Hilary Term

[2018] UKSC 17

On appeal from: [2015] NIQB 4

JUDGMENT

In the matter of an application by Kevin Maguire for Judicial Review (Northern Ireland)

before

Lord Kerr

Lord Reed

Lord Hughes

Lady Black

Lord Lloyd-Jones

JUDGMENT GIVEN ON

21 March 2018

Heard on 19 October 2017

Appellant	Respondent
Aidan O'Neill QC	David A Scoffield QC
Anita Davies	Donal Sayers
(Instructed by KRW Law LLP)	(Instructed by Elliott Duffy Garrett Solicitors)

LORD KERR: (with whom Lord Reed, Lord Hughes, Lady Black and Lord Lloyd-Jones agree)

Introduction

1.
The appellant, Kevin Maguire, was a defendant in criminal proceedings in the Crown Court in Belfast. By the issue of a legal aid certificate dated 7 June 2012, he became entitled to public funding to instruct a solicitor and two counsel to appear on his behalf in those proceedings. The certificate was issued under article 29(2) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 (the 1981 Order).

2.
The appellant's first trial, before a judge sitting with a jury, began on 28 November 2012 at Belfast Crown Court. He was represented by Mark Barlow of counsel (described in these proceedings as

“leading junior counsel”) and Clive Neville, a solicitor-advocate who is a member of the firm of Trevor Smyth & Co, solicitors. They received instructions to appear for Mr Maguire from Chris Mitchell who is a solicitor in the same firm as Mr Neville, Trevor Smyth & Co The jury in the first trial were unable to reach a verdict and they were discharged.

3.
The appellant was tried again. That re-trial was originally scheduled to begin on 13 November 2013. Mr Maguire again wished to have Mr Barlow as his “leading counsel”. In the meantime, however, Mr Barlow had appeared before a summary panel of the Bar Council, convened by the professional conduct committee of the council in relation to two other cases in which he had appeared as “leading counsel”. In both cases a solicitor advocate had acted as Mr Barlow’s “junior”. Mr Barlow is not Queen’s Counsel. He was called to the Bar of England and Wales in 1992 and to the Bar of Northern Ireland in 2006. He is junior counsel in both jurisdictions. His appearance before the committee, therefore, was to answer charges that he had been in breach of rule 20.11 of the code of conduct for the Bar of Northern Ireland. At the material time this rule stated that:

“In criminal cases where legal aid has been granted for two barristers one should be a senior counsel. Where, exceptionally, a senior counsel is unavailable, it is permissible for a junior to lead. This junior should be experienced and be of not less than 15 years’ standing.”

4.
After some discussion before the summary panel as to the extent of the exceptionality provided for by this rule, Mr Barlow admitted that he had been in breach of it. In neither of the two cases had it been established that senior counsel was not available.

5.
Following this, Mr Barlow informed the appellant that he could not act as his leading counsel. The appellant, and subsequently his current solicitors, engaged in correspondence with the Bar of Northern Ireland about this. The solicitors asserted that if Mr Barlow was not permitted to appear as the appellant’s leading counsel, this would constitute a violation of Mr Maguire’s rights under article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The respondent rejected this claim. Mr Maguire’s retrial duly proceeded in January 2015. He was acquitted of seven of the 11 counts on which he had been charged. The jury failed to reach a verdict on the remaining four counts. The prosecution has indicated that it is not intended that the appellant be required to stand trial again on those counts.

The judicial review application

6.
The appellant applied for leave to issue judicial review proceedings on 9 June 2014. He claimed that the Bar Council’s decision to “impede” his choice of lead advocate violated his rights under article 6.3(c) of ECHR. He asserted that his right to choose counsel was limited only by the interests of justice test articulated in that provision. Leave to apply for judicial review was granted on 6 October 2014.

7.
Following a hearing before a Divisional Court (Sir Declan Morgan LCJ, Coghlin and Gillen LJJ), judgment was delivered on 19 January 2015, dismissing the appeal (Neutral Citation No [2015] NIQB 4). All three members of the Divisional Court gave judgments. Morgan LCJ considered that the right to choose one’s counsel; was “a qualified right” - para 36; “the defendant’s wish to have particular

legal assistance may be overridden where there are sufficient grounds for concluding that this is necessary in the interests of justice." Coghlin LJ considered that rule 20.11 of the code of conduct was "fair and proportionate", designed as it was to provide a "basic generic safeguard" for a defendant, victims and the general public. That safeguard ensured that in cases involving a charge of murder or where there were exceptional difficulties, legal representation should comprise senior and junior counsel. The overall purpose of the code of conduct was to guarantee that the lay client was represented by the most able and experienced counsel available - para 5. No breach of article 6.3 had occurred - para 12. Gillen LJ held that the code of conduct accorded with the triangulation of interests - those of the accused, those of the victim and his or her family and the interests of the public - identified by Lord Steyn in Attorney General's reference (No 3 of 1999) [2001] 2 AC 91, 118. There was therefore no violation of article 6.3(c) - para 23.

The statutory regime

8.
Article 29(1) of the 1981 Order provides that any person returned for trial on certain indictable offences, as specified in the sub-article, is entitled to free legal aid in the preparation and conduct of his defence at the trial. For that purpose, he has solicitor and counsel assigned to him according to rules made under article 36, if a criminal aid certificate is granted in accordance with the succeeding provisions of article 29.

9.
The relevant rules are the Criminal Aid Certificates Rules (Northern Ireland) 2012 (the 2012 Rules). Rule 4(1) of these provides for the assigning of a solicitor and rule 4(5) makes provision about counsel as follows:

"A criminal aid certificate granted under article 29 of the Order -

(a) includes representation by one counsel; and

(b) may include representation by two counsel only in the cases specified and in the manner provided for by the following provisions of this rule."

10.
Rule 4(6) provides that where the charge is one of murder, or the case presents exceptional difficulties, the certifying authority may certify that in its opinion the interests of justice require that the assisted person shall have the assistance of two counsel. (The certifying authority in this context is a court - article 29(2) of the 1981 Order. In this case, the certificate for two counsel was issued by a district judge.) Exceptionality for the purposes of rule 4(6) is defined in rule 4(7) as where the case "for or against the assisted person involves substantial novel or complex issues of law or fact, such that it could not be adequately presented by one counsel."

11.
Rule 4(11) provides:

"Without prejudice to paragraphs (6) and (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, the judge shall grant such a certificate."

12.

The grant of a certificate is therefore mandatory where required for the protection of an accused person's Convention rights and discretionary where the offence is murder or one which comes within the exceptional category. Where, on either account, a certificate under rule 4(5)(b) for two counsel is granted, rule 4(3) becomes relevant:

"Any member of the Bar who is practising in Northern Ireland and is willing to appear as counsel for legally aided persons in criminal cases may be instructed, on behalf of the assisted person, by the solicitor assigned under paragraph (1), and, in any case in which the certifying authority has granted a certificate as provided for under paragraph (5)(b), one such member of the Bar and a member of the Bar, being one of Her Majesty's Counsel who is practising in Northern Ireland or a senior counsel practising outside of Northern Ireland, may be so instructed."

13.
The Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (the 2005 Rules) made provision for the payment of costs in legally aided proceedings in the Crown Court. The 2005 Rules were amended by the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2011 (the 2011 Rules). Rule 2 of the 2005 Rules, as amended by rule 6 of the 2011 Rules, provides that counsel means "counsel assigned under a criminal aid certificate granted under article 29 of the [1981] Order, or counsel who undertook the defence of a person at the request of the judge under article 36(2) of the Order".

14.
Rule 4A of the 2005 Rules deals with the payment of enhanced costs where a solicitor conducts a trial or hearing in the Crown Court. Paragraphs 1 and 4 are the relevant provisions. They provide:

"(1) Where a solicitor exercising his right of audience under section 50 of the Judicature (Northern Ireland) Act 1978 conducts a trial or hearing without counsel he shall be entitled to an enhancement of his costs in accordance with this rule.

...

(4) This rule also applies where a criminal aid certificate was granted for two counsel and a solicitor conducts the trial or hearing with or without a second counsel."

15.
In the course of the appeal before this court, a question arose concerning the use of the term "solicitor advocate" in the relevant legislation and rules. In written submissions made by the respondent after the hearing, the following information and explanations were provided. There is no reference to the term in the 1981 Order. Rule 2 of the 2005 Rules (as made) provided that the term "advocate" included a solicitor exercising a right of audience under section 50 of the Judicature (Northern Ireland) Act 1978 (the 1978 Act) (which gave a general right of audience to solicitors to conduct proceedings in the Crown Court, whether or not he has been certified by the Law Society as an "advanced advocate").

16.
The term "solicitor advocate" appeared several times in the 2005 Rules, as they were originally made. The term also appeared in the Legal Aid for Crown Court Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2009 (the 2009 Rules), within a "rates for payment table" inserted in the 2005 Rules by rule 17 of the 2009 Rules.

17.

The 2011 Rules amended the 2005 Rules by substituting “counsel” for “advocate” where that term had appeared in the latter rules. It also provided for the omission of the definition of “advocate” which had been contained in rule 2 of the 2005 Rules. The 2011 Rules also provided that Schedule 1 to the 2005 Rules be amended and that Schedule 2 should be removed. The upshot of all this is that no reference to “solicitor advocate” remains within the 2005 Rules. The relevant terms are simply “counsel” or “solicitor”. As regards the present appeal, therefore, this means that Mr Neville, when appearing for the appellant in the Crown Court, fell to be paid by the legal aid authorities as a solicitor and in no other capacity. A solicitor has rights of audience under section 50 of the 1978 Act but is not included in the expression “counsel” for the purpose of calculating payment of legal aid, nor for the purpose of the two counsel provision in rule 4(3) of the 2012 Rules.

Article 6 of ECHR

18.
Article 6.1 of ECHR provides:

“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 …”

19.
The context for the more explicit rights contained in the succeeding paragraphs of article 6 is set by this overarching provision. The emphasis is on the need for fairness. Trial by an independent and impartial tribunal is obviously vital to the achievement of the goal of fairness. Likewise, the presumption of innocence provided for in para 6.2 and the requirements stipulated in article 6.3(a) that everyone charged with a criminal offence must be informed promptly and in detail “of the nature and cause of the accusation against him”. So too, the obligation in article 6.3(b) that a person charged with a criminal offence must have adequate time and facilities for the preparation of his defence and the requirement in article 6.3(d) that an accused person be permitted to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. These requirements, together with that contained in article 6.3(e) to the effect that, if necessary, the accused person should have the free assistance of an interpreter, were obviously conceived as what is described in the prefatory words of article 6.3 as “minimum rights” to be essential safeguards for a fair trial.

20.
It is against that background that the provision which is critical in this appeal, article 6.3(c) of ECHR, falls to be considered. It provides that every person charged with a criminal offence shall have the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

21.
Sensibly, Mr O’Neill QC for the appellant accepts that this does not confer an absolute right on an accused person to insist upon public funding of the services of a lawyer of his choice to defend him. He argues, however, that the right is one which, in common with other qualified rights under the Convention, should only be interfered with in circumstances which can be shown to be justified. Thus, argues Mr O’Neill, the appellant is entitled to demand that he be defended by Mr Barlow and Mr Neville, unless it can be shown by the public authority that would seek to refuse that demand, that their refusal was justified. The appellant’s case is therefore cast as entitlement to a right to choose

not only his lawyers but also that they be paid at public expense unless there is a proportionate justification for denying him that entitlement. Moreover, his claim extends to being entitled to allocate the role to be played by Mr Barlow - as soi disant leading counsel - in his trial.

22.
For the respondent, Mr Scoffield QC contends that the justification/proportionality analysis is inapt. This is not a case, he argues, where an admitted interference with a qualified Convention right calls for justification. Rather, he says, it is one where the rules governing representation of the appellant at his criminal trial (specifically that which requires that, in other than exceptional circumstances, he be represented by senior and junior counsel) be examined in order to ascertain whether they infringe his right to a fair trial. Thus, it is not a case of the appellant having entitlement to the full panoply of the particular type of representation that he wishes to have and that this entitlement can only be denied where justification for interference with it can be shown. The appellant's claim fails, Mr Scoffield argues, at the anterior stage of the inquiry, viz whether there is anything about the rule embodied in rule 20.11 of the code of conduct which impinges on Mr Maguire's right to a fair trial.

23.
In order to decide which of these fundamentally different approaches to the application of article 6.3(c) should prevail, it is necessary to examine the jurisprudence of the European Court of Human Rights (ECtHR).

The case law of ECtHR

24.
In Correia de Matos v Portugal (Application No 48188/99) the applicant had been committed for trial in Portugal for insulting a judge. The judge investigating that charge assigned a lawyer to represent him. Mr de Matos objected. He wanted to represent himself. He relied on article 6.3(c) of the Convention. He appealed against the order of committal. His appeal was declared inadmissible because it had not been lodged by a lawyer and because he was forbidden to defend himself in person. An appeal to the Constitutional Court was dismissed for the same reason. The Strasbourg court observed that the European Commission on Human Rights (ECmHR) had ruled on a number of occasions that article 6.3(c) did not invest an accused person with the right to decide how the fair trial of the charge against him should be secured. In particular, in X v Norway (decision of 30 May 1975, DR 3, p 43) ECmHR had held that "although this provision guarantees that proceedings against the accused will not take place without adequate representation for the defence, it does not give the accused the right to decide himself in what manner his defence should be assured. The decision as to whether the applicant will defend himself in person or be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, depends upon the applicable legislation or rules of court".

25.
The court in Correia de Matos saw no reason to depart from previous case law. It said:

"… in this area it is essential for applicants to be in a position to present their defence appropriately in accordance with the requirements of a fair trial. However, the decision to allow an accused to defend himself or herself in person or to assign him or her a lawyer does still fall within the margin of appreciation of the Contracting States, which are better placed than the Court to choose the appropriate means by which to enable their judicial system to guarantee the rights of the defence.

It should be stressed that the reasons relied on for requiring compulsory representation by a lawyer for certain stages of the proceedings are, in the Court's view, sufficient and relevant. It is, in particular, a measure in the interests of the accused designed to ensure the proper defence of his interests. The domestic courts are therefore entitled to consider that the interests of justice require the compulsory appointment of a lawyer." (emphasis supplied)

26.
The importance of this decision and the jurisprudence of ECmHR on which it draws lies in the recognition that the test is what the interests of justice require to ensure that an accused person is properly defended, rather than simply what his own particular wishes may be as to the manner of his defence. This points to the need for a wider consideration of the need for fairness of the trial procedure rather than on an emphasis on the predilections of the accused person as to the choice of counsel.

27.
This theme can be detected in the case of K v Denmark (Application No 19524/92, 5 May 1993), again a decision of ECmHR. In that case a lawyer, Mr Reindel, was appointed by the High Court to act as defence counsel for the applicant. It was then discovered that Mr Reindel was to be called as a witness and his appointment was rescinded and another lawyer was appointed in his stead. At para 2 ECmHR said this in relation to article 6.3(c):

"The Commission recalls that the right to legal representation of one's own choosing ensured by this provision is not of an absolute nature (cf for example No 5923/72, Dec 30.5.75, DR 3, p 43) and it does not guarantee the right to choose an official defence counsel who is appointed by the court (cf No 6946/75, Dec 6.7.76, DR 6, p 114). In examining this question under article 6 para 3(c) (article 6-3-c) of the Convention the Commission must take account of the situation of the defence as a whole rather than the position of the accused taken in isolation, having regard in particular to the principle of equality of arms as included in the concept of a fair hearing. Thus article 6 para 3(c) (article 6-3-c) of the Convention guarantees that the proceedings against the accused shall not take place without adequate representation for the defence, but does not give the accused the right to decide himself in what manner his defence should be assured (cf for example No 8295/78, Dec 9.10.78, DR 15 p 242)." (emphasis supplied)

28.
Here again the emphasis was on the adequacy of the representation rather than on the freedom of choice of the accused person as to the identity of counsel by whom he should be represented. This is because the gravamen of the right guaranteed by article 6.3(c) lies in its conducing to a fair trial, rather than its championing of the freedom of the individual defendant to choose the lawyer by whom he should be represented. The article 6.3(c) right can thus be contrasted with, for instance, the rights under article 8 of ECHR which can be characterised as intensely personal and intimately connected to the wishes of the individual on whose behalf they are asserted.

29.
In Mayzit v Russia (2006) 43 EHRR 38 the applicant wished to be represented by his mother and sister. His request that they be permitted to appear for him was refused on the basis that the case required special legal knowledge and professional experience. At paras 65 and 66 the court said:

"65. Article 6(3)(c) guarantees that proceedings against the accused will not take place without an adequate representation for the defence, but does not give the accused the right to decide himself in what manner his defence should be assured. The decision as to which of the two alternatives

mentioned in the provision should be chosen, namely the applicant's right to defend himself in person or to be represented by a lawyer of his own choosing, or in certain circumstances one appointed by the court, depends upon the applicable legislation or rules of court.

66. Notwithstanding the importance of a relationship of confidence between lawyer and client, the right to choose one's own Counsel cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned, and also where it is for the courts to decide whether the interests of justice require that the accused be defended by Counsel appointed by them. When appointing defence Counsel, the national courts must certainly have regard to the defendant's wishes. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice."

30.
The most significant observation in these passages is that the accused person does not have the right to decide "in what manner his defence should be assured". The right is to be represented by sufficiently experienced counsel of one's choice but the role to be played by that counsel cannot be dictated by the defendant. Thus, in the present case, Mr Maguire was entitled to ask that Mr Barlow represent him but he was not entitled to insist upon the status that should be conferred on Mr Barlow in his conduct of the defence.

31.
Dzankovic v Germany (Application No 6190/09, 8 December 2009) was an admissibility decision. The applicant complained that his request for his chosen representative to be designated official defence counsel had been refused. The court held that the interests of justice did not require that the applicant's chosen counsel be appointed official defence counsel. The application was declared inadmissible. The applicant was still represented by the same counsel whom he wished to have designated as official defence counsel. The reason behind the request related to the payment of counsel's fees from public resources. But that made no difference. What was important was, in the words of the judgment, that he had not put forward "any grounds making a different procedural approach necessary to ensure [that his] rights of … defence" were secured.

32.
Likewise, in the present case, the appellant has not advanced any grounds that Mr Barlow should be designated "leading counsel" so as to ensure that his rights of defence would be assured. As the respondent has pointed out, Mr Barlow could continue to act for Mr Maguire but as junior counsel, either with senior counsel, or, if senior counsel was not available, alone. Mr Maguire was not deprived of the services of Mr Barlow by operation of rule 20.11 of the code of conduct. The deprivation, if there was one, was the denial of an enhanced payment to Mr Barlow acting as "leading counsel".

33.
There are four applicable designations of counsel for the purposes of determining rates of payment in accordance with the 2005 Rules. These rates of payment relate to the categories of Queen's Counsel; leading junior counsel; sole junior counsel; and led junior counsel. All permutations of cases where two counsel have been assigned and permissible under the code of conduct are provided for in terms of legal aid payment. The provision of potential rates of payment for a leading junior counsel is, the respondent accepts, appropriate, since junior counsel may lead in the exceptional circumstances described in rule 20.11 of the code of conduct. It is notable, however, that the designation of "leading junior counsel" appears in the relevant statutory framework only for the purposes of identifying an appropriate rate of payment in costs rules. If Mr Barlow had been able to act as leading junior

counsel, therefore, he would have been entitled to an enhanced fee. But this has nothing whatever to do with the issue of a guarantee of a fair trial for Mr Maguire.

34.
The wishes of a defendant as to his choice of counsel must be taken into account but these are properly subordinate to the overall aim of achieving a fair trial. Thus, it is not a question of the defendant enjoying a right to choose his own counsel which is freestanding of the fair trial goal. Rather it is as an element of the objective of a fair trial that the right to have counsel of one's choice arises. For this reason, it is not appropriate to apply the same analysis to the question of infringement of the right as obtains in an examination of an admitted interference with a right such as arises under article 8.

35.
This is clear from such seminal cases as Croissant v Germany (1992) 16 EHRR 135, 151, para 29 where ECtHR said:

"[I]t is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes; indeed, German law contemplates such a course. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice."

36.
The exercise involved here is one of the courts deciding what the interests of justice require, not whether an interference with an individual's Convention right has been justified. Of course, the wishes of a defendant may be pertinent to the question of where the interests of justice lie but that is not because they have an intrinsic value. It is because the desire of an accused person to be represented by someone in whom he reposes trust may be directly relevant to the promotion of the interests of justice aim.

37.
Essentially the same message is conveyed in Dvorski v Croatia (2016) 63 EHRR 7 where the Grand Chamber said at para 76:

"As the Court has already held in its previous judgments, the right set out in article 6.3(c) of the Convention is one element, among others, of the concept of a fair trial in criminal proceedings contained in article 6.1 (see Imbrioscia v Switzerland (1994) 17 EHRR 441, 24 November 1993, paras 36 and 37, Series A no 275, and Salduz v Turkey [GC], no 36391/02, para 50, ECHR 2008)" (emphasis supplied)

38.
It is clear from this review of the relevant authorities that the essence of the right to choose one's counsel lies in the contribution that the exercise of that right makes to the achievement of the ultimate goal of a fair trial. It is not an autonomous right which falls to be considered outside that context. On that account, the circumstances in which and the reasons that Mr Maguire expressed the wish to have Mr Barlow as his "leading counsel" are of obvious importance and require close examination.

Informed choice

39.

The reasons that Mr Maguire wished to have Mr Barlow as his leading counsel were expressed pithily in his affidavit. At para 6, he said:

“Due to the level (sic) of consultations that took place between myself, counsel and solicitors and the work that was undertaken by counsel and solicitor … my wish was to instruct Mr Barlow BL as my lead counsel in the retrial. This was due to the fact that I had confidence in Mr Barlow to appear as my lead counsel due to his knowledge of my case.”

40.
The question of advice to an accused person about his representation at a criminal trial was considered by the High Court of Justiciary in Addison v HM Advocate 2015 JC 105. At paras 25 and 26, the Lord Justice General said:

“25. The Law Society of Scotland Practice Rules 2011 provide that if a case requires appearance in a superior court, the solicitor must advise his client that it is for the client to decide whether a solicitor-advocate or counsel is instructed (rule B8.4.l(b)). That is a sound rule as far as it goes; but the decision of the client on [whether a solicitor advocate or counsel is instructed] must be an informed decision. To make such a decision the client must be advised of his options for representation. A mere recital of those options is no more than a formality if it is not supplemented by advice, a point on which the Practice Rules are silent. In my view, it is the duty of the accused’s solicitor to take all reasonable steps to ascertain which members of the Bar and solicitor advocates experienced in this area are, or may be, available to conduct the defence. Only then can a worthwhile decision on representation be made.

26. The observance of these duties may present the accused’s solicitor with a conflict of interest, especially if he is a solicitor advocate or if a senior member of his firm is a solicitor advocate. This court has already adverted to the latter problem in Woodside v HM Advocate 2009 SCCR 350 (at paras 71-74). It is a matter for concern that it continues. Even where there is no such obvious conflict of interest, the solicitor may nonetheless find it difficult to give wholly objective advice as to the choice of defender from those who are available. In the event, any advice that he gives may be thought to lack the appearance of objectivity.”

41.
Although this admonition was based on a rule which has no equivalent in Northern Ireland, it seems to me to contain sound guidance on how solicitors should ensure that accused persons have sufficient information to make a proper choice as to how they should be represented, particularly when a certificate for two counsel has been issued. There is nothing in the evidence as to the circumstances in which Mr Maguire made his choice to indicate that he received advice of the nature outlined by the Lord Justice General. He should have received such advice. Of course, in the particular circumstances of this case, even if Mr Maguire had received that advice, it does not follow that he would have been entitled to insist that Mr Barlow act as his “leading counsel”. For the reasons given, he was in any event not entitled to insist on that course. The observations in these paragraphs are made to reinforce the message given by the High Court of Justiciary in Addison that it is the professional obligation of solicitors to give clear advice to accused persons of the options available to them when a certificate for two counsel has been granted.

Conclusions

42.

Rule 20.11 of the code of conduct is obviously designed to ensure that proper representation of accused persons should be guaranteed when a certificate for two counsel has been issued. Imposing a requirement that senior counsel be engaged, unless none is available, is entirely consonant with that aim. There is no question of interference with the appellant's right under article 6. To the contrary, the rule is designed to promote and vindicate that right.

43.
In light of that conclusion, it is unnecessary to embark on an examination of the interesting issues raised by the respondent about whether the Bar Council is a hybrid public authority and its entitlement to regulate representation of accused persons in the conduct of criminal trials.

44.
Article 6 does not invest an accused person with the right to demand that he have counsel of his choice at public expense, independently of the requirements of the interests of justice. If it can be shown that the interests of justice will best be served by having a requirement that, where a certificate for two counsel is issued, it will, in general, be better for an accused to be represented by both senior and junior counsel, a requirement that this be so cannot give rise to any violation of article 6. That the interests of justice will be best served in this way is beyond serious dispute, in my opinion. Senior counsel obtain that rank on the basis of an objective assessment of their professional expertise and experience. Rule 20.11 does no more than give effect to the desirability that defendants be represented at the highest possible standard, just as rule 4(3) of the 2012 Rules does.

45.
The circumstance that that aspiration finds expression in a rule contained in the code of conduct of the Bar does not sound on the question of the appellant's article 6 rights. So far from impinging on those rights, the rule is plainly designed to uphold and vindicate them. The source of the rule is therefore irrelevant to any possible violation of article 6.3(c). That simply does not arise.