



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF EBANKS v. THE UNITED KINGDOM

(Application no. 36822/06)

JUDGMENT

STRASBOURG

26 January 2010

FINAL

26/04/2011

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Ebanks v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Giovanni Bonello, *President*,

Nicolas Bratza,

David Thór Björgvinsson,

Ján Šikuta,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić, *judges*,

and Fatoş Aracı, *Deputy Section Registrar*,

Having deliberated in private on 5 January 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 36822/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Caymanian national, Mr Kurt Ebanks (“the applicant”), on 23 August 2006.

2. The applicant was represented by Mr R. McMillan, a lawyer practising in Grand Cayman. The United Kingdom Government (“the Government”) were represented by their Agent, Ms H. Upton, Foreign and Commonwealth Office.

3. On 22 January 2009 the Vice President of the Fourth Section decided to communicate the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The background facts

4. On the morning of 18 January 2000, the body of Curtis Seymour, a taxi-driver, was found in a refuse disposal area in Grand Cayman. He had

been stabbed to death. His van, which he used as a taxi, was found nearby with blood on the interior upholstery. An examination of the van revealed a palm print on the passenger door frame which matched that of Mr Brian Powell, who at that time was living with the applicant. Mr Powell's fingerprint was also found at the gate of the refuse disposal area together with another set of blood-stained fingerprints.

5. On 5 February 2000, Mr Powell was arrested. When interviewed, he denied any personal knowledge of the murder. On 9 February 2000, he made a statement under caution. He claimed that the applicant had developed a plan to rob a taxi driver and that Mr Powell had accompanied him for this purpose. They had travelled in a taxi driven by Mr Seymour. When the taxi stopped, the applicant had held Mr Seymour from behind and demanded money. Mr Powell had searched for money and the applicant had produced a knife from his back pocket and stabbed Mr Seymour in the chest. The applicant had then dragged the body to the refuse disposal area and Mr Powell had opened the gate. Having moved the body, the applicant threw the knife into some bushes before driving the taxi to a swamp area where he tried to dispose of the vehicle. The taxi became bogged down. Mr Powell and the applicant subsequently removed their blood-stained clothing and hid it in some bushes.

6. In the meantime, on 4 February 2000, the applicant was arrested in respect of an unrelated offence of theft. It subsequently became apparent that the applicant was involved in a number of other offences against property and offences of dishonesty. He was held without charge for the purposes of investigation between 4 and 7 February 2000. He was subsequently held in custody without charge between 7 and 17 February 2000 for investigation for murder.

7. On 9 February 2000, the applicant was first questioned under caution after being shown a copy of Mr Powell's statement. The applicant denied Mr Powell's version of events and made no further comments to subsequent questions put to him.

8. On 11 February 2000, Mr Powell took the police to the area where he claimed the knife and blood-stained clothes had been hidden. During the search, the police recovered a knife and several items of blood-stained clothing. Mr Seymour's DNA was subsequently found on an item of clothing belonging to Mr Powell.

9. On 16 February 2000, Mr Powell was again questioned under caution. He confirmed the accuracy of his statement of 9 February 2000 and added that the applicant had used his right hand to stab Mr Seymour and that he, Mr Powell, had touched the deceased while searching for money. He identified the knife recovered by the police as the murder weapon.

10. On 17 February 2000, Police Constable Angela Campbell and Detective Constable Wayne Powell ("the police officers") interviewed the applicant a second time. He was asked whether he would answer questions,

to which he replied that he would not. At that stage, Detective Powell reminded the applicant that he did not need to say anything. The applicant was given no formal caution. The police officers later testified that the applicant then asked them whether he was being recorded, to which they replied in the negative. They also testified that the applicant asked Police Constable Campbell to open her jacket in order to demonstrate that she was not carrying a recording device, which she did.

11. The police officers alleged that the applicant then began to speak about God and about having had a difficult past. Police Constable Campbell told him that God could help him have a better life. At that point, the applicant allegedly sighed and hung his head. He then said that Mr Powell's statement was three-quarters lies and proceeded to give his own version of events. He said that if he spoke the truth he would go to jail, but he wanted to leave a free man as he did not kill Mr Seymour. He said that the "mental Lahee patient" (a reference to Mr Powell) had killed Mr Seymour. He claimed that on the night in question, he had been looking for women but that Mr Powell had dragged him away with him. They were picked up by Mr Seymour, whom Mr Powell instructed to drive to an address which caused the applicant surprise. When the taxi stopped, Mr Powell grabbed Mr Seymour from behind and demanded money. The applicant found 200 dollars in the ashtray. The applicant was armed with a knife and Mr Powell asked for the knife because Mr Seymour had seen their faces. The applicant gave Mr Powell the knife and Mr Powell stabbed Mr Seymour, using both hands. Mr Powell then tried to pull the deceased out of the van but was unable to do so. He told the applicant to get rid of the knife by throwing it in the bushes. The applicant then undid Mr Seymour's seatbelt and Mr Powell pulled the deceased from the van and, after searching the body, dragged it to the dumpster. The applicant described how he had driven the van to the swamp area and tried to dispose of the vehicle by putting a rock on the accelerator, but this was unsuccessful. He threw the car keys into the bushes because he thought his fingerprints would be on them. As the applicant and Mr Powell left the scene, the applicant saw that Mr Powell had Mr Seymour's mobile telephone. Mr Powell wanted to use the phone to ask someone to come and collect them, but the applicant told Mr Powell that he was crazy as the police would be able to trace the call. Mr Powell threw the mobile telephone away. The applicant removed his shirt and jacket and gave them to Mr Powell, who threw them away. They were subsequently met by a friend of Mr Powell, who gave the latter a shirt which he in turn gave to the applicant.

12. The police officers alleged that the conversation with the applicant lasted about one hour. No notes were made during the course of the interview and the applicant asked that what he had said should not be put into writing as he wanted some time to think about it. He wanted to tell the truth but did not want to go to prison for something he did not do.

The police officers testified that, immediately afterwards, they made witness statements as to their recollections of the conversation with the applicant. The two statements were almost identical. They were never shown to the applicant. The applicant denies having made any statement to the police officers.

13. On 19 January 2000, a post-mortem examination revealed that Mr Seymour had suffered four stab wounds: two in the neck area and two on the front of the chest. It was suggested that the nature of the injuries and the lack of defence wounds on the arms or hands of the deceased indicated stabbing from behind.

14. On 21 February 2000, Mr Powell made another statement in which he described the events surrounding the murder in some detail.

B. The domestic proceedings

1. The proceedings before the Grand Court

15. The applicant and his co-accused, Mr Powell, were tried for murder before the Grand Court sitting – at the defendants’ request – without a jury. The applicant was represented by two counsel. Leading counsel was an experienced criminal practitioner who had travelled from London to the Cayman Islands for the applicant’s trial.

16. At trial, Mr Powell amended his version of events. He admitted that he had stabbed Mr Seymour but claimed that it was in self-defence and that he had been alone in the taxi with Mr Seymour at the time. He alleged that his original statement implicating the applicant in the murder had been invented out of revenge following a misunderstanding regarding the theft of drugs which had been in Mr Powell’s possession. The only evidence against the applicant was therefore the alleged statement to the police officers.

17. At a first *voir dire* on 15 and 16 January 2001, the applicant challenged the admissibility of the evidence of the police officers as to his alleged statement. The challenge was made on the grounds that (i) no formal caution had been given and (ii) the manner in which the statement was taken was unfair. The police officers gave evidence and were cross-examined. The defence called no evidence.

18. A second *voir dire* was subsequently held on the admissibility of the alleged statement to the police officers. The judge noted that such a course of action was unusual but acceded to the request for a further *voir dire* in light of the seriousness of the charge. At the hearing, the applicant’s lawyers alleged that the statement had been obtained through oppression. Again, the applicant did not testify.

19. The record of the *voir dire* hearings showed that the trial judge had positively encouraged the applicant to give evidence, but he did not do so.

At no stage in either *voir dire* did the applicant's lawyers put to the police officers the fact that the applicant denied having made the statement.

20. In his ruling on the admissibility of the alleged statement, the judge found that, while it would have been appropriate for a further caution to have been given on 17 February, it was not a requirement. He emphasised that at the start of the conversation the officers did not have enough evidence to charge the applicant with murder. He further concluded that there was nothing to suggest that the manner in which the statement was taken was unfair and that there was no evidence that any inducement had been offered to the applicant to encourage him to make the alleged statement. He said:

"14. There is no direct evidence here of why Mr Ebanks spoke to the officers. I infer that he believed that what he said could not be used as evidence if it was not recorded or written down as he spoke. I also infer, as I have indicated, that he believed that it would be easier to deny it later if no record was made of it. I infer that he spoke partly because of the need to unburden himself, due to remorse and his religious beliefs."

21. As regards the allegations of oppression, the judge found that even assuming, without finding, that the detention without charge was unlawful, that in itself was insufficient to indicate that the applicant had made his statement as a result of oppression. He noted that:

"32. ... [The applicant] showed considerable presence of mind on February 17th. For example, he insisted that the conversation not be tape-recorded. He asked Det. Const. Campbell to open her jacket for the purpose of proving to him that she had no concealed tape recorder on her person. Many of his answers show a considerable mental acuity, which is the opposite of the state we associate with oppressive conduct."

22. The judge observed, in the course of submissions, that he had heard nothing to indicate that the applicant's detention had had any adverse affect on him. He indicated that he would normally expect to see evidence of a psychiatrist or psychologist as to the effect of oppressive conduct and quite likely evidence from the accused himself. Shortly after this observation, counsel for the applicant sought a short break in order to allow him to seek instructions from the applicant. When proceedings resumed, counsel continued his argument, in the course of which he agreed that "there is no positive evidence by the defence as to the effect of the oppression". Accordingly, the judge found the statement to be admissible as evidence in the main trial, concluding that no oppression had been demonstrated.

23. Following the ruling in the *voir dire*, the examination in chief and cross-examination of the police officers were adopted for the purposes of the main trial proceedings. At that time, Counsel for the applicant said:

"My Lord, may I just take a moment? ... My Lord, I just want to make sure my client understands that we were adopting cross-examination from earlier ... My Lord, in light of that, I have no further questions."

24. The applicant did not give evidence at his trial. His allegation that he did not make the disputed confession was not put before the court. The transcript of the trial shows that on several occasions, his lawyer took time to ensure that the applicant understood and agreed to various steps being taken on his behalf.

25. The prosecution case included evidence that the deceased had been carried from the vehicle to the location where his body was found by two people, and dragged for some distance. It also included a statement from the applicant's former girlfriend to the effect that in January 2000 the applicant had said that he knew about a murder and a statement dated 8 March 2000 from the applicant's cousin to the effect that the applicant had made incriminating statements and that, following the murder, the applicant and Mr Powell had planned to leave Grand Cayman and go to Honduras. At trial, the applicant's cousin claimed that his statement was untrue and had been made under the influence of alcohol and cocaine.

26. Both defendants were convicted by the judge of murder on 26 January 2001 and sentenced to life imprisonment. The judge, in a fully reasoned judgment, found that Mr Powell had administered the knife wounds; that his evidence that the applicant was not present was untrue; and that the applicant's confession was true.

2. The proceedings before the Cayman Islands Court of Appeal

27. On 9 February 2001, the lawyers who had conducted the trial on behalf of the applicant gave notice of an application for leave to appeal against the conviction on the grounds that it was unsafe and unsatisfactory. They indicated that full written grounds would follow.

28. At some later date, the applicant appointed a new lawyer and, on 22 October 2001, he swore an affidavit regarding the conduct of Mr St John Stevens and Mr McGrath, his lawyers at trial. In his affidavit, he argued that:

“11. When the voir dire started concerning my statement, I was expecting Mr St John Stevens to charge right at the two police officers who were lying and try to discredit them. But he didn't and he kept telling me, 'This way is better. They gave you a truncated form of your rights.' He also kept saying to me, 'You've told me that you did not make the statement, but I'm going to attack it this way. They kept you in custody too long without charging you. I'll get the statement thrown out because of oppressive conduct.' Never once did he put to the officers the fact that I didn't make the statement at all. I sat in the court and listened to the two officers' lies and kept thinking that I would have my chance to talk later. At all times I wanted to testify and tell the judge under oath what I have stated in this affidavit. Then the time came and I was talked out of it by the two lawyers. They made me think that they knew best and so I put all my trust in them.

12. During the testimony of Angela Campbell, when I heard her lying about a number of things, I got upset and I raised my hand and said, 'I want to testify. I want to tell my side of the story.' Mr Stevens jumped up and rushed back to me and said,

‘Be careful what you’re doing, Kurt. They haven’t proven anything against you. They’re not hurting you, they’re not hurting you, so relax and behave and keep quiet. And don’t put yourself in the stand and give them a chance to cross-examine you.’ I told him, ‘I don’t have any problem going on the stand. I’m not guilty of anything. I don’t have anything to hide.’ He told me that if I took the stand and rebutted whatever the officers were saying the judge would more than likely believe them over me and in doing so my ground of appeal ‘would be thrown out the window’. If I didn’t testify, they would have a chance for an argument on the appeal. Mr Stevens said that was the best way to approach the case.

13. At lunch time on that day, Mr McGrath came to see me about taking the stand. Mr McGrath did not actually take much part in my trial. He was not in court every day and it was Mr St John Stevens who conducted my defence. On this day, Mr McGrath gave me the impression that Mr Stevens had sent him to talk to me. He said, ‘This is the turning point in your case. We have to make a tactical decision. I know you were adamant from day one that you gave no statement to the police officers.’ I said, ‘Yes, sir.’ Then he said, ‘It will be better to approach the case this way since nothing is damaging you.’ He just talked and talked and I got confused and thought, ‘Well, he’s the lawyer’, and he talked me out of testifying. Because of that, the judge never got to hear what was the most important thing and that was that those two police officers fabricated a statement that I never made to them. Because of that statement, I have been convicted of a murder I did not commit and had nothing to do with.”

29. On 24 October 2001 the applicant’s lawyer gave notice that the applicant was applying to the Court of Appeal to have the affidavit received in evidence.

30. The applicant issued a release of privilege, thereby releasing his trial lawyers from the lawyer/client privilege in relation to their communications in respect of the trial proceedings. His trial lawyers subsequently also swore affidavits.

31. Mr McGrath filed his affidavit on 15 November 2001, replying that:

“4. From a very early stage the appellant’s instructions were firm and unequivocal in a number of regards:

- (i) He would contest the allegation;
- (ii) He would elect trial by judge alone;
- (iii) He disputed the making of the alleged confession;
- (iv) At no stage in the proceedings would he give evidence.

5. The appellant alleges that his case was presented in defiance of his instructions. This is untrue. The conduct of the case at trial was entirely consistent with the appellant’s particular instructions. Whilst it is correct to say that no positive case was ever put in relation to 4(iii) above this was upon the appellant’s instructions.

6. The appellant’s instructions that he would not give evidence in the proceedings remained a central tenet of his position throughout.

7. The consequences of his not giving evidence were discussed in great detail with the appellant, both prior to the arrival of leading counsel and in the presence of leading counsel. The decision not to give evidence in the trial created tactical considerations and decisions for the appellant.

8. I explained to the appellant and advised him how this decision might affect his trial. I was present when leading counsel advised the appellant how this might affect his trial. I am satisfied that the appellant understood the advice and that he understood the implications of his decision not to give evidence.

9. The appellant chose to challenge the alleged confession on the basis of its admissibility. Upon instructions it was argued on the voir dire that the Crown could not satisfy the tribunal to the requisite criminal standard that what the police officers alleged had been said had been said voluntarily. I am satisfied that the appellant understood the advice offered and the instructions he was providing in relation to the conduct of the voir dire.

10. On the voir dire the learned trial judge ruled against the appellant and in favour of the Crown in relation to the submission that the alleged confession should be excluded. The potential consequences of such ruling had been discussed and were discussed with the appellant before and during the trial. Because he would not give evidence the appellant chose not to put his case about not making the confession to the police officers in the course of the trial proper. This was a topic which was discussed with him in some detail. I am satisfied that the appellant was aware that, having provided such instructions, the only triable issue for him would be the admissibility of the alleged confession.

...

13. Paragraph 11 of the affidavit is not true. Mr St John Stevens was instructed to challenge the admissibility of the alleged admission on the voir dire. At no stage did the appellant indicate to me any desire to testify in the proceedings. I did not 'talk him out of it.' I explained to the appellant on many occasions that the decision whether to give evidence or not was his and his alone. I explained that he could not be compelled to give evidence, neither could anyone stop him from giving evidence. Mr St John Stevens did not, as far as I am able to say, put any undue influence or pressure upon the appellant not to give evidence.

...

15. I did have many conversations with the appellant in the cells during the course of his trial. Mr St John Stevens did communicate to me that the appellant had become upset in the dock during the proceedings and there had been a short adjournment. The words which the appellant attributes to me in paragraph 13 of his affidavit are inaccurate in detail and in substance. At no stage did I say or would I say 'We have a tactical decision to make.' I made it clear at all stages that the decision about testifying, as well as other substantial decisions were matters for the appellant and not matters for me or for leading counsel. I did not talk the appellant out of testifying. There was never any change of instructions in relation to the appellant's decision not to give evidence, nor in relation to the way he wished his case to be conducted."

32. Mr St John Stevens filed his affidavit on 21 November 2001. In it, he said:

"2.1 The appellant's case was presented in accordance with and upon clear and unequivocal instructions.

2.2 I am satisfied that at each material stage both before and during the trial the appellant's instructions that he would not himself give evidence was unequivocal.

2.3 I am satisfied that those instructions were given and confirmed after the ramifications of not giving evidence, whether it be during the voir dire or the trial, had been explained in detail by myself and David McGrath both together and independently, and that the appellant fully understood that advice.

2.4 The ramifications of not giving evidence was discussed and advice given in the context of the voir dire, the trial and potential grounds of appeal.

The appellant's instructions were that the Crown should be put to proof as to establishing that the confession in issue was made voluntarily and that no positive case would be put over and above this issue.

...

These 'bedrock' instructions did not change. Up to the time of verdict, the learned judge 'retired' for three days to consider his judgment, the appellant was quite satisfied with the conduct of his defence and understood the avenue of appeal. I am satisfied that the appellant's case was presented in accordance with and upon clear and unequivocal instructions. I am satisfied that the instructions were given upon careful consideration both before and during the trial and that advice was fully understood. I am satisfied from all I have seen, heard and read that the appellant's instructing attorney acted at all times with and upon proper instructions."

33. The applicant argued before the Court of Appeal that: (i) the sole evidence against him was the alleged statement of 17 February 2000; (ii) the alleged statement was not reduced to writing and signed by him; and (iii) he had continually and consistently instructed each of his defending counsel that he had not made the alleged statement and that it was a fabrication by the police officers. Accordingly, he argued, the failure of his trial lawyers properly to put his case to the court had denied him a fair trial.

34. On 12 April 2002, the court dismissed the appeal. It refused permission for *viva voce* evidence to be heard from the applicant to supplement his affidavit, noting that:

"57. ...He had filed no affidavit in response to those from his former attorneys, although there was an opportunity for him to do so had he so wished."

35. As to the applicant's decision not to give oral evidence at trial, the court considered that as a matter of best practice, lawyers should record in writing their clients' wish not to testify in the proceedings. However, where no record was available, the court could nonetheless come to a decision as to whether the defendant in question was given advice from counsel and whether, after such advice, he had decided of his own free will not to testify. In the applicant's case, the court noted that:

"62. Ebanks was being represented by experienced attorneys. Mr McGrath has sworn that Ebanks gave clear instructions from the inception of the case that he would not give evidence at any stage of the proceedings, and that he conveyed those

instructions to Mr Stevens. Both Mr McGrath and Mr Stevens have sworn that they over and over again gave detailed advice to Ebanks as to the ramifications of his decision not to give evidence and of the possible consequences and that Ebanks understood those instructions. Mr McGrath said that he met with Ebanks several times in his cell and Mr Stevens said that his first conference with Ebanks was a week before the trial commenced. This was not a case in which the defendant did not have access to his counsel and only saw them briefly before his trial. On the affidavits before us, we are completely satisfied that Ebanks took a deliberate, constant and continuous decision not to give evidence and instructed his counsel accordingly.”

36. As to the failure of the applicant’s lawyers to put forward a positive defence to the effect that the applicant disputed making the alleged confession, it held that:

“63. It would have been most improper for defence counsel to have suggested to [the police officers] that they were lying and had fabricated the account that they were giving unless defence counsel were prepared to call Ebanks as a witness. This much would have been clear to Ebanks and that is why his defence was conducted in a way that no positive case was put forward on his behalf.”

3. The proceedings before the Privy Council

37. The applicant subsequently appealed to the Privy Council. On 27 March 2006, the Board dismissed the appeal by a majority of three judges to two. Delivering the leading judgment for the majority, Lord Rodger of Earlsferry concluded that:

“15. ... while Mr McGrath specifically acknowledges that from the outset the appellant’s position was that he disputed making the statement to the police officers, Mr St John Stevens does not address that issue. To that extent there could be said to be a difference between the two principal affidavits for the trial lawyers. The significance of that difference is less than might at first sight be thought, however, since, according to Mr McGrath, even though that was the appellant’s position, he was equally adamant from the outset that at no stage in the proceedings would he give evidence. In that situation, according to Mr McGrath, while it is correct to say that no positive case was ever put in relation to the allegation that he had not made the statement, this was upon the appellant’s instructions. This is consistent with Mr St John Stevens’ position that the appellant’s instructions were that no positive case would be put over and above the issue of the voluntariness of the confession.”

38. Lord Rodger emphasised that a decision by an accused not to give evidence at his trial was “of such potential importance” that it should be recorded in writing. However, Lord Rodger declined to find that the failure of the applicant’s solicitors to produce a written record of the applicant’s decision meant that the court should give the applicant the benefit of the doubt and accept his version of events. He considered that in some cases, the appeal court may wish to hear evidence from the parties but that there may be cases where the court felt able to resolve the dispute without hearing evidence.

39. In the present case, he concluded that:

“20. So far as the matter of Mr Ebanks not giving evidence is concerned, the only question is whether counsel in effect forced him, against his will, not to go into the witness box. Their Lordships notice that there is nothing to suggest that Mr Ebanks made any protest about this during the trial. Nor is there anything to suggest that, even shortly after the trial, he complained to any fellow prisoner, or court official or prison officer. The first time that such a complaint emerges is some nine months later in his amended grounds of appeal dated 24 October 2001 and in his affidavit dated two days earlier. Of course, the delay in making the complaint does not show that it is unsound, but it is a factor to be taken into account. An appeal court must always bear in mind the distinct possibility that such a complaint may be fabricated – indeed that is precisely why there should be a contemporaneous written record of the decision that the defendant is not to give evidence.

40. Referring to the record of the trial proceedings, he highlighted the care taken by Mr St John Stevens throughout the trial to ensure that the applicant understood the proceedings, noting the following:

“21. More importantly, however, the appellant’s allegation is really that, on this critical matter, as well as on the matter of cross-examining the police witnesses, counsel overrode his instructions. But that allegation is wholly inconsistent with the picture which emerges from the record of the trial itself where on several occasions Mr St John Stevens took time to ensure that the appellant understood and agreed to the step which was being taken on his behalf. . In para 6 of this judgment their Lordships have already drawn attention to one such occasion when, at the conclusion of the second voir dire, Mr St John Stevens took time to explain to Mr Ebanks that the cross-examination in the voir dire would, in effect, be held repeated in the main trial. Earlier, during the evidence of Julie Harris, Mr St John Stevens had asked for a break of five minutes to seek clarification of a point – although this is not said explicitly, it appears likely that the clarification was to come from his client.

...

23. On another occasion, when prosecuting counsel announced that his next witness was going to be Colin Pryce, Mr St John Stevens asked whether he might just take instructions from his client – and was allowed to do so. Later on, after the appellant’s brother, Dwene Ebanks, had given his evidence in chief and had apparently dealt with certain matters which had not been mentioned in his statement, counsel for Powell asked for a moment to consult his client and Mr St John Stevens asked if he could take instructions at the same time.

24. It is also noticeable that when the judge reserved his judgment and proposed to give it at a time after Mr St John Stevens was due to fly back to the United Kingdom, Mr St John Stevens none the less recognised that he should be present. And, in the event, he was indeed present at the short hearing even though, of course, there was little which he could say on behalf of Mr Ebanks when he was convicted of murder.

41. He concluded:

25. These passages in the record suggest that, so far from being uncaring or cavalier about Mr Ebanks’ views, instructions and interests, Mr St John Stevens was careful to consult his client whenever appropriate. It would make absolutely no sense to suppose that when he had taken care in these relatively minor matters, he had simultaneously

been riding roughshod over Mr Ebanks' views as to whether he should give evidence. Moreover, it is extremely difficult to see why counsel would have deliberately flouted a desire on Mr Ebanks' part to give evidence when the lack of any evidence from him was likely to cause potential difficulties, especially in the voir dres. In these circumstances, their Lordships are satisfied that, although counsel culpably failed to have the matter recorded at the time, they can accept the evidence of Mr McGrath and Mr St John Stevens that they were following Mr Ebanks' instructions in not calling him to give evidence."

42. As to the second complaint regarding the failure of the applicant's lawyers to put his denial that he made the statement to the police officers, the Board disagreed with the Court of Appeal and the trial court and found that it was counsel's duty to put the defendant's case, even where he did not intend to call evidence to support it. Lord Rodger noted that:

"29. ... If ... the police officers have indeed been lying, there can be no proper objection to cross-examination which successfully exposes those lies, even if the defendant does not subsequently go into the witness box to give positive evidence about those lies. On the other hand, the reality is that, if the police officers robustly reject the imputations against them, such allegations will usually carry little weight with the jury unless the defendant backs them up by giving evidence. And, as Waller LJ pointed out, if the defendant fails to do so, the judge will be fully entitled to make a strong comment on that failure.

30. ... Even if Mr Ebanks had all along said that he would not give evidence, that would not, of itself, have been a reason why counsel could not have cross-examined the police officers to the effect that he had not made the statement, if Mr Ebanks' instructions were that counsel should do so. Indeed, as a matter of proper professional practice, he would still have been bound to do so."

43. However, he concluded that:

"31. The point does not actually arise in this case, however, since there is nothing in the affidavits of counsel to suggest that Mr St John Stevens proceeded as he did because he thought that it would have been professionally improper to suggest to the police witnesses that Mr Ebanks had not made the statement when Mr Ebanks was not going to give evidence to back it up. So the Court of Appeal really proceeded on a basis for which there is no foundation in the attorneys' affidavits. In fact, the position taken by Mr McGrath and Mr St John Stevens in their affidavits is simply that the allegation was not advanced because Mr Ebanks instructed that it should not be."

44. Considering the applicant's allegation that counsel had defied his instructions in not challenging the evidence of the police officers, Lord Rodger preferred the evidence of the trial lawyers:

"32. Again, their Lordships note that this allegation did not surface until some eight months after the trial. And, again, the Board notes that the allegation is hard to square with the obvious care taken by Mr St John Stevens to obtain his client's instructions at various points throughout the trial. Moreover, Mr Ebanks advances no reason why counsel should have chosen to flout his instructions on this matter, which by no means simplified the presentation of the defence case, especially in the voire dres. On the other hand, the line which counsel adopted in the voir dres was consistent with the instructions which they say that he had given them: standing those instructions, the only thing that they could try to do was to have the statement excluded on the grounds

which Mr St John Stevens advanced and argued with great care, as is obvious from the transcript of the submissions made to the judge.”

45. Lord Rodger concluded:

“33. It is not possible to say why Mr Ebanks decided not to give evidence and to limit the scope of counsel’s attack on the police evidence. It may be that he was not confident of withstanding cross-examination by prosecuting counsel. It may be that he thought it better tactically not to challenge the evidence of the police officers head-on. It may be, as Mr Perry suggested, that his overall strategy was to keep as low a profile as possible and to rely on Powell’s evidence that Ebanks was not present when he killed Curtis Seymour. This would be consistent with the way in which counsel for Powell went first in cross-examination, even though Mr Ebanks was named first on the indictment. Whatever the reasons may be, their Lordships are satisfied that Mr St John Stevens acted in accordance with his client’s instructions at the time. Having been convicted, Mr Ebanks may now have come to believe that his instructions were different. But there is no adequate basis for holding that counsel acted improperly. On the contrary, the record suggests that, as the judge considered, like the other counsel Mr St John Stevens had paid diligent attention to the preparation of the case.”

46. In his dissenting judgment, Lord Steyn considered the Court of Appeal’s decision to refuse *viva voce* evidence on the ground that the applicant had not lodged a response to the affidavits of his former solicitors to be “astonishing”. He noted that Mr McGrath’s affidavit was served eight days before the appeal hearing, and Mr St John Stevens’ only two days before the appeal hearing. He found that:

“38. ... In any event, at the very least on the affidavit evidence there was a clear dispute of fact. So far as there was ambiguity it was due to the fact that Mr St John Stevens (unlike Mr McGrath) did not directly address the core point in the Appellant’s affidavit i.e. that he told the attorneys that he never made any confession.

39. In these circumstances the Court of Appeal erred in refusing to hear *viva voce* evidence, and the decision of the Court of Appeal should be quashed for failure to accord the Appellant due process.”

47. As to the question whether the Court of Appeal could have declined to hear oral evidence on the ground that it would make no difference, Lord Steyn said:

“40. ... To have decided the case on such a basis would have been unfair and contrary to due process. After all, it is entirely possible (and even likely) that Mr St John Stevens would have made the same core concession that Mr McGrath made, viz that the Appellant insisted that he made no confession to the police.

41. It is necessary to consider the consequence of the hypothesis that the Appellant’s core allegation in his affidavit, viz that he told counsel that he did not make the confession, is or may be correct. On this basis, trial counsel should have cross examined the police to this effect despite the fact that it had been decided not to call the Appellant to give evidence. Again, Mr McGrath’s evidence supports this critical point.”

48. Lord Steyn concluded that:

“42 ... Legal principle dictates that counsel’s duty is to put the defendant’s case, whether or not he intends to call evidence to support. The misunderstanding by the Court of Appeal may well have been widespread in Caribbean countries. That this ‘would have been clear to Ebanks’, as the Court of Appeal observed, is absurd. But the Court of Appeal clearly thought that counsel did not put it to the police that they fabricated their version because he considered that it would have been improper to do so. Indeed that is what Rowe JA said. The Court of Appeal would have been in a position to have a local view of counsel’s perceptions of an advocate’s duty (mistaken as it was) in the given situation. In any event this explains why counsel did not cross examine the police appropriately. The failure to do so (when it was required) amounts in the circumstances to a material irregularity. It potentially prejudiced the Appellant’s defence. And it is impossible to say that, absent the irregularity, the jury would inevitably have convicted.”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Cayman Islands

49. The Cayman Islands is a British Overseas Territory. The United Kingdom is responsible for its international relations. Under Article 56 of the Convention, the United Kingdom has made a declaration extending the application of the Convention to the Cayman Islands.

50. The Cayman Islands has its own government, with the power to make its own laws, and its own judiciary under its Constitution, established by the Cayman Islands (Constitution) Order 1972. Its legal system is based on English common law and the Judicial Committee of the Privy Council is the court of final appeal under the Cayman Islands (Appeals to Privy Council) Order 1984.

B. Recording of defendant’s wish not to testify

51. In *R v. Bevan* (1993) 98 Cr App R 354, Watkins LJ considered the position as regards the decision of a defendant not to testify. He noted that:

“One criticism has, however, to be levelled at learned counsel. It is to be hoped that all counsel will heed what we now say. When the decision is taken by a defendant not to go into the witness-box, it should be the invariable practice of counsel to have that decision recorded and to cause the defendant to sign the record, giving a clear indication that (1) he has by his own will decided not to give evidence and (2) that he has so decided bearing in mind the advice, if any, given to him by his counsel. That certainly was the practice in the days when the members of this Court were practising at the Bar. It should never have been departed from. It is our firm view that if the practice has fallen by the wayside, it should be restored to its former prominence and become invariable once again.”

52. Subsequently, in *R v. Chatroodi* [2001] EWCA Crim 585, Pitchford J reiterated the importance of ensuring a written record of the defendant's decision:

“39. As long ago as 1993 Watkins LJ, giving the judgment of this Court in *R v Bevan* 98 Cr App R 354, said that it should be the invariable practice of counsel to record any decision of a defendant not to give evidence, signed by the defendant himself, indicating, clearly, that the decision has been made of his own free will, and that in reaching that decision he has borne in mind advice tendered by counsel. We are bound to express some dismay at the knowledge that comparatively senior counsel, advising a client not to give evidence ... was unaware of this obligation.

40. While we would not expect counsel to record every detail of every conference between himself and his client, we would expect some written record of a conversation relevant to the important question whether it was in the defendant's interests to give evidence at his trial. This court suffers the disadvantage, in the absence of such a record, of being required to evaluate the recollections of counsel, on the one hand, and the appellant on the other.”

53. The Privy Council ruled that the practice of recording a defendant's decision not to testify was also desirable in the Caribbean jurisdictions in *Bethel v. The State* (1998) 55 WIR 394. There, the appellant had alleged that his counsel had acted improperly in several respects, including in not permitting him to give evidence. Lord Hoffmann recorded that their Lordships felt bound to say that:

“they are surprised that in a capital case no witness statement was taken from the petitioner or other memorandum made of his instructions. In view of the prevalence of allegations such as those now made, they think that defending counsel should as a matter of course make and preserve a written record of the instructions he receives. If this appeal serves no other purpose, it should remind counsel of the absolute necessity of protecting themselves from such allegations in the future.”

C. Counsel's duty to put defendant's case

54. It was previously thought to be improper to make a charge against a witness at trial which was not supported by testimony from the defendant. In *R v. O'Neill* (1950) 34 Cr App R 109, having referred to the defence allegation that the alleged statement had been beaten out of the defendant, Lord Goddard LCJ said:

“However, what the Court desires to call attention to is this: *having suggested this in cross-examination to the police, and having repeated the suggestion before the jury, counsel did not call his client to support what he had been instructed to say, and the Court has no hesitation in saying that that is not the proper practice* ... It is quite wrong and improper conduct on the part of counsel to make a charge against the police or against any other witness by way of defence – because, of course, it would have been a defence if the statements which were the principal evidence against the applicants had been extracted from them by improper means – if he does not intend to call his client to give evidence to support the charge.

.... It is ... entirely wrong to make such suggestions as were made in this case, namely that the police beat the prisoners until they made confessions, and then, when there is the chance for the prisoners to substantiate what has been said by going into the box, for counsel not to call them. The Court hopes that notice will be taken of this, and that counsel will refrain, if they do not intend to call their clients, from making charges which, if true, form a defence but which, if there is nothing to support them, ought not to be pursued.” (emphasis added)

55. In *R v. Callaghan* (1979) 69 Cr App R 88 Waller LJ in the Court of Appeal endorsed the passage from *O'Neill* and added:

“This Court entirely agrees with those observations. It does not seem to us there has been any change in circumstances since that decision was made which would justify some different ruling being made.”

56. However, Waller LJ subsequently made a statement relating to his judgment in *Callaghan* (The Times, 20 February 1980). According to the report:

“His Lordship said that it appeared that there was an aspect of the problem which did not then occur to him. That had been brought to his attention by the professional conduct committee of the Bar. From time to time there might be a case where a client required a challenge to be made to a police officer but at the same time refused to go into the witness box to support that challenge because of his very bad record. Such a case should be wholly exceptional.

In such circumstances counsel had a difficult decision. He must warn his client that the judge would probably make a very strong comment on his client’s failure to support the suggestions on oath in the witness box. If nevertheless the client, having been warned, insisted, then counsel must carry out his instructions even though he was aware that his client would not support his cross-examination. His client could not complain if a strong comment was made from the Bench.

His Lordship was making a statement now, but at some future time, when a suitable case occurred, it would be possible to modify the dictum which he made in *R v Callaghan*.”

57. Referring to this statement, the current (sixteenth) edition of Phipson on Evidence (2005), para 12-30 at page 330 comments:

“It is submitted that now, as then, counsel’s duty is to put the defendant’s case, whether or not he intends to call evidence to support it.”

58. As outlined above, the view of Waller LJ in his statement of February 1980 was endorsed by the Privy Council in the applicant’s case.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 IN CONJUNCTION WITH ARTICLE 6 § 3 (c) OF THE CONVENTION

59. The applicant complained that the failure of his original lawyers to ensure that his case was put before the court in the trial proceedings and to act in accordance with his instructions, and the subsequent failure of the Court of Appeal and the Privy Council to remedy that failure, breached his rights under Article 6 § 1 taken together with Article 6 § 3 (c) of the Convention, which read as follows:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(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; ...”

60. The Government contested that argument.

A. Admissibility

61. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

a. The applicant

62. The applicant disputed that the evidence of the lawyers in their affidavits was “clear and unequivocal” such that *viva voce* evidence was not required. He pointed to Lord Steyn’s observation that Mr St John Stevens did not directly address the applicant’s allegation that he told his lawyers that he had not made the alleged confession. He also disputed that his

lawyers had at all times acted in accordance with his instructions, alleging that they had failed to put forward his defence at trial. He claimed that although he wanted to expose the fabrication of the police officers' account, he was "discouraged and talked out of" doing so by his counsel.

63. The applicant further submitted that the lack of a written record of his decision not to give evidence was a serious impropriety which prevented him from having a fair trial.

64. The refusal to hear *viva voce* evidence had a significant detrimental effect on the determination not only of whether the applicant had made the alleged confession but also of whether he had genuinely decided of his own free will not to give evidence.

b. The Government

65. The Government emphasised that the applicant was represented by experienced leading counsel, junior counsel and two attorneys. During the course of the trial, leading counsel made every effort to comply with the applicant's instructions and to defend him in the most appropriate and effective manner. The Government relied on the record of the proceedings which showed that counsel sought regularly to obtain the applicant's instructions on matters concerning the conduct of the trial. Further, the clear and unequivocal evidence given in the applicant's lawyers' affidavits was that the trial was conducted in accordance with the applicant's express instructions. The Government concluded that the applicant's instructions to his lawyers that they were not to suggest that the police officers had fabricated his statement were for tactical reasons: a challenge to the police officers' integrity would have allowed the prosecution to adduce evidence of the applicant's previous bad character. Moreover, the applicant sought to rely on Mr Powell's evidence that he, Mr Powell, had killed the victim acting alone, even though this account of events was inconsistent with the other evidence in the case.

66. The Government considered that the determination of the criminal charge against the applicant was in all respects fair and in accordance with the requirements of Article 6. They relied on the fact that the domestic courts had found that the applicant instructed his counsel to challenge the admissibility of the evidence given by the police officers on grounds of unfairness, oppression and omission to administer a full caution and that the applicant's counsel had made every effort to comply with the applicant's instructions and conduct his defence in an appropriate and effective manner. They emphasised that the trial judge had conducted the trial in a careful manner giving well-reasoned and entirely persuasive rulings as to the admissibility of the evidence; that the trial judge had made clear before giving his rulings and in the presence of the applicant himself that the defence case was weak in the absence of evidence from the applicant; that at no stage did the applicant voice any complaint about the conduct of

proceedings and the record of proceedings demonstrates the care of his lawyers in advancing an effective and appropriate defence; that the first time the applicant asserted that his counsel had acted in defiance of his instructions was nine months after the conclusion of his trial; that the clear and unequivocal evidence given in the applicant's lawyers' affidavits was that the trial was conducted in accordance with the applicant's express instructions; that there were sound tactical reasons for the applicant to instruct his lawyers not to deny that he had made the statement; and that the Privy Council considered the applicant's complaint in detail and reached the same conclusion as the Court of Appeal. It was significant to note that the Privy Council had the benefit of a full transcript of the trial proceedings.

67. As to the alleged failure of the applicant's lawyers to put his denial that he had ever made the alleged statement before the court, the Government pointed to Mr St John Stevens' affidavit in which he stated that the applicant's instructions were that he would not give evidence and that the prosecution should be required to prove that the confession statement was made voluntarily. That these were the applicant's instructions was supported by the evidence of Mr McGrath. Evidence of other lawyers involved in the case did not contradict this position. Both the Court of Appeal and the Privy Council found that the applicant's lawyers had complied with his instructions. In doing so, the courts had examined the credibility of the applicant's allegation carefully and had rejected it in a highly persuasive manner. Relying on *Klaas v. Germany*, 22 September 1993, § 29-31, Series A no. 269; and *Edwards v. the United Kingdom*, 16 December 1992, § 34, Series A no. 247-B, the Government contended that there was no basis for the Court to proceed to make a new assessment of the facts as found by the domestic courts as their conclusions were neither arbitrary nor unfair. The Government therefore invited the Court to accept the findings of fact made by the domestic courts.

68. The Government disputed the suggestion that defence counsel at trial had proceeded on the basis that it would have been improper to have suggested that the police officers were lying unless the applicant was prepared to give evidence to that effect. They argued that there was no evidence to suggest this and that the point did not arise directly for consideration in the appeal to the Privy Council.

69. As to the failure of the applicant's counsel to record in writing the applicant's decision not to give evidence, the Government highlighted that the Court of Appeal had considered the matter with some care and took note of the experience of the applicant's counsel, the sworn evidence of the lawyers involved and the fact that they had made sufficient efforts to meet with the applicant regularly. Although the failure to record the applicant's decision in writing did not accord with best practice, this shortcoming could be remedied by a factual determination of the question whether the applicant wished to remain silent. In this regard, it was significant that at no

stage during the trial had the applicant indicated that he wished to give evidence. There was nothing in the record of proceedings to support his allegation. On the contrary, the record of the *voir dire* hearings showed that the trial judge had positively encouraged the applicant to give evidence. After taking instructions, counsel for the applicant had informed the court that no evidence would be called. Accordingly, on the factual question, the domestic courts found that the applicant's account was not credible. The Government argued that it was not the role of the Court to act as a fourth instance tribunal. The failure to keep a written record did not of itself render the trial unfair.

70. Regarding the refusal of the Court of Appeal to hear *viva voce* evidence, the Government contended that the Court of Appeal was satisfied that it could reach a decision on the basis of the available evidence. Moreover, the position was considered afresh in the Privy Council, where it was reiterated by Lord Rodger that a court may feel able to resolve such a dispute without hearing evidence. The Government insisted that this must be the correct approach as an appeal court could not be required invariably to hear evidence where a factual dispute arose between the parties. Furthermore, rules on admissibility of evidence were primarily a matter for regulation under national law (referring to *Schenk v. Switzerland*, 12 July 1988, Series A no. 140).

2. The Court's assessment

71. The applicant alleged that he did not have a fair trial and complained of a violation of Article 6 §§ 1 and 3 (c). The Court first notes that the guarantees in paragraph 3 of Article 6 are specific aspects of the right to a fair trial in criminal proceedings as set forth in paragraph 1 of the same Article. Accordingly, the applicant's complaint will be examined under these provisions taken together (see, among other authorities, *Benham v. the United Kingdom*, 10 June 1996, § 52, *Reports of Judgments and Decisions* 1996-III; and *Kulikowski v. Poland*, no. 18353/03, § 55, 19 May 2009).

72. The Court observes that the responsibility of the Contracting Parties is incurred by the actions of their organs. A lawyer, even if officially appointed, cannot be considered to be an organ of the State. Given the independence of the legal profession from the State, the conduct of the case is essentially a matter between the defendant and his or her counsel, whether counsel be appointed under a legal-aid scheme or be privately financed, and, as such, cannot, other than in special circumstances, incur the State's liability under the Convention (see *Artico v. Italy*, 13 May 1980, § 36, Series A no. 37; *Daud v. Portugal*, 21 April 1998, § 38, *Reports of Judgments and Decisions* 1998-II; *Tuziński v. Poland* (dec.), no. 40140/98, 30 March 1999; *Rutkowski v. Poland* (dec.), no. 45995/99, ECHR 2000-XI;

and *Cuscani v. the United Kingdom*, no. 32771/96, § 39, 24 September 2002).

73. Nevertheless, assigning counsel to represent a party to the proceedings does not in itself ensure the effectiveness of the assistance (see *Imbrioscia v. Switzerland*, 24 November 1993, § 38, Series A no. 275). There may be occasions when the State should act and not remain passive when problems of legal representation are brought to the attention of the competent authorities. It will depend on the circumstances of the case whether, taking the proceedings as a whole, the legal representation may be regarded as practical and effective (see, *mutatis mutandis*, *Artico*, cited above, § 33; *Goddi v. Italy*, 9 April 1984, § 27, Series A no. 76; *Rutkowski*, cited above; *Staroszczyk v. Poland*, no. 59519/00, §§ 121-122; and *Siałkowska v. Poland*, no. 8932/05, §§ 99-100, 22 March 2007).

74. In considering whether the trial proceedings were fair within the meaning of Article 6, the Court must consider the proceedings as a whole including the decision of the appellate courts. Moreover it is not for the Court to substitute its own assessment of the facts for that of the domestic court (see, *inter alia*, *Klass v. Germany*, cited above, § 29). As a general rule, it is for the national courts to assess the evidence before them as well as the relevance of the evidence which defendants seek to adduce and the Court will only interfere where the assessment of the evidence or establishment of the facts by the domestic courts can be impeached on the ground that they were manifestly unreasonable or in any other way arbitrary (*I.J.L. and Others v. the United Kingdom*, nos. 29522/95, 30056/96 and 30574/96, § 99, ECHR 2000-IX). Similarly, the decision as to whether in a particular case it is appropriate to call witnesses to testify is one for the domestic courts (see *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B). The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was heard, were fair (see *Edwards*, cited above § 34).

75. The Court observes that the applicant's allegations of unfairness in respect of the first instance trial proceedings centred on two factual disputes, the first concerning his decision not to give evidence at trial; and the second regarding his instructions to his lawyers at trial as to whether to put before the court his denial that he made a statement to the police. The applicant complained that, in reaching its decision on these matters, the Court of Appeal ought to have heard *viva voce* evidence.

76. As its starting point, the Court agrees with the Government that an appeal court cannot be required invariably to hear oral evidence where a factual dispute arises on appeal. To impose such a duty on appellate courts would excessively curtail their discretion to deal with the cases before them in an appropriate and proportionate manner. Where a factual dispute arises, the court is entitled to consider whether it is able to resolve the dispute on the basis of any affidavits and other material placed before it or whether

fairness requires that oral evidence be heard. In deciding upon the correct course of action in a given case, the court is entitled to have regard to the strength of the evidence contained in the written materials as well as to the potential clarifications which oral evidence would bring as regards the factual dispute in question. However, where the written material before the appeal court is ambiguous or unclear in respect of details relevant to the ground of appeal raised, fairness may require the appeal court to hear oral evidence in order to seek to clarify the positions of the parties.

77. As regards the applicant's complaint that he was prevented from giving oral evidence at trial, the Court emphasises at the outset that it is clearly unfortunate that the applicant's desire not to give evidence was not recorded in writing. However, in the absence of such a record, the question whether the applicant chose to remain silent of his own free will was a question of fact to be resolved on the basis of the evidence available. In the present case, the Court notes that the Court of Appeal had the benefit of affidavits from the applicant and his trial counsel. The clear picture which emerged from the affidavits of counsel was a denial of the allegation contained in the applicant's affidavit that he had failed to understand the implications of not giving evidence. The Court of Appeal also considered it significant that the applicant's counsel were experienced lawyers and had met with him regularly before the trial to discuss his case (see paragraph 35 above). Further, the Court observes that Lord Rodger, on behalf of the majority in the Privy Council, examined the applicant's complaint afresh. With the benefit of a full transcript of the trial proceedings, he noted that the applicant had not raised this complaint at any time during trial and that it was first made some nine months after the conclusion of the trial (see paragraph 39 above). He further emphasised that the record of the trial showed the time and care taken by Mr St John Stevens to ensure that the applicant understood the proceedings and agreed to the steps taken on his behalf, citing specific examples (see paragraph 40 above). Finally, he pointed out that, given the difficulties that the applicant's refusal to give evidence was likely to create for counsel's presentation of his defence, it was hard to see why counsel would have "deliberately flouted" the applicant's wish to give evidence (see paragraph 41 above).

78. The Court agrees with the findings of the domestic courts that, on the question of the failure of the applicant to give oral evidence at trial, the contents of the affidavits were clear. In these circumstances, fairness did not require the hearing of *viva voce* evidence on this issue. As to the conclusions of the domestic courts, the Court considers that it was not unreasonable for the Court of Appeal and the Privy Council to conclude, on the basis of the affidavit evidence and the verbatim record of the trial as well as the general context of the applicant's case, that counsel had acted in accordance with the applicant's instructions and that the applicant had genuinely decided of his own free will not to give evidence in his defence.

There are therefore no grounds for the Court to interfere with the domestic court's assessment of the facts on this matter.

79. As regards the failure of counsel to challenge the police officers' evidence that the applicant had made a statement, the Court notes that the Court of Appeal dismissed the applicant's appeal on the mistaken understanding that it would only be possible to challenge such evidence where the applicant gave oral evidence in support of that challenge. The court having found that the applicant's decision not to give evidence was freely made, it necessarily followed that he could not claim any unfairness from the failure of his counsel to present a positive case (see paragraph 36 above). The Court considers that if the applicant's counsel wrongly advised him that, in light of his decision not to give evidence, they were unable to dispute the making of the statement, then this error was so fundamental that it deprived the applicant of a fair trial. However, the question arises whether, in the present case, any such mistaken advice was given to the applicant by counsel.

80. The Court's starting point is the opinion of Lord Rodger in the Privy Council, in which he found that the Court of Appeal was wrong to conclude that a positive challenge to the making of the statement could not be made in the absence of oral evidence from the applicant and emphasised that it was the duty of counsel to present the defence case, even where the defendant refused to give evidence (see paragraph 42 above). However, Lord Rodger concluded that the point did not arise on the facts of the applicant's case as the Court of Appeal had proceeded on a basis for which there was no foundation in the lawyers' affidavits (see paragraph 43 above). Like Lord Rodger, the Court considers that there was nothing in the affidavit evidence to suggest that Mr St John Stevens had proceeded as he did because he thought it would be professionally improper to put to the police officers that the applicant had not made the statement when he was not going to give evidence in support of the submission (see paragraphs 28 and 31 to 32). The Court of Appeal did not find that counsel had advised the applicant thus (see paragraph 36 above). Further, the applicant himself did not allege, either in his affidavit or in his written submissions to this Court, that he had been advised that it was improper for counsel to challenge the statement in light of his refusal to give evidence. Instead, he claimed that he was "discouraged and talked out of" challenging the credibility of the officers (see paragraph 62 above). In the circumstances, the Court considers that it was not unreasonable for the Privy Council to conclude that the Court of Appeal's conclusion on this issue was irrelevant to the disposal of the case and to proceed to deal with the applicant's complaint based on the written material before it.

81. In dismissing the ground of appeal, Lord Rodger referred again to the delay in making the complaint and to the obvious care taken by Mr St John Stevens to obtain the applicant's instructions during trial. He pointed out

that the decision not to challenge the credibility of the police officers “by no means simplified the presentation of the defence case”, particularly in the *voir dire*s (see paragraph 44 above). He also highlighted that there may have been tactical reasons for the decisions made by the applicant in the presentation of his defence (see paragraph 45 above).

82. The Court recognises that in the context of any criminal proceedings, decisions must be made as to how best to present an accused’s defence at trial. In many cases several options will be available and it is the responsibility of the accused to select, with the advice of counsel, the defence which he wishes to put before the court. Any defendant subsequently convicted will naturally feel aggrieved if he had an alternative defence which was not, in the event, pursued. He may convince himself, often unrealistically, that the alternative defence would have been successful where the actual defence run was not. However, it is not in the interests of justice to allow a defendant to seek to advance such alternative defence after his conviction unless there are special circumstances which give rise to a real concern that the legal representation at trial was defective in a fundamental respect.

83. In the present case, the Court notes that the allegations as to counsel’s failure to comply with the applicant’s instructions were first made some nine months after the conclusion of the trial and not, as might reasonably be expected, immediately or at least very shortly after. The Court further notes that the verbatim transcript of the trial, which was available to the Privy Council in its consideration of the case, provides strong evidence of the attentiveness of counsel to the wishes and instructions of the applicant. Both Mr McGrath and Mr St John Stevens were clear in their affidavits as to the content of the applicant’s instructions and the fact that they had acted in accordance with those instructions (see paragraphs 31 to 32 above). In the circumstances, the Court does not consider the conclusions of the Privy Council to be manifestly unreasonable or arbitrary.

84. As to whether the domestic courts ought to have heard *viva voce* evidence, the Court acknowledges that the statement of Mr St John Stevens did not address directly the question whether the applicant had consistently denied making the alleged confession. However, the relevant question for the applicant’s appeal was not whether he denied making the confession but whether he instructed his solicitors to present a positive case to that effect at trial. As noted above, the lawyers’ affidavits were clear on this point. Mr McGrath noted that, “Whilst it is correct to say that no positive case was ever put in relation to [the applicant’s denial that he made a statement] this was upon the appellant’s instructions ... Because he would not give evidence the appellant chose not to put his case about not making the confession to the police officers in the course of the trial proper” (see paragraph 31 above). Mr St John Stevens said, “The appellant’s

instructions were that the Crown should be put to proof as to establishing that the confession in issue was made voluntarily and that no positive case would be put over and above this issue ... I am satisfied that the appellant's case was presented in accordance with and upon clear and unequivocal instructions" (see paragraph 32 above). The position of counsel was, in this respect, unambiguous and there was therefore no requirement for the court to hear *viva voce* evidence on the matter.

85. There has accordingly been no violation of Article 6 § 1 in conjunction with Article 6 § 3 (c) of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 6 § 1 of the Convention in conjunction with Article 6 § 3 (c).

Done in English, and notified in writing on 26 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı
Deputy Registrar

Giovanni Bonello
President