicit in this passage that the court would refuse an application for change of representation only where it had decided that the accused had terminated the lawyer's retainer for improper motives or was seeking to manipulate the legal aid system. In the present case, the judge cannot have considered that the appellant was embarked on such a course because he granted a legal aid certificate for the sentencing hearing.

25. The Court of Appeal in the present case said that the grant of a new legal aid certificate should be taken into account but that this "on its own does no more than what was said at para 36 of *Ulcay*". This is the passage from that paragraph which the Lord Chief Justice quoted in support of his conclusion as to the limited relevance of the grant of a new legal aid certificate:

> "... The fact that the judge was prepared to transfer the legal aid certificate does not mean that he was saying that, whatever the consequences to the trial, new representation must be obtained, and that thereafter he would conduct the trial in accordance with whatever applications were made by new counsel. The clear implication of what the judge decided was that whilst he was content for new representation to be obtained at public expense and no doubt he hoped that it would, nevertheless he could not and did not abrogate his responsibilities to the interests of justice in the overall context of the trial and its proper conduct and management."

26. It is important to keep in mind the background against which these observations were made. The appellant in *Ulcay* had not only withdrawn instructions from the legal team that had represented him throughout the trial until the close of the prosecution case. He had purported to withdraw admissions which he had already made in the course of the trial. In particular, he had asserted that his was not the voice heard on tapes of intercept evidence. He had previously accepted that it was indeed his voice. The new legal representatives who had been engaged to act for Ulcay asked for an adjournment of some weeks. The trial had begun on 5 September 2005 and the withdrawal of original counsel took place on 18 October. The appellant wanted the trial to be aborted and to begin again before a new jury. In these circumstances it is not surprising that the trial judge refused to adjourn the trial nor, when he was told by counsel that they could not represent the appellant unless an adjournment of some weeks was granted, that he ordered that the trial must continue.

27. In the present case there is no question of the appellant wishing to manipulate the system by deferring the sentencing hearing. Since he has been convicted and is in custody awaiting sentence, it is obviously in his interests to have that part of the process completed. The observations in para 36 of *Ulcay* relate to an attempt by the appellant to have his trial aborted. This does not arise on the present appeal. In these circumstances, the fact that the trial judge granted a further legal aid certificate is indicative of his view that the engagement of a new legal team was not associated with an attempt by the appellant to manipulate the trial process.

Events following the hearing of the appeal

28. After the Court of Appeal had heard the Department's appeal but before judgment was delivered, a consultation document was published as part of a review of the 2005 Rules. A section of this document dealt with the situation that had arisen in the appellant's case. At para 3.6 of the document the following appeared:

> "One area where the 2005 Rules were challenged recently by judicial review proceedings was on their alleged failure to provide appropriate

remuneration for a sentence hearing. This arose because the defendant dismissed his counsel just before conviction and required new counsel to represent him during sentencing. However, he was unable to secure the services of counsel on the basis that the fees payable did not provide sufficient remuneration for the work involved. Essentially, this was because the new counsel would have to undertake an amount of preparation work to familiarise themselves with the case before being in a position to properly represent the defendant and, in these circumstances, counsel considered that the fees available did not provide sufficient remuneration. The circumstances which caused this situation to arise were highly unusual and entirely unforeseen."

29. This was an unambiguous acknowledgment by the Department that it had not anticipated that new legal representatives might be required to take over at the sentencing stage from those who had appeared for the accused at trial. More importantly, the consultation document implicitly accepted that the 2005 Rules, in the form that they existed after the changes brought about by the 2011 Rules, had failed to cater for the proper remuneration of counsel briefed for the first time to appear for an accused person after the trial had ended. This much is clear from a section in the document headed 'Omissions in the 2005 Rules' para 3.16 of which stated:

"... the Department is content that it should make adjustments to the sentence hearing fee contained in the 2005 Rules, where a new legal team is instructed following a defendant's conviction, to better reflect the amount of work involved in preparing for and representing the defendant at the hearing. To achieve this, the Department is proposing to set fees, which could be applied retrospectively, that would be triggered by the volume of evidence served on the defendant by the Public Prosecution Service in relation to his case."

30. The Department made it clear that, as well as considering responses to the consultation document, it would take into account the judgment of the Court of Appeal and might amend its proposals in relation to sentence hearing fees in light of it. The consultation exercise took place between 5 July 2013 and 16 August 2013. Submissions were received from the Bar Council, the Law Society and LSC. In November 2013 the Department published its report on the consultation. It set out its conclusion in para 3.2 (sic) of the report as follows:

"In light of the Court of Appeal judgment, the Department is content that it should proceed and introduce enhanced sentence hearing fees in the 2005 Rules, where a new legal team is instructed following a defendant's conviction, to better reflect the amount of work involved in preparing for and representing the defendant at the sentence hearing. To achieve this,

the Department considers that it would be appropriate to introduce the fees that were the subject of public consultation ..."

31. Draft amendment rules were shown to this court in the course of the hearing of the appeal on 5 December 2013. We were informed that these were to be considered imminently by the Justice Committee of the Northern Ireland Assembly and that it was planned that they should come into force in January 2014. It was proposed that the rules should operate retrospectively. Rule 5 of the draft rules intimates an amendment of para 15 of Schedule 1 to the 2005 Rules by the insertion of a new para 15B which will make provision for the payment of additional fees for preparatory work undertaken by a new legal representative for a sentencing hearing.

Discussion

32. The assessment and payment of fees to a legal representative who has replaced another at the sentencing stage of criminal proceedings was, self-evidently, a material consideration which should have been taken into account by the rule making body which introduced amendments to the 2005 Rules by the 2011 Rules. It has been frankly acknowledged that this situation was not adverted to at the time of the making of the 2011 Rules. There was therefore an admitted failure to have regard to a relevant factor and, on that account alone, judicial review will lie of the decision to introduce the 2011 Rules without making provision for the payment of fees which would properly reflect the preparatory work which a legal representative, new to the case at the sentencing stage, would have to undertake.

33. Since article 37 of the 1981 Order requires the rule making body to devise rules that prescribe the payments to be made which reflect the time and skill necessary to carry out particular types of criminal legal aid work, a failure to make provision for remuneration of preparatory work by a new legal representative is, to that extent, ultra vires the enabling provision. This situation is not relieved by the circumstance that the rule making body must also have regard to the cost to public funds of any provision made by the Rules; and to the need to secure value for money. Those factors complement the obligation to have regard to the time and skill required to undertake particular forms of work; they do not extinguish it.

34. At the conclusion of the hearing of the appeal, this court announced that it would allow the appeal for reasons to be given later. This judgment contains those reasons. At the time that the appeal was allowed, it was stated that we had concluded that a declaration should be substituted for the order of mandamus made by Treacy J. When he granted judicial review an order of mandamus was appropriate. Now that the Department has accepted that the 2005 Rules require to be amended to allow for payment for preparatory work undertaken by a new legal representative, mandamus is

no longer necessary. The declaration will be to the effect that the failure of the rule making body to take account of the need to provide for such payment rendered the Rules to that extent unlawful and ultra vires their powers under article 36 of the 1981 Order.

35. It was urged on this court that a failure to include in the Rules a general exceptionality provision and the prescription of fixed fees for every form of payment for legal work undertaken built into the Rules an inherent defect. The amount properly payable to reflect the time and skill required in every conceivable situation demanded the inclusion of a dispensing provision to cater for exceptional cases of which this was merely one instance.

36. The need for a measure of flexibility, or rather, the perils of inflexibility, have been well recognised in *Buchanan and Advocate General for Scotland v McLean* [2001] SCCR 475, also reported as *McLean v Buchanan* [2001] 1 WLR 2425. The potential for injustice inherent in a fixed payment scheme was expressly referred to by Lord Hope in para 45 of his opinion in that case. And at para 71, Lord Clyde said this about the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, (SI 1999 No 491):

> "... 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."

37. Lord Clyde acknowledged that his observations went further than was required to decide the issue before the Privy Council in that case. So also in the present appeal. But his words contain a salutary warning. While we are satisfied that the new draft rules, since they are to be applied retrospectively, meet the appellant's complaint, it cannot be predicted with confidence that a combination of circumstances, at present unforeseen, might not give rise to a similar challenge to that which the appellant has successfully made to the Rules in the present case.