Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Briefing by Attorney General

10 November 2011

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Colum Eastwood
Mr Seán Lynch
Ms Jennifer McCann
Mr Basil McCrea
Mr Jim Wells

Witnesses:

Mr John Larkin	) Attorney General for Northern Ireland
Mr Philip Gilpin	) Office of the Attorney General for Northern Ireland
Ms Maura McCallion	) Office of the Attorney General for Northern Ireland

The Chairperson:

I welcome to the meeting the Attorney General for Northern Ireland; Philip Gilpin, solicitor to the Attorney General; and Maura McCallion, division head of the Office of the Attorney General. The meeting will be recorded by Hansard. Attorney General, I invite you to address the Committee. I am sure that members will have questions afterwards.

Mr John Larkin (Attorney General for Northern Ireland):

I am very grateful, Chairman. It is appropriate to begin by acknowledging the very constructive step that the Minister of Justice has taken in withdrawing the proposal for the draft rules. It

demonstrates the effectiveness of the consultation exercise and the Committee's input in the law-making process. That is only to be welcomed. It is also fair to say that the rules were designed to address what is an undoubted problem.

I hope that you all have the brief note that we have submitted, which accompanies a small bundle of materials. At the outset, it is worth drawing attention to the present test for the granting of a certificate of two counsel, which is set out in rule 2(4) of the current rules. It is worth spending a wee bit of time looking at that. The current rule 2(4) provides that:

> "Where the charge is one of murder, or the case appears to present exceptional difficulties, a certifying authority may certify that in its opinion the interests of justice require that the person charged shall have the assistance of two counsel."

Now, a moment's reflection will suffice to convince all reasonable readers that that is actually quite a high test. At the same time, anyone who is familiar with the practice of district judges in Magistrates' Courts cannot help but observe that there appears to have come into being a culture where — I will put this as delicately as I can — the absolute strictness of the present statutory test does not obviously appear to be in evidence.

Let me flesh that out a bit, if I may, with autobiography. I took silk in 2001, and in the early years, I did a certain amount of criminal work. I appeared as senior counsel in cases that were not, in fact, remotely exceptionally difficult. The cases concerned resulted in, for example, pleas of guilty to armed robbery. I am thinking particularly of two cases of armed robbery, one at an ATM and the other at a social security office. Those were important cases from the perspective of the public and, undoubtedly, the accused. However, they did not appear to present exceptional difficulties. Yet, certificates for two counsel were awarded to both. Now, if the present test were properly and faithfully applied, I think that much of the concern about the public purse would be assuaged.

It may not be necessary to spend a great deal of time on the present draft rules, because, as the Minister indicated, they have been withdrawn. To summarise briefly, I think that the problem with the draft rules is that they build in delay by providing for, save in cases of murder, the reservation of the decision to grant a certificate for two counsel to a Crown Court judge. Indeed, there are further complexities involved as to when that can actually happen. The provision will build in delay to any case where it is imagined by solicitors acting for defendants that the defence

team is incomplete and that they believe the case to be one of sufficient complexity.

Then one can look at the actual trigger for the assignment of two counsel, which, based on the draft that I have, is set out in rule 4(7). The rule states:

"A criminal aid certificate may be granted in respect of two counsel if and only if:

(a) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact".

I will pause there and ask you to note this point: a case where a prosecution case is hugely complex and gives rise to issues of considerable difficulty and complexity would not, in itself, satisfy that test. That is because it is the case for the assisted person that gives rise to the triggers of substantial novel or complex issues of law or fact. Again, that strikes me as profoundly wrong in principle. If one is engaging in an overall exercise of assessing the complexity or difficulty of a case in a general sense, one should be looking at the case as a whole and principally, as presented by the prosecution, rather than looking only at what might be contained in the defence case. The actual affirmative case by a defendant might be very straightforward: "It was not me; I was not there". However, the actual chain of proofs on the part of the prosecution might, in one view, be hugely, indeed, fiendishly complex or novel.

The other trigger is the following:

"(b) in the opinion of the court the case for the assisted person involves substantial novel or complex issues of law or fact and two counsel have been instructed on behalf of the prosecution."

You may have cases where, for a variety of reasons, presentationally, which is not by any means an illegitimate stance on the part of the prosecution, two counsel are instructed for good reasons that are nothing to do with the substantially novel or complex nature of the case, and where, nonetheless, there would appear to be an imbalance.

A further problem in one view, setting aside the great difficulty that there might be in obtaining a certificate in genuinely difficult and complex cases, was the residual clause in rule 4 (12):

"Without prejudice to paragraph (7), where a judge of the court before which the assisted person is to be tried is of the opinion that in the interests of justice a criminal aid certificate in respect of two counsel must be granted in order to protect the assisted person's rights under the Human Rights Act 1998(a), the judge shall grant such a certificate."

What that does, of course, is broaden in an imprecise way the circumstances in which a certificate may be granted. It hitches the scope of the judge to grant a certificate to whatever emerges from time to time from Strasbourg as to the content of article 6 of the convention. In my view, the old test — the present test — if faithfully applied, is better. It has the added advantage of including a quality threshold, because it is clear that if you look at rule 2(6), it says:

"Any member of the Bar whose name appears on the register maintained in pursuance of Rule 2…may be instructed, on behalf of the person charged, by a solicitor assigned as aforesaid, and, in any case in which the certifying authority has given a certificate as provided for in paragraph (4), one such member of the Bar and a member of the Bar, being one of Her Majesty's Counsel who has expressed his willingness to undertake the defence, may be so instructed."

The paradox in the new rules is that, as well as being obscure and difficult and setting, perhaps, an artificially high barrier, having breasted that particular tape, you can instruct simply two junior counsel. The public, who, after all, are paying for that, do not have the assurance that one of the counsel instructed is senior counsel.

I also make some points in relation to issues of possible vires between "a judge", who is referred to in the rules, and "the judge", who is referred to in the order. I express no concluded view on that but simply raise it as an issue. I also raise it because it may have been suggested by officials that it could be possible for a judge to deal with those matters before arraignment. The view of the English Court of Appeal, on the basis of its decision in Regina v. Tonner, which members have, is quite clear that it is only when a person has pleaded not guilty that a trial will be known to be required. Therefore, it could not, in one view, be open to a judge to grant a certificate for two counsel in the Crown Court before that stage has been reached. It is inevitable that there will be delay. At present, magistrates take the decision, and the full defence team is available for the day on which the accused is to be arraigned or at least ought to be in a position to be properly instructed to make all such necessary applications as might arise in a particular case.

That is probably a little briefer than it might otherwise have been had it not been for the ministerial letter. As you said, Chairperson, I will be delighted to assist members with any questions that they may have.

The Chairperson:

Thank you very much, Mr Larkin. There are a couple of points that I want to pick up on, because

the Committee may want to pursue this issue with whoever is best placed to do so. You make the point that, if the current test, which requires exceptionality, is being faithfully applied, there would not be an issue. By that, I take it that you mean the concern around the legal aid bill to the taxpayer. Could you comment on the culture that has developed? Obviously, the Department brought these proposals forward because of the rise in the bill from assigning two counsel. If we apply this test as you believe it should be applied, in a much stricter regime than that which has developed in the culture that has existed, would the legal aid bill drop and would there be a dramatic reduction in the number of cases that were being assigned two counsel? Would it bring us into line with other jurisdictions? How much time is spent by the magistrates when they decide whether a case is exceptional? What was the culture when it came to deciding to appoint two counsel?

Mr Larkin:

It would probably be instructive for members of the Committee, either singly or in groups, to spend a little time in a Magistrate's Court when committal proceedings come on. I know that, in due course, the Justice Minister will ask the Committee to look at the issue of committal proceedings separately. However, with regard to legal aid, if Committee members engaged in that exercise were to momentarily lose attention, they might well miss the determination of the legal aid issue. For the most part, they are not lengthy considerations. The longest part of the process will be the pitch made by the defence solicitor as to why two counsel should be awarded in any given case. One does not see any particularly extensive reasoning being given either for a grant or for a refusal.

One useful step that might be taken in any new proposal in the future would be to require magistrates to give reasons as to why they consider a case to be exceptional, and it should be magistrates who still deal with that issue. One speaks often about accountability. Of course, accountability is a particularly fraught and sensitive issue when it comes to judges. One of the ways in which judges are accountable is through what is referred to fashionably these days as "narrative accountability". That is, if you are under an obligation to give a reason for what you are doing, that imposes, first, an internal discipline on why you are doing something and, secondly, it enables the public to understand, one hopes, why something has happened. That is a useful exercise, and I proffer that.

The other thing is that, because it is an issue of law as to whether something is exceptional, it

would be open to the Lord Chief Justice, in a practice direction, not to indicate how cases should be decided, as that is a matter for the individual magistrate, but to simply, respectfully and tactfully remind magistrates of the content of the present law. The present Lord Chief Justice is commendably energetic in arranging a series of Judicial Studies Board events on a variety of issues for judges at all levels. It is readily foreseeable that that is the kind of thing that could very easily find a place in a Judicial Studies Board event. Therefore, magistrates would be invited to look again at the content of the legislation and, among themselves, perhaps in group work, think of where they see an issue of exceptionality might lie. I am not a magistrate, but proffering, *in abstracto*, a view of the law, cases of homicide plainly would present exceptional difficulty. That is already foreshadowed in the express provision for murder cases. However, it strikes me that a standard case of rape where consent was the issue, would not, in the absence of other more serious or greater complexities, give rise to a certificate for two counsel. Nevertheless, in a standard rape case, it would be unusual not to have certificate for two counsel as part of what I have described as the present legal culture, and that is something to be looked at.

One can safely leave it to the good sense of properly trained magistrates to apply a statutory test with appropriate flexibility. I am mindful of the famous advice that Mr Justice Frankfurter used to give his students:

> "Read the statute, read the statute, read the statute".

If you read the statute here, it is quite clear what has to happen.

The Chairperson:

I am trying to understand this from a layman's perspective. A case is put forward, the magistrate decides yes, and he or she then ticks the box to say, "I have authorised two counsel". However, he or she does not provide any rational for the case being exceptional.

Mr Larkin:

Yes, that is the present position. If I were the paying party — the Legal Services Commission that foots the bill for that — I would, to put it in a very low key way, be interested in knowing why the papers for a very standard armed robbery or a fairly standard rape case were deemed to yield an exceptional case.

The Chairperson:

How would you get that accountability into the system? Is it a matter of the Legal Services Commission having a challenge function? Should the Lord Chief Justice have the power to hold magistrates to account? What is the best mechanism to change that culture?

Mr Larkin:

Let me take that important issue in two stages. I will first take the party with the interest. If I was, for example, the Legal Services Commission, and I considered that a decision had been taken, which plainly showed that an erroneous approach to the law had been taken, it would be open to me to apply for judicial review of that magistrate. That might be seen as an impolitic thing to do; I do not know. However, if I was a paying party, and I was sufficiently concerned that a proper statutory test had not applied or had been misapplied before me, it strikes me that I would actively consider that approach.

It would not be for the Lord Chief Justice to do more than remind magistrates of the content of the existing law, because it is not an issue of practice here. However, if an obligation to give reasons were added to the present rules, it would enable one to see very quickly. The twin aspect of the obligation to give reasons is, as I mentioned, the internal discipline. Therefore, if you were gliding towards an unreflecting decision to grant a certificate for two counsel and realised that you must set out your reasons for that, it may be that, if you realise that it is very difficult to construct those reasons, that is not a decision you should be taking.

The Chairperson:

OK. Thank you.

Mr Wells:

Every day that I sit on this Committee I think of three important facts: first, I should have studied law at Queen's – that was a missed opportunity; secondly, things happened under direct rule that wasted vast amounts of taxpayers' money; and, thirdly, if the Chairman goes first, he asks all the best questions. *[Laughter.]* The Chairman has wisely asked three of the questions that I had intended to ask.

I have had experience of a Magistrate's Court, unfortunately, from both sides, and often, as I sat waiting for my fate to be determined, I wondered what the second counsel was actually doing.

What is the difference in cost between a case that runs with one counsel and a case that runs with two? Do you have a rough idea?

Mr Larkin:

Those figures can be readily obtained, but not here by me. If one approaches it another way, you will know that in the most recent tranche of legal aid reforms there was a diminution in the rates. The rates set out a higher fee for senior counsel. Therefore, when senior counsel is not instructed, you can simply blot out that fee and the junior's fee as additional elements, and you would be left with the fees for a single junior counsel and the solicitor.

Mr Wells:

Before that point was arrived at, could we say that cases with two counsel were twice as expensive or perhaps 60% more expensive than cases with one counsel? What, roughly, would have been the extra cost of having a second counsel?

Mr Larkin:

Subject to correction, I would have thought that, the bill for counsel alone would probably have been a little more than double.

Mr Wells:

So, for the past 30 years, we have had a situation in which many counsel sat in cases knowing full well that they were not needed, yet they took fees.

Mr Larkin:

The question is: which one is it? Is it the senior counsel or the junior counsel?

Mr Wells:

Yes, but it is now perfectly possible to run a case with one counsel — one QC or one junior counsel. The fact was that people were sitting there and doing precious little, yet they were receiving exactly the same fee. You said that the amount was roughly double.

Mr Larkin:

I will give this great hostage to fortune both now and for the future: do not give any particular weight to anything mathematical that I say. Those figures are generally available.

One must be careful. In any case in which two counsel are instructed, one would be hopeful and would be entitled to expect that people would work properly if they have been assigned by the public purse. Merely because one counsel, typically the senior counsel, has a speaking part does not mean that the junior counsel is not playing a full part in the preparation and presentation of that case. You also touch on an important point about having, perhaps, a senior counsel working alone. That is not provided for, either in the present rules or in the now withdrawn draft. It strikes me that, from one point of view, it should be possible to contemplate a range of possible counsel permutations for particular cases. For example, there may be a case that is very extensive but not particularly complex. That might be a case for two junior counsel; they might share a fairly extensive workload in a case that could last eight or 10 weeks. On the other hand, if that eight-week or 10-week case gives rise to exceptionality issues, it seems to me that the public, who are paying for it, would want the quality assurance that, notionally, one hopes, the rank of senior counsel affords.

Mr Wells:

To follow on from what the Chairman said: is the Legal Services Commission, which pays the bill, given absolutely no indication as to why two counsel have been approved rather than one?

Mr Larkin:

That is correct. There is no obligation on magistrates to give reasons for the assignment of two counsel, but for the statement of the present statutory test.

Mr Wells:

It is quite obvious to most reasonable people that the test has not been passed. I think that a reasonable person would realise that a case such as the dreadful Jennifer Cardy case would warrant two counsel. That was an incredibly difficult and complex murder case, and it was correct to have two counsel. That is an easy one to assess. Equally, there must have been many cases in which a reasonable person might say that there was no need for two counsel, but, at the stroke of a pen, the magistrate can say that having two counsel is fine. There is no accountability or comeback, and the bill is automatically paid. The Legal Services Commission cannot say, "Hold on a minute here. This is ridiculous". Am I right in saying that that cannot be done?

Mr Larkin:

The LSC could do something. Let us take a particularly burlesqued example, if you will. Let us say that there is a simple case of shoplifting that is absolutely straightforward and of no conceivable complexity. It involves the theft in a store of a bar of chocolate, and the magistrate grants a certificate for two counsel. It would be open to the Legal Services Commission to judicially review that decision and to protect the fund against a payment that, as you imply, any reasonable person would think clearly does not comply with the statutory test.

Mr Wells:

How often has that happened in the past 30 years?

Mr Larkin:

The judicial review challenge?

Mr Wells:

Yes.

Mr Larkin:

I am not aware of a single challenge by the LSC to a magistrate's decision to assign two counsel.

Mr Wells:

For the past 30 years, we have dished out money hand over fist when we did not need to, and there was never any accountability or test to stop that happening.

Mr Larkin:

No, the test is there —

Mr Wells:

— but it is not being implemented.

Mr Larkin:

I suspect that a certain culture may have come into being whereby there is almost a going rate. So, if it is an armed robbery of any seriousness; two counsel. If it is a rape; two counsel.

Mr Wells:

If it is a bar of chocolate; two counsel.

Mr Larkin:

Well, I am also not aware of any fanciful examples of that kind —

Mr McCartney:

Why have a court case in the first place?

Mr Larkin:

— ever having arisen, mercifully. However, if that were to happen, the LSC is not without its remedy. Whether it chooses to go down that road is another issue. However, it is certainly the paying party and would, I think, have an obligation to protect the fund.

Mr Wells:

This would all be very humorous, only it deprives the taxpayer of money that could be used for hospitals, roads and schools rather than for lining the pockets of highly paid barristers, QCs and solicitors. That is the reality of what is going on. Every day that I sit on this Committee I think that some day I will ask someone to add up all the money that has been wasted over the past 30 years and tell us how much it is. The answer will be frightening — it will be tens of millions of pounds. Has there ever been a case of a junior counsel or senior counsel being honest and saying, "Hold on a minute; I am not needed, and I am withdrawing from the case."? Does that happen often?

Mr Larkin:

I do not know is the only candid answer I can give. It strikes me that the difficulty for senior counsel in that position is that, where a judicial officer has determined that there should be two counsel, one would be slow to walk away. Again, these days, the practice of law often takes place in a highly protective, fearful climate. Therefore, one would be slow to see someone walk off the pitch where he or she may expose themselves to a complaint from someone who says, "Well, the magistrate thought that I should have two counsel, yet you are walking away.".

Mr Wells:

My experience in the courts is that the lead counsel will stand up and articulate the case of the defendant extremely well. The other counsel will sit there listening and, occasionally, will hand a note to the lead counsel. Then he will sit for another couple of hours and then hand over another note. I often wondered what on earth the other counsel ever did, because it is quite obvious that the lead counsel had prepared his case himself. He used his own words, and they were in his own handwriting. The other person seemed to be just sitting there; it was as if he was wearing a number 12 shirt in case he had to step in if the other guy took ill or something. I could never work out what he did, and now we know that he does very little.

Mr Larkin:

That is actually not true. Certainly, I can recall seeing cases where what you have described occurs, but I can also recall seeing cases where it did not. I have to say that, when I practised in criminal matters, the juniors who worked with me would not have got away with that. They would have taken witnesses, and there would have been a splitting of the respective load. They would have responded to directions from the relevant senior counsel as to what they would be doing. They would take a note, of course, but their role would not be confined to that. I cannot recall, from personal experience, a single instance of a junior in a criminal case simply sitting in the back row and confining himself or herself to handing out notes — not on my watch. One hopes that that is replicated across the board, but, the world being as it is, of course it is not.

In one sense — this will come as no surprise to the Committee — I have, in the abstract, no objection to lawyers being well paid, but the reality is that we live in an era of increasing financial stringency, and difficult decisions have to be made about where social priorities lie. Reference has been made to healthcare — if I may say so, it is the obvious reference. The demands that healthcare imposes on this Administration's Budget are enormous and potentially infinite. Will it really be sensible to say, publicly and out loud, that we cannot spend that money on heart surgery because we need it for lawyers?

Mr Wells:

I wish you well in campaigning on that one.

Mr Larkin:

I am not campaigning on that one. In fact, I am not campaigning at all, happily.

That is not to say that states cannot devolve themselves of responsibilities under the convention, under article 6 in particular, of ensuring the means for a proper defence. I do not think anyone on the Committee would take an opposing view to that. It is a question of getting the balance right and of ensuring that, where magistrates properly identify cases of exceptionality, the appropriate level of representation is available.

Mr McCartney:

Thank you for your presentation. I was slightly late and may have missed the beginning of your presentation. Has the Attorney General seen the copy of the Minister's letter to the Committee?

Mr Larkin:

Yes, I have.

Mr McCartney:

Are you satisfied with the letter? I find it difficult. Is the Minister now saying that he is not going to pursue those rules?

Mr Larkin:

My understanding is that the present draft is being withdrawn and will not be laid, but the Minister will revert on the issue. With respect, I think that he is right to revert on the issue. Obviously, it will be helpful to see in the meantime what happens in relation to any awareness. To that extent, it might be interesting to see what emerges, even from the very fact of this exchange having taken place and of drawing attention to what the real nature of the test is. As you know, action was taken by a number of solicitors practising in criminal courts over the summer. It is interesting that, as a result, instead of the applications for two counsel being made to magistrates, they had to be made to Crown Court judges. The Crown Court judges were applying exactly the same test as the magistrates, but the overwhelming sense that I get from practitioners is that very many fewer certificates for two counsel were being granted, simply because, on those occasions, the statutory test was being strictly applied.

Mr McCartney:

There are a number of issues, and we have had several presentations, but one issue is that, if the matter is left until it goes to the Crown Court, there is an obvious delay.

Mr Larkin:

Yes, there is.

Mr McCartney:

As you have outlined it today, if what you call "narrative accountability" is inserted in the system, the system should work better and appropriate counsel will be awarded at the appropriate time.

Mr Larkin:

I think that is right. There is sometimes criticism of the absence of legislation, but I would rather have no legislation than potentially bad, harmful or unpredictable legislation. It is important to get these issues right. The present legislation is actually very good, but only when it is strictly applied. It makes the decision at the right time, potentially in the right way, and ensures that senior counsel is instructed. If the public are paying for it, the public are entitled to expect that they are getting some quality for their money.

Mr McCartney:

At present, no reasons are given as to why two counsel are provided. Are any reasons given if two counsel are not provided?

Mr Larkin:

No, no reasons are given. Typically, it would be a matter of, "Yes, I think that this is a case for two counsel" or "No, I do not think that this is a case for two counsel". That would be the kind of thing — I hesitate to call it an explanation — that you will get in the Magistrates' Courts.

Mr McCartney:

You said that there is no history of appeal —

Mr Larkin:

No, nor challenge by judical review — not that I am aware of.

Mr McCartney:

What about from the defence point of view? Is there a mechanism for them to go back and —

Mr Larkin:

Yes, there is. In a case where a certificate for two counsel was not granted by a magistrate, the application could be renewed. There would not be an appeal, but the application would be made again to the Crown Court judge on arraignment.

Mr McCartney:

It does not go back to the magistrate; it goes to the next level.

Mr Larkin:

It does.

Mr McCartney:

It strikes me that it is difficult to read from the Minister's letter whether he is saying that he will, perhaps, come back and accept the model as you have laid out. However, if he comes back with that model, I think we will be in a different place than we were previously. We were faced with the old model versus the new model, but now we have to see the newer model before we can progress this. Thank you.

The Chairperson:

Members, no one else has indicated that they would like to ask a question. Attorney General, I thank you and your team.

Mr Larkin:

Chairman, we are very grateful.

The Chairperson:

Sorry, I have one last question that just came to mind. You gave a written submission, and the plan was still to go ahead with the statutory rule. What changed? Why did we go from a written submission that was obviously dismissed to the Minister taking his proposal off the table, apart from the Committee saying last week that it wanted to invite you here?

Mr McCartney:

The persuasiveness of a good counsel.

Mr Larkin:

Maybe that is it. It is hard to say, but I think that the Minister has genuinely and personally applied his mind to the issue in recent weeks. Obviously, the Committee has heard from officials, but I think the Minister has applied his mind and is, in my opinion, genuinely reflecting on the complexity of the issues.

The Chairperson:

Thank you very much.