



29 January 2014

PRESS SUMMARY

In the matter of an application of Raymond Brownlee for Judicial Review (AP) (Northern Ireland) [2014] UKSC 4

On appeal from [2013] NICA 57

JUSTICES: Lord Neuberger, President; Lord Kerr, Lord Clarke, Lord Reed, Lord Hodge

BACKGROUND TO THE APPEALS

This appeal concerns the provision of Legal Aid in criminal proceedings in Northern Ireland.

Raymond Brownlee was convicted on 1 June 2012 of a number of offences including false imprisonment, making threats to kill and wounding with intent. He had been represented by senior and junior counsel until the close of the prosecution's case. But differences arose at that point between Mr Brownlee and his legal team, which resulted in their no longer acting for him. The judge indicated that he intended to proceed with the trial. He did not permit the prosecution to close the case to the jury but asked Mr Brownlee whether there was anything that he wished to say. Having been informed that there was not, the judge charged the jury, who returned the guilty verdicts. They also found Mr Brownlee not guilty on three further counts, on one of these by direction of the judge. The case was adjourned to permit Mr Brownlee to instruct new solicitors and counsel.

New solicitors came on record for Mr Brownlee on 29 June 2012. On 3 July 2012, following representations made on Mr Brownlee's behalf, the judge extended the legal aid certificate which he had granted to include senior counsel as well as junior counsel and solicitors. It had been submitted that the sentencing exercise would be complex and might result in an indeterminate or extended sentence. Consequently, a substantial amount of preparation would be required to properly represent Mr Brownlee during the sentencing exercise. But the fees payable by the Legal Services Commission (LSC) for the sentencing hearing were fixed by the Legal Aid for Crown Court Proceedings (Costs) Rules (Northern Ireland) 2005 (the Rules) at £100 for a solicitor, £120 for junior counsel and £240 for senior counsel. No fees were payable in respect of any preparatory work that counsel would be required to undertake. A provision allowing for the payment of exceptional fees had been removed by an amendment in 2011.

Mr Brownlee's solicitors were unable to engage counsel to act for him on the sentencing hearing. They were consistently informed that the absence of any allowance for preparation in the fixing of the fee level makes it unfeasible to act on behalf of the appellant for the payment specified.

Mr Brownlee applied for judicial review of LSC's decision not to allow any modification of the standard fees to be paid for the sentencing hearing in his case. Treacy J held that the consequent impossibility of retaining counsel amounted to a denial of access to justice. He made an order of mandamus (an order that instructs a party to do a particular thing) requiring the respondent, the Department of Justice (who are responsible for LSC), to take all necessary steps to make Mr Brownlee's right to legal aid effective.

The Department of Justice successfully appealed Treacy J's order. Morgan LCJ, delivering the judgment of the Court of Appeal, acknowledged that inadequate remuneration within a legal aid scheme can breach a defendant's right to a fair trial under article 6 of the European Convention on Human Rights if an accused consequently finds it impossible to obtain the services of an appropriate lawyer to represent him. But this was a problem of Mr Brownlee's own making, so that his sentencing process should not be hindered because of it.

In fact, it is clear from a transcript of the trial that it was senior counsel who had initiated the process of withdrawal from the case. He told the judge that he felt professionally compromised and could no longer act for Mr Brownlee. At that stage, the appellant did not want counsel to withdraw. There can be no question of counsel having been dismissed by the appellant at that point. It was only after lunch, having been given time to consult with his solicitor, that Mr Brownlee said in answer to the judge's direct question that he wanted to dispense with counsel's services.

After the Court of Appeal had heard the Department's appeal but before judgment was delivered, a consultation document was published as part of a review of the Rules, which implicitly accepted that they had failed to cater for the proper remuneration of counsel briefed for the first time to appear for an accused person after the trial had ended. Draft amendment rules were shown to this court in the course of the hearing of the appeal on 5 December 2013. These were expected come into force in January 2014 with retrospective effect. The new rules will make provision for the payment of additional fees for preparatory work undertaken by a new legal representative for a sentencing hearing.

JUDGMENT

The Supreme Court unanimously allows Mr Brownlee's appeal and declares that the rule-making body's failure to allow for new legal representatives to be paid for preparatory work was unlawful.

REASONS FOR THE JUDGMENT

At the conclusion of the hearing of the appeal, this court announced that it would allow the appeal for reasons to be given later. This judgment contains those reasons. The assessment and payment of fees to a legal representative who has replaced another at the sentencing stage of criminal proceedings was, self-evidently, a material consideration which should have been taken into account by the rule-making body which amended the Rules in 2011. This failure to have regard to a relevant factor justifies judicial review of the decision to amend the Rules in 2011 without making provision for the payment of fees that would properly reflect the preparatory work which a legal representative, new to the case at the sentencing stage, would have to undertake [32].

Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 requires the rule-making body to devise rules prescribing payments to be made to reflect the time and skill necessary to carry out particular types of criminal legal aid work. A failure to make provision for remuneration of preparatory work by a new legal representative is therefore unlawful. The cost to public funds of any provision made by the Rules and the need to secure value for money complement this obligation rather than extinguish it [33].

This court concluded that a declaration should be substituted for the order of mandamus made by Treacy J. When he granted judicial review an order of mandamus was appropriate. Now that the Department has accepted that the Rules require to be amended to allow for payment for preparatory work undertaken by a new legal representative, mandamus is no longer necessary. The declaration will be that the failure of the rule-making body to take account of the need to provide for such payment rendered the Rules to that extent unlawful [34].

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at <http://www.supremecourt.uk/decided-cases/index.shtml>.