Trinity Term
[2013] UKSC 36
On appeal from: [2012] HCJAC 51; [2012] HCJAC 20

JUDGMENT

O'Neill No 2 (Appellant) *v* Her Majesty's Advocate (Respondent) (Scotland)

Lauchlan (AP) (Appellant) v Her Majesty's Advocate (Respondent) (Scotland)

before

Lord Hope, Deputy President
Lord Kerr
Lord Wilson
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

13 June 2013

Heard on 29 and 30 April 2013

Appellant (O'Neill)
John Carroll
Liam Ewing
Ann Ogg
(Instructed by Drummond Miller LLP)

Respondent
Dorothy Bain QC
Douglas Fairley QC
Susanne Tanner
(Instructed by The Appeals Unit, Crown Office)

Appellant (Lauchlan)
William McVicar
Gerard Considine
Liam O'Donnell
(Instructed by Fitzpatrick and Co)

Respondent
Dorothy Bain QC
Douglas Fairley QC
Susanne Tanner
(Instructed by The Appeals Unit Crown Office)

LORD HOPE (with whom Lord Kerr, Lord Wilson, Lord Hughes and Lord Toulson agree)

1. On 10 June 2010 the appellants, William Hugh Lauchlan and Charles Bernard O'Neill, were found guilty in the High Court of Justiciary at Glasgow of the murder of Mrs Allison McGarrigle between 21 June and 1 September 1997, and of a subsequent attempt to defeat the ends of justice by disposing of her body at sea. The charges of which they were convicted in that trial had been separated from a number of charges on the same indictment of or relating to sexual offences against children. Their trial on the sexual offence charges took place before Lord Pentland between 26 April and 12 May 2010. Their trial on the murder charges, which is the trial to which this appeal relates, took place (between 17 May and 10 June 2010) before the same judge but with a different jury. The appellants were sentenced to life imprisonment for the murder, with punishment parts of 26 and 30 years respectively, and to concurrent sentences of eight years imprisonment for attempting to defeat the ends of justice.

2. The appellants both appealed against their convictions at the second trial and against their sentences. Lauchlan was granted leave to appeal against his conviction for murder by the sifting judges, but this was restricted to two grounds alleging errors by the trial judge. He was also given leave to appeal against sentence. O'Neill too was granted leave to appeal against sentence, but the sifting judges refused him leave to appeal against his conviction for murder. The appellants applied under section 107(8) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") for leave to appeal against their convictions for murder on certain grounds which the sifting judges had held were unarguable. On 8 February 2012 Lauchlan was refused leave to appeal on those grounds by the Appeal Court. O'Neill was given leave to appeal on one ground only which alleged an error by the trial judge: [2012] HCJAC 20.

3. The appellants then applied for leave to appeal to this court under paragraph 13 of Schedule 6 to the Scotland Act 1998 on some of the grounds on which they were refused leave on 8 February 2012. On 19 April 2012 the Appeal Court (Lord Justice Clerk Gill, Lord Hodge and Lord McEwan) gave both appellants leave to appeal on a ground alleging undue delay. It gave O'Neill leave on another ground alleging apparent bias on the part of the trial judge arising out of things that had happened in the presence of the jury at the end of the first trial: [2012] HCJAC 51. The trial judge had been shown a list of the appellants' previous convictions after they had been found guilty of the sexual offence charges, and he then made a comment about their character, having regard to their records and the nature of the offences of which they had been convicted.

Jurisdiction

4. This court has jurisdiction to hear appeals in relation to criminal proceedings in the High Court of Justiciary under Part II of Schedule 6 to the Scotland Act 1998 ("the 1998 Act"). The opening paragraph of Part II is in these terms:

> "3. This Part of this Schedule applies in relation to devolution issues in proceedings in Scotland."

The expression "devolution issue" is defined in paragraph 1 of Schedule 6, which provides:

> "1. In this Schedule 'devolution issue' means-
>
> (a) a question whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is within the legislative competence of the Parliament,
>
> (b) a question whether any function (being a function which any person has purported, or is proposing, to exercise) is a function of the Scottish Ministers, the First Minister or the Lord Advocate,
>
> (c) a question whether the purported or proposed exercise of a function by a member of the Scottish Government is, or would be, within devolved competence,
>
> (d) a question whether a purported or proposed exercise of a function by a member of the Scottish Government is, or would be, incompatible with any of the Convention rights or with EU law,
>
> (e) a question whether a failure to act by a member of the Scottish Government is incompatible with any of the Convention rights or with EU law,
>
> (f) any other question about whether a function is exercisable within devolved competence or in or as regards Scotland and any other question arising by virtue of this Act about reserved matters."

5. The Scotland Act 2012 ("the 2012 Act") made a number of important changes to this court's jurisdiction to deal with devolution issues under Schedule 6 to the 1998 Act. They came into effect on 22 April 2013: The Scotland Act 2012 (Commencement No 3) Order 2013 (2013/6 (C1). This is also the relevant date for the purposes of The Scotland Act 2012 (Transitional and Consequential Provisions) Order 2013 (2013/7 (S1)) ("the 2013 Order"): see article 1(2) of that Order. This appeal was heard one week later on 29 and 30 April 2013. Section 36(4) of the 2012 Act provides:

> "In paragraph 1 of Schedule 6 (devolution issues), after sub-paragraph (f) insert –
>
> 'But a question arising in criminal proceedings in Scotland that would, apart from this paragraph, be a devolution issue is not a devolution issue if (however formulated) it relates to the compatibility with any of the Convention rights or with EU law of
>
> (a) an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament,
>
> (b) a function,
>
> (c) the purported or proposed exercise of a function,
>
> (d) a failure to act.'"

6. The effect of the exclusion of questions of the kind referred in section 36(4) of the 2012 Act from the list of devolution issues in paragraph 1 of Schedule 6 to the 1998 Act is that these questions must now be dealt with as compatibility issues under the 1995 Act. Section 288ZA(2), which was inserted into the 1995 Act by section 34(3) of the 2012 Act, provides that "compatibility issue" means

> "a question, arising in criminal proceedings, as to –
>
> (a) whether a public authority has acted (or proposes to act) –
>
> (i) in a way which is made unlawful by section 6(1) of the Human Rights Act 1998, or

(ii) in a way which is incompatible with EU law, or

(b) whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is incompatible with any of the Convention rights or with EU law."

7. Section 288ZB(4), which was inserted into the 1995 Act by section 35 of the 2012 Act, provides for references of compatibility issues to the Supreme Court by a court consisting of two or more judges of the High Court of Justiciary. Subsection (6) of that section provides that, on a reference to it under that section, the powers of the Supreme Court are exercisable only for the purpose of determining the compatibility issue. Subsection (7) provides that, when it has determined a compatibility issue on a reference under that section, the Supreme Court must remit the proceedings to the High Court. Section 288AA, which was inserted into the 1995 Act by section 36(6) of the 2012 Act, provides for appeals to the Supreme Court. It contains the same directions in subsections (2) and (3) as to the way this court's powers are to be exercised in the case of appeals as those in subsections (6) and (7) of section 288ZB which relate to references.

8. Article 2 of the 2013 Order provides:

"(1) A convertible devolution issue is a question arising in criminal proceedings before the relevant date which –

(a) is a devolution issue;

(b) would have been a compatibility issue had it arisen on or after that date; and

(c) has not been finally determined before the relevant date.

(2) But a devolution issue arising in criminal proceedings before the relevant date is not a convertible devolution issue if –

(a) the issue has been referred, or a determination of the issue has been appealed, to the Supreme Court under Schedule 6 to the 1998 Act; and

(b) the hearing of the reference or appeal commences before the relevant date."

Article 3(1) provides that, subject to qualifications which do not apply in this case, a convertible devolution issue becomes a compatibility issue for all purposes on the relevant date.

9. The allegation of undue delay raised a devolution issue within the meaning of paragraph 1(d) of Schedule 6 to the 1998 Act. It arose in criminal proceedings before 22 April 2013, it satisfied the other tests set out in article 2(1) of the 2013 Order and the hearing of the appeal did not commence before 22 April 2013. So it was a convertible devolution issue, and it has now become a compatibility issue by virtue of article 3(1). As it has come before the Supreme Court as an appeal against the determination of that issue by the Appeal Court, it is to be treated as an appeal under section 288AA(1) of the 1995 Act: 2013 Order, articles 4(2) and 7(2). So the powers of this court must be exercised in the manner provided for by section 288AA(2) and (3) of the 1995 Act.

10. The allegation of apparent bias was the subject of an amended note of appeal which had been lodged on O'Neill's behalf before the hearing before the Appeal Court of his application under section 107(8) of the 1995 Act. It made no mention of any act on the part of the Lord Advocate, so it does not appear to have raised a devolution issue at that stage. But it was submitted on O'Neill's behalf by his solicitor advocate when he was applying for leave to appeal to this court that this allegation did raise a devolution issue: [2012] HCJAC 51. Lord Hodge explained the position in paras 6 and 7 of the Appeal Court's opinion:

"6. In additional ground 15 of his grounds of appeal Mr O'Neill complained about the comments of the trial judge, Lord Pentland, at the end of the first phase of the trial. We expressed our views on this ground in paragraphs 81 to 88 of this court's opinions. Mr Carroll submitted that the challenge raised a devolution issue as the Lord Advocate had persevered with the prosecution in the face of what was evidence of an unfair trial.

7. For the reasons which we stated in those paragraphs we did not think that the points which Mr Carroll raised were arguable. We adhere to that view. But we recognise that the splitting of the trial into two phases before two juries and the resulting presentation of previous convictions and the judge's remarks at the end of the first phase were very unusual circumstances. We are satisfied that it is appropriate to give leave to appeal on this ground."

11. The way the argument on this ground of appeal proceeded in the Appeal Court suggests that, as it was not presented as a devolution issue at the stage of the application under section 107(8) of the 1995 Act, there has been no determination of that issue by that court against which there could have been an appeal under paragraph 13 of Schedule 6 to the Scotland Act 1998. But the Appeal Court had power under paragraph 11 of the Schedule to refer any devolution issue which arose in proceedings before it to this court, and that is what seems to have happened in this case. By the same process of reasoning as applies to the allegation of undue delay, this issue was a convertible devolution issue and is now a compatibility issue. This means that this court has jurisdiction to consider it, and that its powers must be exercised in the manner provided for by section 288ZB(6) and (7) of the 1998 Act.

Undue delay

(a) the issue

12. The period of time relied on in this case extends from 17 September 1998, when the appellants were detained under section 14 of the 1995 Act on suspicion of conspiracy to murder, to 10 June 2010 when they were convicted. It was not until 5 April 2005 that the appellants appeared on petition at Kilmarnock Sheriff Court on charges which ultimately formed the basis for the charges in the indictment of which they were convicted. There was a further period until 10 September 2008 when the indictment was served on them, but the focus of attention at this stage is on that which occurred between 17 September 1998 and 5 April 2005. The question which this court has been asked to decide requires it to identify the right starting point for the purposes of the reasonable time guarantee in article 6(1) of the European Convention on Human Rights.

13. The issue was focussed by Lord Hodge in the Appeal Court's opinion of 19 April 2012 in this way:

> "2. Mr McVicar on behalf of Mr Lauchlan sought leave to argue before the Supreme Court that the decision of that court in *Ambrose v Harris* (2011 SLT 1005) had the result that the starting point in the assessment of reasonable time under article 6 of the European Convention on Human Rights ("ECHR") was not, as the Appeal Court had held in *O'Neill v HM Advocate* (2010 SCCR 357), the stage when an accused person appeared on petition but the earlier stage when the accused was interviewed by the police under caution in the exercise of their powers under section 14 of the 1995 Act. Mr Carroll on behalf of Mr O'Neill adopted Mr McVicar's submissions.

> 3. We have decided to grant leave to appeal on this ground. We set out our reasoning in paragraphs 25-29 of this court's opinions but recognise that the issue raised is one which arises from statements in a decision of the Supreme Court on which that court may wish to provide further guidance."

14. The parties agree that the issue can be formulated in this way: whether for the purposes of their right to a trial within a reasonable time in terms of article 6(1) of the European Convention on Human Rights the appellants were "charged" on 17 September 1998. That, say the appellants, is the date that should be taken to be the starting point. The Crown contends, on the other hand, that the correct starting point is 5 April 2005. It was suggested by the appellants in the statement of facts and issues that this court should also say whether or not the period between 17 September 1998 and 10 June 2010 when the appellants were convicted constituted an unreasonable delay in the process of determination of the charges against them. But it was accepted during the hearing of the oral argument that this issue would raise questions of fact which are best left for determination by the Appeal Court.

(b) the facts

15. The deceased, Mrs Allison McGarrigle, had a son named Robert who was subject to a residential supervision requirement under the Social Work (Scotland) Act 1968. It required him to live during the week with his father in Kilmacolm but he was permitted to visit his mother, who was divorced from his father, during the day on Saturdays. On Saturday 14 June 1997 Robert did not return to his father's address after visiting his mother. Instead he and his mother went to Largs, where they met the appellants and went to live with them in a property which they were then occupying in that town. On or about 20 June 1997 a drinking session took place there at which a number of people including the appellants, Mrs McGarrigle and Robert were present. Mrs McGarrigle was no longer there the following morning, and she was never seen by Robert again. On 16 February 1998 she was reported to the police as a missing person by her ex-husband. The exact date when she was last seen was marked as unknown, but it was noted that she had cashed a benefit cheque in Rothesay on 12 June 1997.

16. By September 1998 the police enquiry into Mrs McGarrigle's disappearance was being referred to by the Procurator Fiscal at Kilmarnock as a disappearance in suspicious circumstances, and by the Head of the Crown Office Appeals Unit and Crown Counsel as a murder enquiry. In the meantime, on 17 June 1998, the appellants were convicted of a number of sexual offences including offences against Robert McGarrigle. These offences had been committed between March 1993 and 27 July 1996 when Robert and his mother were living close to where the appellants were then living in Rothesay. On 18 August 1998 the

appellants were sentenced in respect of these convictions to periods of 6 years and 8 years imprisonment respectively and became subject to notification requirements under the Sex Offenders Act 1997. They were taken to Peterhead Prison to serve their sentences.

17. On 14 September 1998 the Procurator Fiscal at Kilmarnock wrote to the Governor of Peterhead Prison requesting that the appellants be released into the custody of the police for questioning. On 17 September 1998 they were taken from custody and detained by officers of Grampian Police under section 14 of the 1995 Act on suspicion, as that section requires, of having committed an offence punishable by imprisonment. The offence which they were suspected of having committed was conspiracy to murder. They were taken to a police station in Aberdeen where they were each questioned separately by two police officers.

18. Lauchlan was questioned from 11.14 to 16.45 hours, with breaks between 11.51 and 12.25 hours and 15.18 and 16.01 hours. He was cautioned at the start of his interview. He made it clear when it began that, on the advice of his solicitor, he would not be answering any questions that were put to him, and he maintained that attitude throughout what was a long and unproductive interview. One or two passages are, however, of interest.

19. During the early stages of the interview the police restricted themselves to asking a series of questions. Lauchlan remained silent in response to all of them. He was then told (Appendix 1, p 492, MS p 820): "What you've got to realize here is this is not going to go away we are not going to go away." Shortly afterwards Lauchlan broke his silence and this conversation took place (Appendix 1, p 497, MS p 825):

> "WL Look if you're going to charge me with something charge me I've had enough.
>
> DC2 I didn't mention, I have not mentioned charging you with anything.
>
> WL If not give this up.
>
> DC2 No I'm interviewing you William okay. I intend to carry out the interview with or without your co-operation I intend to carry out the interview."

20. As the interview went on the questioning became more direct. Lauchlan was asked (Appendix p 512, MS p 840): "Did you murder Allison McGarrigle?" He did not respond. This question was then put to him (Appendix p 515, MS p 843):

> "DC2 …I will ask you for a final time with the weight of the evidence against you and your friend knowing something about the disappearance of Allison McGarrigle will you help us to find her remains?"

There was no response, so the question was put to him again:

> "DC2 I'm not asking you at this stage if you killed her. I'm not asking you at this stage if you know who killed her. I'm asking you at this stage whether or not you would consider helping us to find her remains. It's a separate question. Are you? ….Are you prepared to help us to find Allison McGarrigle yes or no? Answer that one question I'll put to you …. I'll finish the interview and put the tape off. So you don't, you're not interested in helping us. Canny go any further than that Wullie"

21. As the interview drew to a close one further attempt was made to elicit a response (Appendix p 526, MS p 854):

> "DC1 …. If you did not have anything to do with Allison McGarrigle's death you have no reason not to speak to us, would you agree wi' that? You're not, your refusal to speak to us. The only reason I can think of is that you have something to do with her death. or that someone very close to you had something to do with her death and that out of loyalty you will not tell us. Which is it? Which is it William? Unless you can come up with another reason why you should refuse to speak to us about it. It's got to be one of those two. So which is it? Convince me otherwise."

As the interview was about to end these final questions were put (Appendix p 528, MS p 856):

> "DC2 Did you murder Allison McGarrigle? Did you?

DC1 Did you kill Allison McGarrigle? Were you present when someone else did?"

Lauchlan did not answer them. He remained silent.

22. O'Neill was questioned from 10.53 to 16.31 hours, with a break from 13.02 to 14.19 hours. He was cautioned at the start of the interview. He gave his name and age and said that he was unemployed. But he refused to answer any further questions, most of which were met by the words "No comment". Several minutes after the opening stage of the questioning there was this exchange (Appendix p 534, MS p 862):

"O/N You're going to charge me in't you? You'd be as well just charging me and taking me to court.

DC1 Charlie, Charlie, we're here, we've explained to you what we're doing and we're speaking to you right. It's as simple as that. … I am hoping that you might find it within yourself to give us some assistance, right. We're no up here to crucify Charlie O'Neill."

23. As the questioning went on there was no change in O'Neill's attitude. In the course of a long narrative of the information that was in the hands of the police he was told (Appendix p 578, MS p 906):

"I'm asking you quite bluntly Allison McGarrigle's dead, you're involved in her death, you're the only person that can say how much or how little involvement you have but from the information that we have here there is no doubt whatsoever that you are involved in her death….I'm giving you the opportunity sitting here in this room the noo tae say tae me, this is what happened, this is how it happened, it may even be why it happened ah don't know and here is what you need to know. Because its no going away Charlie, it'll never go away. It'll never go away."

Sometime later he was asked (Appendix p 597, MS p 925): "Did you kill her Charlie? Was she just too much bother for you?" He made no comment in reply. In the course of the next question he was told directly that the reason why he would not answer questions was quite simple: "Because you killed her." At the end of the interview one of the interviewing officers said (Appendix p 602, MS p 930):

> "Right what we'll do at the minute Charlie is we'll stop the interview. We'll need to go and seek some advice."

24. The appellants were not arrested or charged at the conclusion of their interviews, but were returned to Peterhead Prison to continue serving their sentences. Lauchlan was released on licence on 18 January 2002. In March of the following year, in breach of the notification requirements, he travelled to Spain. O'Neill was released on licence on 22 May 2003. He too travelled to Spain shortly afterwards in breach of those requirements and met Lauchlan. On 22 April 2004 they were arrested in connection with the apparent abduction of a fourteen year old boy. Steps were then taken for them to return to the United Kingdom to face charges that they were in breach of the notification requirements under the Sex Offenders Act. On 15 March 2005 they pled guilty to these charges, and on 4 April 2005 they were each sentenced to three years imprisonment. On 5 April 2005 they were charged with the murder of Allison McGarrigle and with concealing and disposing of her body in an attempt to pervert the course of justice. They appeared on petition at Kilmarnock Sheriff Court where they were committed for further examination and remanded in custody.

(c) articles 6(1) and (3)(c)

25. Article 6(1) of the Convention states that in the determination of his civil rights and obligations or "of any criminal charge against him", everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 2 AC 72, para 20, Lord Bingham of Cornhill analysed the article in this way:

> "First, the right of a criminal defendant is to a hearing. The article requires that hearing to have certain characteristics. If the hearing is shown not to have been fair, a conviction can be quashed and a retrial ordered if a fair trial can still be held. If the hearing is shown to have been by a tribunal lacking independence or impartiality or legal authority, a conviction can be quashed and a retrial ordered if a fair trial can still be held. If judgment was not given publicly, judgment can be given publicly. But time, once spent, cannot be recovered. If a breach of the reasonable time requirement is shown to have occurred, it cannot be cured."

In *Dyer v Watson* [2002] UKPC D1, [2004] 1 AC 379, 2002 SC (PC) 89, para 73, I said that these four rights can and should be considered separately, and that a complaint that one of them has been breached cannot be answered by showing that

the other rights were not breached: see also *Darmalingum v The State* [2000] 1 WLR 2303, 2307-2308, per Lord Steyn. Delay is therefore to be seen as affording an independent ground of relief, whether or not there was prejudice or any threat to the fairness of the trial. The fact that an accused person has been convicted after a fair hearing by a proper court cannot justify or excuse a breach of his guarantee of a disposal of the charge against him within a reasonable time: *Dyer v Watson*, para 94.

26. As Lord Bingham observed in *Attorney General's Reference (No 2 of 2001)*, para 26, the requirement that a criminal charge be heard within a reasonable time poses the inevitable questions: when, for the purposes of article 6(1), does a person become subject to a criminal charge? When, in other words, does the reasonable time begin? That is the question to which this issue is directed.

27. But it is necessary also to notice article 6(3), which states that everyone "charged with a criminal offence" has certain minimum rights, including "(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." This is because it has been recognised that a person has a Convention right of access to a lawyer under that article, read in conjunction with article 6(1), before answering any questions put to him by the police in circumstances where the questioning might affect his right to a fair trial: *Salduz v Turkey* (2008) 49 EHRR 421; *Cadder v HM Advocate* [2010] UKSC 43, 2011 SC (UKSC) 13, [2010] 1 WLR 2601.

28. The question posed by article 6(1) read together with article 6(3) is a different question from that posed by the reasonable time guarantee, although both questions require a date to be identified. That it should be within a reasonable time is one of the characteristics required of a hearing by article 6(1): see para 25, above. So too is the requirement that the hearing is fair. But the answer to the question whether the hearing is fair may depend on things that happened before it is known when the hearing will take place, or whether there will be a hearing at all. So the question can be put this way: when does the person become entitled to that protection to preserve his right to a fair trial? When, in other words, is he to be taken to have been "charged" for the purposes of those articles?

29. In *Ambrose v Harris* [2011] UKSC 43, [2011] 1 WLR 2435, 2012 SC (UKSC) 53, the questions were raised as to the correct starting point for the purposes of the right to legal advice under article 6 in accordance with the principle in *Salduz*. In para 62 I said:

> "The correct starting point, when one is considering whether the person's Convention rights have been breached, is to identify the moment as from which he was charged for the purposes of article 6.1. The guidance as to when this occurs is well known. The test is whether the situation of the individual was substantially affected: *Deweer v Belgium* [1980] 2 EHRR 439, para 46; *Eckle v Germany* [1982] 5 EHRR 1, para 73. His position will have been substantially affected as soon as the suspicion against him is being seriously investigated and the prosecution case compiled: *Shabelnik v Ukraine* (Application No 16404/03) (unreported) given 19 February 2009, para 57. In *Corigliano v Italy* [1982] 5 EHRR 334, para 34 the court said that, whilst 'charge' for the purposes of article 6.1 might in general be defined as the official notification given to the individual by the competent authority of an allegation that he has committed a criminal offence, as it was put in *Eckle's* case 5 EHRR 1, para 73, it may in some instances take the form of other measures which carry the implication of such an allegation."

As the Appeal Court indicated when it gave leave to appeal on this ground, it is with reference to this passage that further guidance is needed, as the appellants' argument is that the date of their police interviews should be taken as being the date when the reasonable time begins: [2012] HCJAC 51, paras 2 and 3.

30. Of the four cases decided by the Strasbourg court to which I referred in para 62 of *Ambrose*, however, only *Shabelnik v Ukraine* was concerned with the protection that is afforded by article 6(3)(c). *Corigliano* and *Eckle* were concerned with the reasonable time guarantee, and *Deweer* was concerned with the question whether the proceedings were within the scope of the article. The discussion in *Shabelnik*, para 52, of the manner in which articles 6(1) and (3)(c) are to be applied makes the point that article 6 may be relevant before a case is sent for trial, if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions: see also *Imbroscia v Switzerland* (1993) 17 EHRR 441, para 36. In *Ambrose v Harris*, para 63 I said that the Lord Advocate's submission that the protection of article 6(3)(c) was not engaged until the individual was taken into custody could not withstand the emphasis that the Strasbourg court puts on the consequences of an initial failure to comply with its provisions, as in *Salduz's* case, para 50 and *Zaichenko v Russia* (Application No 39660/02) (unreported) given 18 February 2010, para 35. These remarks were directed to the first of the three characteristics of a hearing required by article 6(1) – that the hearing is fair – not to the reasonable time guarantee.

31. Yet the court went on in *Shabelnik v Ukraine*, para 52, to say this:

> "The manner in which article 6(1) and (3)(c) is to be applied during the preliminary investigation depends on the special features of the proceedings involved and on the circumstances of the case. The moment from which article 6 applies in 'criminal' matters also depends on the circumstances of the case, as the prominent place held in a democratic society by the right to a fair trial prompts the Court to prefer a 'substantive', rather than a 'formal', conception of the 'charge' contemplated by article 6(1)."

This passage suggests, as does the first sentence of para 62 in *Ambrose*, that the date when a person becomes subject to a "criminal charge" and the reasonable time begins is the same as that when the person is "charged" for the purposes of article 6(3)(c): see also *Yankov and Manchev v Bulgaria* (Applications Nos 27207/04 and 15614/05) (unreported) given 22 October 2009, para 18, where the starting point was taken to be the date when the police took a statement from the applicant in which he confessed to taking part in the commission of the offence and not the date when a formal charge was directed against him. In some cases the same date may be equally appropriate for each of these two purposes. But they are separate guarantees, and it is not obvious that the relevant date for each of them must be the same.

32. In *Salduz v Turkey*, para 50 the Grand Chamber pointed out that the right in article 6(3)(c) is one element, among others, of the concept of a fair trial in criminal proceedings in article 6(1). In para 55 it said that, in order for the right to a fair trial to remain sufficiently "practical and effective", article 6(1) required that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police unless there were compelling reasons to restrict that right. In *Eckle v Germany*, on the other hand, the court said in para 73 that in criminal matters the reasonable time referred to in article 6(1) begins to run as soon as a person is 'charged', and that this may occur on a date prior to the case coming before the trial court, such as the date of arrest, the date when the person was officially notified that he would be prosecuted or the date when the preliminary investigations were opened. In *Attorney General's Reference (No 2 of 2001)*, para 27 Lord Bingham said that as a general rule the relevant period for this purpose will begin at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him – a formulation which he hoped might be easier to apply in this country.

33. The reasoning in paras 50-55 of *Salduz v Turkey* at no point examines the meaning of the word "charged" but concentrates instead on the requirements of a fair trial. This suggests that different approaches can be applied to the two guarantees as to what is the relevant date. Article 6(3)(c), which applies where a person is "charged with a criminal offence", must now be read in a way that makes the guarantee of a fair trial practical and effective. The first interrogation of a

suspect may take place, and often does, before the person is officially alerted to the likelihood of criminal proceedings against him. To wait until the stage is reached when there is sufficient evidence to bring a charge before the suspect has the right of access to a lawyer could seriously prejudice his right to a fair trial. So the focus, for the purposes of this part of article 6, is on the state of affairs when the suspect is first interrogated.

34. Contrast that with the focus of the reasonable time guarantee in article 6(1). It is on the running of time, not on what is needed to preserve the right to a fair trial. Its rationale is that a person charged should not remain too long in a state of uncertainty about his fate: *Wemhoff v Federal Republic of Germany* (1968) 1 EHRR 55, para 18; *Stögmuller v Austria* (1969) 1 EHRR 155, para 5. As Lord Bingham said in *Attorney General's Reference (No 2 of 2001)*, para 16, a person who is facing conviction and punishment should not have to undergo the additional punishment of protracted delay, with all the implications that it may have for his health and family life. So the date as from which time runs is taken to be the date as from which his position has been substantially affected by the official notification. Practice as to how these matters are handled varies from state to state, but in the United Kingdom this could well be some time after the date when he was first subjected to police questioning.

(d) discussion

35. It is, of course, plain that the appellants were entitled to the protection of article 6(1) read together with article 6(3)(c) on 17 September 1998 when they were interviewed. *Salduz v Turkey* had not yet been decided, nor had *Cadder v HM Advocate*. So they were not offered the protection of having a lawyer present during the police questioning. In the event the absence of a lawyer made no difference, because the appellants knew perfectly well that they were entitled to remain silent and were able steadfastly to resist all attempts to persuade them to provide the police with answers that might incriminate them. Their position was, however, indistinguishable from that of the appellant in *Cadder*. Like him, they were being questioned as detainees under section 14 of the 1995 Act. They were also being questioned as suspects. In *Ambrose v Harris*, para 63, I said that the moment at which the individual is no longer a potential witness but has become a suspect provides as good a guide as any as to when he should be taken to have been charged for the purposes of article 6(1). For completeness I should have said "for the purposes of article 6(1) read in conjunction with article 6(3)(c)", as it is the guarantee of a fair trial that the *Salduz* protection seeks to serve.

36. I would hold therefore that the date as from which reasonable time begins to run is the subject of a separate guarantee from the guarantee that the trial will be fair, and that it requires to be approached separately. It is not enough that the

appellants were being subjected to questioning in circumstances that might have affected their right to a fair trial. The question is whether they were charged on that date, in the sense indicated by *Eckle v Germany*, para 73, as explained by Lord Bingham in *Attorney General's Reference (No 2 of 2001)*, para 27. Were they officially notified that they would be prosecuted as it was put in *Eckle*, or officially alerted to the likelihood of criminal proceedings against them as it was put by Lord Bingham, when they were being interviewed?

37. The appellants were certainly not at any stage of their interviews "charged" in the formal sense. They both asked the police whether they were going to be charged, and they both received indications to the contrary: see paras 19 and 22, above. Lauchlan was told that he was being interviewed. In O'Neill's case the interviewer avoided the question. But the fact that the question was asked at all is quite revealing. The appellants had been through this process before. They knew what to expect. It must have been obvious to them that the reason why they were not being charged was that the police did not yet have enough evidence to do so. They were both asked directly whether they had killed Mrs McGarrigle. But, in the context in which these questions were being put, it cannot be said that that this amounted to an official notification that they were likely to be prosecuted. All the indications during the prolonged questioning to which they were subjected were that the police were not in a position to report the proceedings with a view to prosecution without having obtained more evidence.

38. The attitude of the police at this stage was entirely understandable. They had not yet established that Mrs McGarrigle was dead. Her body had not been found. In the absence of any evidence to show where, when and how she had died, they were in no position to initiate criminal proceedings against the appellants for her murder. All they had were suspicions based on a volume of circumstantial evidence. That was why so much of the appellants' questioning was directed to trying to establish where her body was. It was not until 5 November 1998 that the missing person investigation was scaled down due to lack of progress. The police were still seeking additional evidence by means of press releases, including publications in the *Big Issue* magazine in June 2002. In August 2003 they received hearsay information to the effect that the appellants had killed Mrs McGarrigle and disposed of her remains in a wheelie bin which was thrown off the back of a boat in Largs. That led to the further inquiries that resulted in their being in a position to charge the appellants on 5 April 2005. That was not the state of affairs when they were being interviewed.

39. I would therefore hold that the date when the reasonable time began was 5 April 2005, and not 17 September 1998 when the appellants were detained and interviewed under section 14 of the 1995 Act.

Apparent bias

(a) the facts

40. The indictment which was served on the appellants on 10 September 2008 contained eighteen charges, of which the first three concerned the murder of Mrs McGarrigle. The remaining charges were of, or were related to, sexual offences against children. On 17 July 2009, after a preliminary hearing, Lord Kinclaven ordered that the murder charges were to be separated from the sexual offences charges. The consequence of his determination was that the appellants were tried in 2010 in a sequence of two trials before the same judge, Lord Pentland, but before different juries and with a different Advocate Depute. The trial of the sexual offences charges took place between 26 April and 12 May 2010. The Crown accepted pleas of not guilty to some of those charges before the trial began. It withdrew the libel on a number of others at the close of the Crown case, and a submission of no case to answer was sustained with regard to one more. In the result three charges went to the jury, all of which related to sexual offences against boys who were aged 14 and 6 years old at the time of the offences. O'Neill was found guilty on all three, and Lauchlan was found guilty on two of them.

41. When the verdicts had been returned and recorded the Advocate Depute moved for sentence. He tendered a schedule of previous convictions in respect of each appellant. He drew attention to the fact that Lauchlan had been convicted in 1998 of two charges of sodomy and four charges of shameless indecency and that in 2005 he had been convicted of offences under sections 2 and 3 of the Sex Offenders Act 1997. He also drew attention to similar convictions in 1998 and 2005 in the case of O'Neill. He then mentioned that the Crown had lodged an application for a lifelong restriction order, for which a risk assessment under section 210B of the 1995 Act (as inserted by section 1 of the Criminal Justice (Scotland) Act 2003) would be required, to be made in both cases. He asked that consideration of this matter be continued until the conclusion of the trial on the murder charges. He explained, for the benefit of the jury who had not been made aware of the fact that there was to be another trial, that for this reason there had been an embargo on public reporting of the trial on the sexual offence charges. He said that, as there would be a prejudice to the next trial if the judge were to do any public act at that stage, the matter should be continued. Having ascertained that the solicitor advocates for the defence had no objection to the continuation, the trial judge addressed the appellants.

42. The judge told them first that, as he intended to make the appropriate order under the Sexual Offences Act 2003, he was required by the legislation to state to them both that they had again been convicted of sexual offences to which Part 2 of

that Act applied and that they were subject to the notification requirements contained in that Act. He told them that the court had certified those facts, and that the clerk of court would give them a copy of the relevant certificate together with a notice which gave further details of the notification requirements with which they must comply. Then, while the jury were still present, he said this:

> "Having regard to your very serious records, and to the nature of the offence of which you stand convicted on the present indictment, it is clear that you are both evil, determined, manipulative and predatory paedophiles of the worst sort. Beyond that I intend to reserve any observations which I may have to make until the outcome of the next stage of the proceedings is known; that is after you have been tried on the remaining charges to which the advocate depute has made reference. I shall therefore adjourn all questions of sentence until Friday of next week, and I shall continue consideration of the Crown's motion made under section 210B of the 1995 Act for an assessment order."

43. No objection was made at the start of the murder trial on 17 May 2010 to the fact that Lord Pentland was to preside over that trial too, nor was any motion made that he should recuse himself. Two events occurred in the course of that trial which were later commented on. The first occurred on 27 May 2010 when an adjournment of the trial was sought on behalf of O'Neill by his solicitor advocate, Mr Carroll. He was said to be suffering from a severe headache and unable to follow what was going on. This was said to be a chronic problem for which he had a prescribed medication which he required to take. The trial judge did not accede to this request immediately but closely questioned Mr Carroll and invited the Advocate Depute to make enquiries with the prison authorities. During a brief adjournment O'Neill was given paracetamol and then indicated that he was fit to continue. The second event occurred when a Crown witness, DC Wilkie, became incoherent and obviously unwell while being cross-examined by Mr Carroll. The judge adjourned the proceedings immediately to allow the witness to receive medical treatment. He was fit to continue and complete his evidence the next day.

(b) the issue

44. This issue was raised on behalf of O'Neill only in the Appeal Court. As has already been explained in para 10 above, it was the subject of an amended note of appeal which was lodged shortly before the hearing before the Appeal Court of his application under section 107(8) of the 1995 Act. Mr McVicar did not seek to adopt it on behalf of his client Lauchlan, although he pointed out that if the argument was sound its effect would be to his client's benefit.

45. The devolution issue seems only to have emerged in the course of oral argument in the Appeal Court when it was considering the applications for leave to appeal to this court. It decided to give leave on this issue because it was recognised that the splitting of the trial into two phases before two juries and the resulting presentation of previous convictions and the judge's remarks at the end of the first phase were very unusual circumstances. Mr Carroll said that the fact that the trial judge was shown his client's previous convictions was not important to his argument, as it was not unusual for a judge to see the accused's previous convictions before the start of or during a trial: *O'Hara v HM Advocate* 1948 JC 90; *Leggate v HM Advocate* 1988 JC 127; 1995 Act, section 275A (as inserted by section 10(4) of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002). But they were the trigger, as he put it, for the comments by the trial judge on his client's character. It was to those comments that he directed his argument.

46. The issue has been focussed in the sixth issue in the statement of facts and issues on the appellants' behalf in these terms:

> "Whether (i) the conduct of the trial judge can be said to have given rise to a legitimate concern as to the appearance of an absence of impartiality in the context of the appellants' right to a fair trial by an impartial tribunal in terms of article 6(1) of the European Convention on Human Rights; and (ii) if the answer to issue 6(i) is affirmative, whether the act of the Lord Advocate in persevering with the trial was incompatible with the appellants' rights under article 6(1)."

(c) the authorities

47. The test for apparent bias which was laid down in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357 was designed to express in clear and simple language a test which was in harmony with the objective test which had been applied by the Strasbourg court. It is set out in para 103 of the judgment in that case in these terms:

> "The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

In *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187, [2003] ICR 856, para 14 Lord Steyn said that the purpose and effect of the modification which it made to the common law were to bring the common law rule into line with the Strasbourg jurisprudence. Lord Bingham of Cornhill made the same observation in *R v*

Abdroikov [2007] UKHL 37, [2007] 1 WLR 2679, para 14 when he said that there is now no difference between the common law test of bias and the requirement under article 6 of an independent and impartial tribunal. In *Szypusz v United Kingdom* (Application No 8400/07) (unreported) given 21 September 2010, para 39 the Strasbourg court acknowledged that its jurisprudence had been taken into account in *Porter v Magill*, and set out that test. It also acknowledged, in para 40, the further guidance in *Helow v Secretary of State for the Home Department* [2008] UKHL 62, 2009 SC (HL) 1, [2008] 1 WLR 2416 with regard to the attributes of the fair-minded observer as background to the issue that it had to decide.

48. The court is invited in this case to examine the allegation of apparent bias after the proceedings that are said to have been affected by it have taken place. But the principles to be applied are the same as those which determine the question whether, because of things he has said or done previously, the judge should recuse himself. So it may be helpful to look at cases in which it was the judge's decision not to recuse himself that was in issue.

49. In *President of the Republic of South Africa v South African Rugby Football Union*, 1999 (4) SA 147, 177 the Constitutional Court of South Africa made these comments on the position of judges (in that case, members of the Constitutional Court itself) who, it was said, ought to have recused themselves:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

50. That passage was quoted with approval by the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para 21. It referred also in

paras 22-24 to three extracts from Australian authorities about the duty of the judge to hear and determine the cases allocated to him which it found to be persuasive: *In re JRL, EX arte CJL* (1986) 161 CLR 342, 352; *In re Ebner* (1999) 161 ALR 557, para 37; *Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* [1999] VSCA 35. In para 25 of *Locabail* there is an extensive discussion of the grounds on which objection to a judge could or could not reasonably be taken. While it was emphasised that every application for recusal must be decided on the facts and circumstances of the individual case, the court noted that a real danger of bias might well be thought to arise

> "if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion."

51. In *JSC BTA Bank v Mukhtar Ablyazov (Recusal)* [2012] EWCA Civ 1551, the question was whether a judge had been right not to recuse himself as the nominated judge of trial, in circumstances where he had had to hear, prior to trial, an application to commit one of the parties for contempt of court and had found a number of contempts proven, by reason of the doctrine of apparent bias in *Magill v Porter*. Rix LJ, delivering a judgment with which Toulson and Maurice Kay LJJ agreed, pointed out in para 65 that, although the principles of apparent bias are now well established and were not in dispute in that case, the application of them is wholly fact sensitive. In para 70 he said that it seemed to him that the critical consideration is that what the first judge does, he does as part and parcel of his judicial assessment of the litigation before him:

> "He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias."

That was a case of civil litigation, but I do not think that there is any difference in principle between the position of a judge in a case of that type and the situation where it is said that there is apparent bias on the part of a judge in a criminal trial.

52. In *Helow v Secretary of State for the Home Department*, the question was whether there was a real possibility that Lady Cosgrove was biased by reason of her membership of an association and her receipt of its quarterly publication which contained some articles which were fervently pro-Israeli and antipathetic to the PLO, of which the appellant was a member. Among the reasons that were given

for holding that there was not any real possibility of bias in her case were that the context is crucially important: para 4, by myself; that Lady Cosgrove was a professional judge with years of relevant training and experience: para 23, per Lord Rodger of Earlsferry; and the taking of the judicial oath, albeit as more of a symbol than of itself a guarantee of the impartiality which any professional judge is by training and experience expected to practise and display: para 57, per Lord Mance.

(d) discussion

53. What then of this case? The obvious starting point is the context. When he made his remarks, Lord Pentland was addressing the appellants in the performance of his judicial function. The fair-minded and informed observer would appreciate that he was a professional judge who had taken the judicial oath and had years of relevant training and experience. He would hear and understand the context in which the remarks were made. They were made in open court from the bench while he was performing his duty as a judge at the trial. He would appreciate too, that when the judge was presiding over the next trial, he would be doing so in the performance of his duty to preside over that case. He would understand, of course, that while the facts were a matter for the jury, the judge too had functions to perform which required him to be impartial. But it would only be if the judge expressed outspoken opinions about the appellants' character that were entirely gratuitous, and only if the occasion for making them was plainly outside the scope of the proper performance of his duties in conducting the trial, that he would doubt the professional judge's ability to perform those duties with an objective judicial mind.

54. The context indicates that nothing like that occurred here. The judge had just told the appellants, as he was required to do, that they were subject to the notification requirements. He had been told by the Advocate Depute that an application was to be made for a risk assessment order. He had been asked to defer consideration of it until after the conclusion of the murder trial, but the appellants were entitled to be given some indication as to what they might expect. His comments on the appellants' character were directly relevant to that issue. For reasons that would have been obvious in the light of the Advocate Depute's submissions, the judge had to restrict himself to those few comments. He told them that he intended to reserve any further observations until the outcome of the next stage of proceedings was known. The observer would also understand that, if the judge had been passing sentence on the appellants, the remarks he made would have been entirely appropriate as background to the sentences which he would have been obliged to pass.

55. There is one other circumstance which, in this case, can properly be taken into account. The appellants and their solicitor advocates were all present when the remarks were made, and they were all there again at the commencement of the murder trial. Yet no objection was made by any of them either at the end of the sexual offences trial or at the start of the murder trial to the fact that Lord Pentland was to preside over the murder trial. The fair-minded and informed observer would not have overlooked this fact. It might well have seemed to him to be odd, if there was any real basis for an objection, that those with the most immediate interest did not take the opportunity of raising the point at that stage. Mr Carroll's explanation was that a challenge at that stage would not have been likely to succeed, as the judge would almost certainly have rejected it. He also said that his objection would have fallen away if the murder trial had been conducted fairly. He pointed to the contrast between the judge's handling of the incident when he told the judge that his client was unwell and his handling of the incident when DC Wilkie became ill in the witness box.

56. I am not persuaded by Mr Carroll's explanation. The point which he had to answer is not, I would stress, one of waiver. It is simply that the fair-minded and informed observer would take account of the fact that it did not seem to occur to those with the most obvious interest to do so, or their advisors, that the judge had trespassed beyond the proper performance of his duties when he commented on the appellants' character. As for his conduct of the trial, the judge's concern that no proper reason had been given for interrupting the proceedings when he was told that the appellant was not well and his reaction to the sudden illness of DC Wilkie in the witness box were both readily understandable. I do not find here any grounds for doubting his impartiality. But the only relevant question is whether he should, or should not, have been conducting the trial at all in view of the comments he made at the end of the previous trial about the appellants' character.

57. For these reasons I cannot find any basis for the suggestion that the judge was apparently biased, and I would reject it. It follows that the Lord Advocate did not act incompatibly with the appellants' article 6(1) right to a fair trial by proceeding with the appellants' trial on the murder charges before Lord Pentland. We were addressed on the question whether the appellants waived their right to found on their Convention right, but I do not need to examine that issue as I do not accept that their right was breached.

Conclusion

58. I would determine the two compatibility issues that are before us by holding (1) that the date when the reasonable time began for the purposes of the appellants' article 6(1) Convention right was 5 April 2005; and (2) that the Lord Advocate's act in proceeding with the trial on the murder charges was not incompatible with

the appellants' article 6(1) right to a trial before a tribunal that was independent and impartial. The proceedings must now be remitted to the High Court of Justiciary.