

SUPREME COURT RULES COMMITTEE

MINUTES OF THE MEETING HELD ON MONDAY 14 MARCH 2005 IN THE JUDGES' ASSEMBLY ROOM, ROYAL COURTS OF JUSTICE

Present: The Rt Hon The Lord Chief Justice (Chairman)
 The Rt Hon Lord Justice Nicholson
 The Rt Hon Lord Justice Campbell
 The Hon Mr Justice Girvan
 The Hon Mr Justice Coghlin
 Mr McCloskey QC
 Mr Horner QC
 Mr Caher
 Ms McGonagle

In attendance: Master Wilson
 Master Ellison
 Master Redpath
 Master McCorry
 Master Napier

Ms Fee) Joint Secretaries
Mr Rogers)

Mr Luney
Ms McGrath
Ms McConnell

Apologies: Master Hall

Minutes of the meeting held on 11 December 2003.

A couple of minor amendments were made to these and they were signed by the Lord Chief Justice.

Matters arising

Mr Justice Girvan asked whether he, as he was no longer Chancery Judge, should stand down in place of Mr Justice Weir. The Lord Chief Justice said that he was keen for him to remain on the Committee given his judicial review experience.

Criminal Justice Act 2003 – Re-trial for serious offences

The draft Criminal Appeal (Re-trial for Serious Offences) Rules (Northern Ireland) 2005 were considered. An amended version of Rule 3, which took account of an error concerning the timescale for service in Rule 3(1), was tabled and approved.

The Lord Chief Justice queried the reference in Rule 3(2) to “where practicable” wondering whether this was too easy a test but he said that he was assured by the secretariat that this mirrored England and Wales and would be sufficient and could be policed by the judiciary. He also questioned whether there ought to be a provision for public interest immunity but had been assured that this was also covered by the “where practicable” formula. He also noted that if the prosecution failed to observe the spirit of the Rule then it would be open for it to be amended. In the interim judges should monitor compliance and could use inherent powers to require documents to be served. In any event the defence were likely to watch the issue.

- In Rule 5(3) the word “the” was added after “own motion or on”.
- In Rule 7(1) the commas after the words “served” and “prosecutor” in the last line were removed.
- In Rule 7(2) in the last line “is served” was changed to “has been served”.
- Rule 7(3) was amended to read “where the court makes an order for restrictions on publication under section 82(1) of the 2003 Act of its own motion or on the”
- Rule 8(3), last line, was amended from “is served” to “has been served”.
- Rule 8(4) was amended to “where the court makes an order varying or revoking restrictions on publication under section 87(7) of the 2003 Act of its own motion or on the ...”
- In Rule 12(2) the commas after “served” and “prosecutor” were deleted.
- In Rule 13(2) the comma after “prosecutor” was removed.

Subject to these changes the Rules were approved.

The Criminal Justice (NI) Order 2004 – Prosecution Appeals

The Committee considered the draft Criminal Appeal (Prosecution Appeals) Rules (Northern Ireland) 2005. The Lord Chief Justice noted that the Rule that had been inserted to deal with applications being heard by a single judge, Rule 10 in the draft, had been deleted because there was a concern about its vires. The NIO had advised that it would include a provision to provide the vires in a forthcoming Criminal Justice (Miscellaneous Provisions) Order. In

the interim, therefore, applications would be made to the full Court of Appeal by an oral hearing.

On the Rules themselves the Committee approved the following changes:

- Rule 3(2)(a) comma after the word 'so' in the last line be deleted,
- Rule 6(2) to read "... a defendant in custody will be entitled to participate ..."
- Rule 10 was deleted,
- Rule 14(1) should be amended to read "shall be made either",
- In Rule 15(3) after "or (2)(a)" the words "is sent" should be inserted,
- In Rule 15(4)(a)(iii) the word "his" before "last" should be deleted,
- In 15 (4)(b)(i) the words "where he" should be changed to "where it",
- In 15(4)(b)(ii) the words "where it indicated" should be amended to "where it has indicated",
- In 15(6) should be amended to read "to have been served". The forms should be amended by the deletion of the words "The Court of Appeal".
- The reference to Court of Appeal in the forms should be deleted.

There was a discussion as to whether the court could listen to a transcript and it was noted that there was no provision for listening at present.

Subject to the above changes these Rules were approved.

Criminal Justice (Evidence) (Northern Ireland) Order 2004 - Evidence of Bad Character and Hearsay Evidence

The Committee then considered the Criminal Appeal (Amendment) (Northern Ireland) Rules 2005.

The Lord Chief Justice noted that Judge Burgess and Mr Conner had expressed a view that where it was proposed to produce evidence about the bad character of a non-defendant then notice should be served on that individual as well as on the defendant. The Lord Chief Justice said that there were potentially Article 8 implications for that person who might want to object, for example, to intimate details being released. The Lord Chief Justice said that there was a contrary argument, however, and he suggested to the Committee, which agreed, that nothing should be done about this issue at this stage.

It was agreed that the reference to Court of Appeal in the forms should be deleted.

Subject to this change the Rules were approved.

Courts Act 2003 – Time Limit for Appeals to the House of Lords

The Committee approved the draft Criminal Appeal (Amendment) (Northern Ireland) Rules 2005 without amendment.

Nationality, Immigration and Asylum Act 2002 – Asylum and Immigration Appeals

The Committee approved the Supreme Court (Amendment) Rules (Northern Ireland) 2005 without amendment.

Report of the Law Reform Advisory Committee on Third Party Discovery

The Committee considered this Report. The Lord Chief Justice said that a concern had been expressed about the competence of the Committee to make rules to give effect to some of the recommendations in the Law Reform Advisory Committee Report on Third Party Discovery. The Law Reform Advisory Committee had noted that primary legislation is needed to make provision for a general power to make discovery orders against third parties.

Mr Justice Girvan noted that there was a difficulty under the current legislation in that courts are not able to deal effectively with third party discovery, whereas in England and Wales the CPR make provision for this. The problem with the Khanna procedure was that it was somewhat artificial and could cause delays and there were different practices in different courts. There was an argument, therefore, for applying Khanna to pre-setting down situations.

Mr Justice Coghlin said that he already applied it in that way. He did not see the need for the legislation and felt there was enough flexibility at present. Master McCorry agreed. Mr Horner said that the Khanna subpoenas worked reasonably well in practice. Ms McGonigal and Mr Caher said that they had no difficulty with the Khanna procedure.

The Lord Chief Justice said that the flexibility of the current informal arrangements appeared to work reasonably effectively. Mr Justice Girvan suggested that rather than introduce a Rule it might be better to prepare a Practice Direction in relation to the report's recommendation about the information which should be provided by a party seeking a Khanna subpoena. The Committee agreed. **(Action Simon Rogers)** The Committee also agreed that the prescribed forms should be amended to include notice of the recipient's right to apply to have the subpoena set aside. **(Action Geraldine Fee)**

Date of next meeting:

To be arranged.