

Privy Council DRA. No. 1 of 2002

Kenneth Anthony Paton Mills

Appellant

v.

**(1) Her Majesty's Advocate and
(2) The Advocate General for Scotland**

Respondents

FROM

**THE HIGH COURT OF JUSTICIARY
SCOTLAND**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 22nd July 2002

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Mackay of Clashfern
Lord Steyn
Lord Hope of Craighead
Lord Scott of Foscote

Lord Nicholls of Birkenhead

1. For the reasons given in the judgments of Lord Steyn and Lord Hope of Craighead, with which I agree, I would dismiss this appeal.

Lord Mackay of Clashfern

2. I have had the advantage of reading the opinion of my noble and learned friend Lord Hope of Craighead. I agree that this appeal should be dismissed for the reasons he has given.

Lord Steyn

3. A question arises on the meaning of article 6(1) of the European Convention for the protection of Human Rights and Fundamental Freedoms. The answer to it is of great importance for the sensible and orderly application of the principles of article 6(1).

Having already given a judgment on this point I feel diffident about doing so again. There are, however, developments of importance to be taken into account, and threads to be brought together. I fear I must return to the point.

4. Counsel for the appellant argues that where in appellate proceedings there has been a breach of the guarantee of a hearing within a reasonable time under article 6(1) of the European Convention on Human Rights, the only and inevitable remedy is to quash the conviction. For this proposition he relies on the decision of the Privy Council in *Darmalingum v The State* [2000] 1 WLR 2303. In that case the Privy Council considered section 10(1) of the Constitution of Mauritius which is modelled on article 6(1) and is to the same effect. In *Flowers v The Queen* [2000] 1 WLR 2396 the Privy Council considered section 20(1) of the Constitution of Jamaica which is also modelled on article 6(1) and is to the same effect. The Privy Council departed from *Darmalingum*. Subsequently the Privy Council has taken the view that, although the outcomes of both cases were correct, there were important principled differences between *Darmalingum* and *Flowers: Dyer v Watson* [2002] SLT 229, per Lord Bingham of Cornhill, at para 29.

Counsel for the appellant has invited the Privy Council to attempt to resolve the problem created by the conflicting dicta. In order to do so it is necessary to attempt to identify the differences in reasoning in *Darmalingum* and *Flowers*.

5. Article 6(1) is of central importance in the scheme of the Convention. The relevant part of article 6(1) reads as follows:

“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.”

The object and purpose of article 6(1) is “to enshrine the fundamental principle of the rule of law”: *Salabiaku v France* (1988) 13 EHRR 379, 388, para. 28. In *Darmalingum* the Privy Council considered article 6(1) in the light of European jurisprudence. Giving the judgment of the Board I said, at pp 2307H-2308B:

“It will be observed that section 10(1) contains three separate guarantees, namely (1) a right to a fair hearing; (2) within a reasonable time; (3) by an independent and impartial court established by law. Hence, if a defendant is convicted after a fair hearing by a proper court, this is no answer to a complaint that there was a breach of the guarantee of a disposal within a reasonable time. And, even if his guilt is manifest, this factor cannot justify or excuse a breach of the guarantee of a disposal within a reasonable time. Moreover, the independence of the ‘reasonable time’ guarantee is relevant to its reach. It may, of course, be applicable where by reason of inordinate delay a defendant is prejudiced in the deployment of his defence. But its reach is wider. It may be applicable in any case where the delay has been inordinate and oppressive. Furthermore, the position must be distinguished from cases where there is no such constitutional guarantee but the question arises whether under the ordinary law a prosecution should be stayed on the grounds of inordinate delay. It is a matter of fundamental importance that the rights contained in section 10(1) were considered important enough by the people of Mauritius, through their representatives, to be enshrined in their Constitution. The stamp of constitutionality is an indication of the higher normative force which is attached to the relevant rights: see *Mohammed v The State* [1999] 2 AC 111, 123H.” (Emphasis added)

The reference to the ordinary law was, of course, a reference to the common law rule as stated in *Attorney-General’s Reference (No 1 of 1990)* [1992] QB 630, 643-644, that no stay will be imposed for inordinate delay unless the defendant shows on a balance of probabilities that owing to the delay he will suffer *serious prejudice to the extent that no fair trial can be held*. In *Darmalingum* it was held that the scope of article 6(1) is wider.

6. In *Flowers* [2000] 1 WLR 2396 the Privy Council approached the matter differently. The Board followed an earlier decision of the Privy Council in *Bell v Director of Public Prosecutions* [1985] AC 937, which had not been referred to in *Darmalingum*. In *Bell* the Privy Council had relied on *Barker v Wingo*, (1972) 407 US 514 and enunciated the following proposition, at p 950:

“Their Lordships agree with the respondents that the three elements of section 20, namely a fair hearing within a reasonable time by an independent and impartial court

established by law, form part of one embracing form of protection afforded to the individual.” (Emphasis added)

In *Bell* the Privy Council had not been referred to article 6(1) or to any European jurisprudence on it. In *Flowers* too there was no reference to European case law.

7. In deciding not to follow *Darmalingum* on the question whether article 6(1) incorporates three separate guarantees Lord Hutton, who gave the judgment, observed at pp 2414H–2415A:

“The judgment of the Board does not refer to the passage in the judgment of the Board in *Bell v Director of Public Prosecutions* [1985] AC 937 which recognises that the right given by section 20 of the Constitution of Jamaica must be balanced against the public interest in the attainment of justice or to the passage which states that the right to a trial within a reasonable time is not a separate guarantee but, rather, that the three elements of section 20(1) form part of one embracing form of protection afforded to the individual.” (Emphasis added)

Relying on *Bell* the Privy Council in *Flowers* rejected the idea that there are three separate guarantees. This ruling enabled the Privy Council in *Flowers* to consider the question of breach (as opposed to remedy) by weighing against a lengthy period of delay, countervailing matters which were plainly considered to be justifying, excusing or balancing factors. Those factors were the gravity of the crime, its prevalence in Jamaica and the guilt of the appellant: p 2415B. If this approach is correct the interpretation of article 6 in *Darmalingum* was wrong.

8. The question whether there are three separate guarantees or not is important. The point was examined by the House of Lords in *Porter v Magill* [2002] 2 WLR 37. In a speech delivered by Lord Hope of Craighead with the agreement of all the Law Lords he said, at p 78, para 87, that article 6(1):

“creates a number of rights which, although closely related, can and should be considered separately. The rights to a fair hearing, to a public hearing and to a hearing within a reasonable time are separate and distinct rights from the right to a hearing before an independent and impartial tribunal established by law. This means that a complaint that one of these rights was breached cannot be answered by showing that the other rights were not breached. Although the overriding question is whether there was a fair trial, it is no

answer to a complaint that the tribunal was not independent or was not impartial to show that it conducted a fair hearing within a reasonable time and that the hearing took place in public: see *Millar v Dickson* 2001 SLT 988, 994D-E per Lord Bingham of Cornhill and my own observations in that case, at p 1003C-F.”

Later in his speech he continued at p 86, paras 108-109:

“108 I would also hold that the right in article 6(1) to a determination within a reasonable time is an independent right, and that it is to be distinguished from the article 6(1) right to a fair trial. As I have already indicated, that seems to me to follow from the wording of the first sentence of the article which creates a number of rights which, although closely related, can and should be considered separately. This means that it is no answer to a complaint that one of these rights was breached that the other rights were not. To take a simple example, the fact that the hearing took place in public does not deprive the applicant of his right to a hearing before an independent and impartial tribunal established by law.

109 I would respectfully follow Lord Steyn’s observation in *Darmalingum v The State* [2000] 1 WLR 2303 about the effect of section 10(1) of the Constitution of Mauritius when he said that the reasonable time requirement is a separate guarantee. It is not to be seen simply as part of the overriding right to a fair trial, nor does it require the person concerned to show that he has been prejudiced by the delay. In *Flowers v The Queen* [2000] 1 WLR 2396 a differently constituted Board, following *Bell v Director of Public Prosecutions* [1985] AC 937, held that prejudice was one of four factors to be taken into account in considering the right to a fair hearing within a reasonable time in section 20(1) of the Constitution of Jamaica. In the context of article 6(1) of the Convention however the way this right was construed in *Darmalingum v The State* seems to me to be preferable. In *Crummock (Scotland) Ltd v HM Advocate* 2000 SLT 677, 679A-B, Lord Weir, delivering the opinion of the High Court of Justiciary, said that under article 6(1) it was not necessary for an accused to show that prejudice has been, or is likely to be, caused, as a result of delay. The article 6(1) guarantee of a hearing within a reasonable time is not subject to any words of limitation, nor is this a case where other rights than those expressly stated are being read into the article as implied

rights which are capable of modification on grounds of proportionality: see *Brown v Stott* [2001] 2 WLR 817, 851B-E; *R (Pretty) v Director of Public Prosecutions* [2001] 3 WLR 1598, para 90. The only question is whether, having regard to all the circumstances of the case, the time taken to determine the person's rights and obligations was unreasonable."

The agreement of the Law Lords, who sat in the case, are recorded as follows: Lord Bingham of Cornhill, p 70, para 57; my speech, p 70, para 59; Lord Hobhouse of Woodborough, p 92, para 131; and Lord Scott of Foscote, p 100, para 161 and 163.

9. My Lords, I have cited lengthy passages from Lord Hope's speech because they explain the structure of article 6(1) more fully than I had done in *Darmalingum*. The decision of the House of Lords in *Porter v Magill* is not binding on the Privy Council. But I would wish to adopt Lord Hope's analysis. Subsequently in *Dyer v Watson* 2002 SLT 229 the Privy Council considered the point again. Four of the Law Lords sitting stated in express terms or by concurrence with others the view that *Darmalingum* more closely reflects European jurisprudence than *Flowers*: see Lord Bingham of Cornhill, p 237, para 29; Lord Hope of Craighead, p 247, para 94; Lord Millett, p 251, para 123; and Lord Rodger of Earlsferry, p 252, para 134. Lord Hutton gave a short separate judgment on the issue of remedies to which I will return. The language of article 6(1), the human rights context, and European jurisprudence, suggest that the best interpretation is that, although the three elements of article 6(1) are closely related, they are nevertheless in law distinct and independent guarantees.

10. If it is assumed, however, that as a matter of language article 6(1) could be read as envisaged in *Flowers*, how should the matter be approached? On this hypothesis it is important to bear in mind that we are interpreting a core provision in a bill of rights. A broad purposive approach is necessary: *Delcourt v Belgium* (1970) 1 EHRR 355, p 367, paras 25-26. This is a classic case calling for what in *Minister of Home Affairs v Fisher* [1980] AC 319, 328, Lord Wilberforce described as "a generous interpretation ... suitable to give to individuals the full measure of the fundamental rights and freedoms referred to". With great respect I have to say that the view which prevailed in *Bell* [1985] AC 937 and *Flowers* [2000] 1 WLR 2396 would seriously emasculate the value and effectiveness of rights conferred by article 6(1). For example, it would be possible in the face of a case of inordinate and oppressive

delay, to hold that the delay is *excused* by the fact that the guilt of the defendant in respect of a serious crime was demonstrated at a fair hearing by a competent court. Such a view sits uneasily with the human rights context.

11. It is interesting to compare the corresponding provision of the International Covenant on Civil and Political Rights (1966), which has been ratified by the United Kingdom but not incorporated into our law. So far as material it reads as follows:

“Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...

2. ...

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...

(c) To be tried without undue delay;”

There cannot even be a linguistic argument in favour of a construction that there is a single guarantee. Unquestionably, article 14.3 enshrines a separate and independent guarantee. It would be strange if article 6(1) of the European Convention, admittedly earlier in date, has on this point a different and more restrictive meaning.

12. Domestic decisions of high authority demonstrate that what can compendiously be called the fair trial guarantees under article 6(1) must in application be considered separately. First, it is well established that the fair hearing guarantee is separate and absolute in character: *Brown v Stott* 2001 SC PC 43, at p 60; *R v Forbes* [2001] 1 AC 473, p 487, para 24. The only degree of flexibility is in regard to the content of a fair trial: in that respect the triangulation of the interests of the defendant, the victim and his family, and society, do arise, eg measures to protect victims: *Doorson v Netherlands* (1996) 22 EHRR 330. Once it is established that a defendant has not had a fair hearing at trial the conviction must be quashed: *Brown v Stott* and *R v Forbes*. Secondly, it is settled law that the guarantee of a hearing before an independent and impartial tribunal

is separate and absolute in character: *Millar v Dickson* [2002] 1 WLR 1615, 1639-1642, paras 61-70; *Porter v Magill* [2002] 2 WLR 37, at p 78, para 87. If it is established that at trial there was a breach of this guarantee, the conviction must be quashed: *Millar v Dickson* and *Porter v Magill*. The third guarantee must now be considered. It is of fundamental importance to distinguish clearly between two matters, namely (a) the scope the guarantee and breach of it and (b) the question of remedy. This distinction is explicit in *Darmalingum* but not in *Flowers*.

13. Given that there is no single rolled-up guarantee but three distinct rights or guarantees, it follows that the views expressed in *Bell* and *Flowers* on the scope of “one embracing form of protection” is not correct. In these circumstances I would respectfully follow the analysis of Lord Hope in paragraphs 108-109 of his speech in *Porter v Magill* which I have set out in extenso in paragraph 8 above. It is to be noted that prejudice, although a relevant factor, is not a prerequisite under the reasonable time guarantee. This is in accord with the approach of the European Court of Justice to this guarantee: *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1, 24, para 66; *Corigliano v Italy* (1982) 5 EHRR 334, 341, para 31; *Howarth v United Kingdom*, Application No 38081/97, (21 September 2000) [2001] Cr LR 229. Purposively construed article 6(1) may *in principle* be invoked by a defendant, who has been acquitted, or by a defendant whose guilt of a serious crime has been conclusively determined at trial and by the dismissal of an unmeritorious appeal. It *may* be applicable in any case where the delay has been inordinate and oppressive: *Flowers* [2000] 1 WLR, 2303, 2308A-B: see also Alistair Webster QC, “Delay and Article 6(1): An End to the requirement of Prejudice” [2001] Cr LR 786.

14. It may be of assistance to spell out the rationale of this guarantee as described in the European jurisprudence. Three themes can be identified. First, “in criminal matters, especially, it is designed to avoid that a person charged could remain too long in a state of uncertainty about his fate”: *Stögmüller v Austria* (1969) 1 EHRR 155, 191, para 5. Secondly it is recognised that lapse of time may result in the loss of exculpatory evidence or in a deterioration in the quality of evidence generally. Thirdly, it has been said that “the safety of a verdict reached a considerable time after the offence often become[s] the subject of controversy, [and] undermine[s] public confidence in the criminal justice system”: S. Stavros, *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights*, (1993), p 77. Even if not exhaustive these underlying themes have a bearing on a proper

disposal when there has been a breach of the “reasonable time” guarantee.

15. The separate question of the remedies available in respect of a breach of the guarantee of a hearing within a reasonable time must now be considered. The court is entitled to be informed of all factors logically relevant to the appropriateness of the remedy. In a post conviction case, for example, the fact that the accused’s guilt was established at trial and that an unmeritorious appeal was dismissed, is undoubtedly a relevant factor in considering what remedy, if any, to grant.

16. The remedies available could include an order for discontinuance of a prosecution, quashing of the conviction, reduction of the sentence, monetary compensation or a declaration. A finding of a violation of a guarantee may itself sometimes be a sufficient vindication of the right: *Eckle v Germany (Just Satisfaction)* (1983) 13 EHRR 556, 560, para 24. It is not necessary to discuss the appropriateness of particular remedies over the infinite range of cases which can come before the courts.

17. It is, however, necessary to identify an error in the reasoning on remedies in *Darmalingum*, which was pointed out by Lord Hutton in *Dyer v Watson* 2002 SLT 229, 251, para 121. *Darmalingum* was viewed by their Lordships sitting in that case as an extreme case involving proceedings hanging over a defendant for fifteen years. I said at p 2310D-F):

“The normal remedy for a failure of this particular guarantee, viz the reasonable time guarantee, would be to quash the conviction. That is, of course, the remedy for a breach of the two other requirements of section 10(1), viz (1) a fair hearing and (2) a trial before an independent and impartial court. Counsel for the prosecution argued however that the appropriate remedy in this case is to affirm the conviction and to remit the matter of sentence to the Supreme Court so that it may substitute a non-custodial sentence in view of the delay. The basis of this submission was that the guilt of the defendant is obvious and that it would therefore be wrong to allow him to escape conviction. This argument largely overlooks the importance of the constitutional guarantee as already explained. Their Lordships do not wish to be overly prescriptive on this point. They do not suggest that there may not be circumstances in which it might arguably be appropriate to affirm the conviction but substitute a non-custodial sentence, eg in a case where there had been a plea

of guilty or where the inexcusable delay affected convictions on some counts but not others. But their Lordships are quite satisfied that the only disposal which will properly vindicate the constitutional rights of the defendant in the present case would be the quashing of the convictions.”

Given that there are words of qualification in this paragraph, I am satisfied that the statement that “the normal remedy” for breach of this guarantee is a quashing of the conviction was not warranted.

18. In *Dyer v Watson* 2002 SLT 229, 251, para 121 Lord Hutton explained:

“The judgments of the European Court, as I read them, suggest that where there has been unreasonable delay in breach of article 6(1) the court does not take the view that a conviction after such delay must automatically be quashed. In *Bunkate v The Netherlands* [(1993) 19 EHRR 477] the court found that there had been unreasonable delay in violation of article 6(1) and then stated (p 484, para 25):

‘The applicant’s claims are based on the assumption that a finding by the Court that a criminal charge was not decided within a reasonable time automatically results in the extinction of the right to execute the sentence and that consequently, if the sentence has already been executed when the Court gives judgment, such execution becomes unlawful with retroactive effect.

‘That assumption is, however, incorrect. The Court is unable to discern any other basis for the claims and will therefore dismiss them.

‘And in *X v Federal Republic of Germany* the Commission stated (1980) 25 DR 144, para 2 in respect of a claim to stay the proceedings:

‘Insofar as the applicant claims a right to discontinuance of the criminal proceedings in view of the long delays which had occurred, the Commission considers that such a right, if it could at all be deduced from the terms of article 6(1) would only apply in very exceptional circumstances. Such circumstances did not exist in the applicant’s case.’”

Lord Hutton is right: it was wrong to say that the normal remedy is the quashing of the conviction.

19. Since the decisions in *Darmalingum* and *Flowers* the Privy Council have been asked to revisit the conflict of authority in *Taito v The Queen* (unreported) 19 March 2002. Under the heading Remedy the Privy Council observed, at para 22:

“In respect of Bennett, Boyd, Donaldson, Savelio, and Taito, counsel invited the Board to allow their appeals and to enter acquittals. For this ambitious submission counsel relied on *Darmalingum v The State* [2000] 1 WLR 2303. Counsel emphasised that in the cases of Bennett, Savelio and Taito the appeals were lodged 5 to 6 years ago. Taito has already served his sentence and Bennett and Savelio are nearing the completion of their sentences. Boyd and Donaldson received minor non-custodial sentences which have been completed. In these circumstances counsel said that the only effective remedy for a breach of the appellants’ constitutional rights is the entering of acquittals. The reliance on *Darmalingum* is misplaced. Delay for which the state is not responsible, present in varying degrees in all the relevant cases, cannot be prayed in aid by the appellants. Moreover, *Darmalingum* was a case where the defendant ‘had the shadow of the proceedings hanging over him for about 15 years’: at 2310C. It was a wholly exceptional case. This argument must be rejected. And their Lordships are satisfied that the Court of Appeal should not be troubled with it on a rehearing of the appeals.”

It is clear from this passage that the Privy Council took the view that quashing of a conviction is not the only remedy for a breach of the particular guarantee. On the contrary, it is clear that *Darmalingum*, and its disposal, was regarded as an exceptional case. The holding in *Taito* is inconsistent with the proposition that the normal remedy for such a breach is the quashing of the conviction.

20. In my view *Darmalingum* must be regarded as modified as I have indicated.

21. While some reference was made in argument to *Attorney General's Reference (No. 2 of 2001)* [2001] 1 WLR 1869, the implications of the judgment of the Court of Appeal do not require examination in the present case.

22. The premise of the appellant’s case has collapsed.

23. The actual disposal of his appeal by the High Court of Justiciary was carefully considered and reasoned: *Mills (No 2) v HM Advocate* [2001] SLT 1359. A reduction of the sentence by nine months was a just disposal in the spirit of article 6(1).

24. I agree with the order which Lord Hope of Craighead proposes and with his reasons on all aspects of the case.

Lord Hope of Craighead

25. This is an appeal under paragraph 13(a) of Schedule 6 to the Scotland Act 1998. The sole issue which it raises relates to the remedy which may be given to an appellant for a breach of his right to a hearing within a reasonable time under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, where there was a delay in the hearing of his appeal which was due to an act of the prosecutor.

26. On 17 October 1996 the appellant was convicted after trial in the High Court of Justiciary at Edinburgh of the theft of a motor car and of assaulting a police officer by driving a car at him, causing it to strike him and then driving it at an excessive speed along certain roads and in such a manner as to cause him to be thrown from the car against a wall to his injury and to the danger of his life. The charge narrated that he was on bail at the time of the offence of assaulting the police officer. On 7 November 1996 he was sentenced to detention in a young offender institution for eight years and six months, six months of that period being attributable to the fact that he committed the offence while on bail.

27. The appellant then took his case to appeal. Initially his appeal was only against sentence. But on 8 May 1997 he sought to appeal against his conviction on the ground of fresh evidence. He had maintained at his trial that he was not the driver of the car which struck and injured the police officer. Fresh evidence was now said to be available which supported his claim that the car was being driven by someone else at the time. On 9 June 1998 the court allowed supplementary grounds of appeal against conviction to be received. On 23 February 1999, having heard argument and in the light of a concession by the Advocate Depute, it decided to allow the evidence of one witness, and of a number of other witnesses in so far as their testimony might have a bearing on his credibility and reliability, to be heard on a later date: *Mills v HM Advocate* 1999 JC 216. A hearing to take this evidence was later fixed for 6 May 1999.

At the commencement of the hearing on that date the Crown asked for the diet to be continued to a later date for further preparation. This motion was opposed by the appellant, but it was granted by the court. The appellant was then admitted to bail. By the time of his release he had served just under three years of his sentence. It has not been suggested that there was any question of undue delay in the proceedings at any stage prior to this date.

28. There was then an interval of two years until 9 May 2001, when the court heard the fresh evidence. On 10 May 2001 it refused the appeal on the ground that the fresh evidence was not capable of being regarded by a reasonable jury as credible. But on the same date the appellant was allowed to lodge a further ground of appeal in which he alleged that there had been a breach of his rights under article 6(1) because of the delay in the hearing of the appeal. The court heard his appeal on this further ground on 31 July 2001. On 1 August 2001 it held that the appellant had established that there had been a breach of his article 6(1) right by the Lord Advocate which fell within section 57(2) of the Scotland Act 1998. His appeal was allowed, and his original sentence of detention was reduced by a period of nine months. The reasons for this decision were given in the opinion of the court which was delivered by Lord Coulsfield: *Mills (No 2) v HM Advocate* 2001 SLT 1359. On 7 November 2001 the High Court of Justiciary granted the appellant leave to appeal against this decision to the Judicial Committee. The appellant was once again granted bail.

29. Two points should be noted at the outset. The first is that the Lord Advocate has not appealed against the decision by the High Court of Justiciary that there was an unexplained delay in the hearing of the appeal which could not be said to have been reasonable. Nor has he appealed against its decision that the appellant had established a breach of his article 6(1) right by the Lord Advocate which fell with section 57(2) of the Scotland Act.

30. These decisions were taken before the hearing by the Judicial Committee on 12 December 2001 of the appeal in *Dyer v Watson, K v HM Advocate* 2002 SLT 229 and without the benefit of the observations which were set out in that judgment. In that case it was said that, although the case law of the European Court provided domestic courts with no specific norm against which they could judge the reasonableness of the length of the proceedings, the decisions indicated that a relatively high threshold had to be crossed before it could be said in any particular case that a period of delay was unreasonable and that the period which has elapsed gives

grounds for real concern that the Convention right has been violated: see Lord Bingham of Cornhill at p 241J-K, para 52, my own opinion at p245J-K, para 80, Lord Rodger of Earlsferry at p 256C-J, para 152. I shall have to return to facts which were relied upon in this case at a later stage in this judgment. But for the present I should like simply to suggest, in the light of the opinions that were expressed in *Dyer v Watson*, that the decision that there was an unreasonable delay in this case should not be regarded as anything other than a decision on its own facts.

31. Nor have we been asked in this case to examine the question what is to be taken to be an “act” of the Lord Advocate for the purposes of section 57(2) of the Scotland Act. That question is for another day: see *HM Advocate v R* 2001 SLT 1366; *R v HM Advocate* (Appeal No 817/01), (unreported) 31 May 2002. All that needs to be said about it at this stage is that it should be borne in mind that the position of the prosecutor is not the same at the stage of an appeal as it was during the trial: *Howitt v HM Advocate* 2000 SCCR 195, 200B per the Lord Justice Clerk (Cullen). During the trial he is the master of the instance: Alison, *Practice of the Criminal Law of Scotland* (1833), pp 88-90. What happens to a conviction thereafter is the responsibility of the court. It may be more difficult in these circumstances to identify an “act” of the Lord Advocate which can be said to have caused delay in the hearing of an appeal.

32. The second point relates to the jurisdiction of the Judicial Committee to hear this appeal. Although it was not suggested that your Lordships should not hear this appeal, it is important to understand the basis on which the jurisdiction is being exercised in this case.

33. Paragraph 13 of Schedule 6 to the Scotland Act provides that an appeal shall lie to the Judicial Committee “against a determination of a devolution issue”. The expression “devolution issue” is defined in paragraph 1 of Schedule 6. The definition which is in point where an issue is raised with reference to section 57(2) in regard to an act by the Lord Advocate is in these terms: “a question whether a purported or proposed exercise of a function by a member of the Scottish Executive is, or would be, incompatible with any of the Convention rights or with Community law”: paragraph 1(d) of Schedule 6. There is no doubt that the decision of the High Court of Justiciary which was given on 1 August 2001 was a determination of a devolution issue within the meaning of that paragraph. The question which it had been asked to decide was

whether there had been an act by the Lord Advocate which resulted in a breach of the appellant's right to a hearing within a reasonable time under article 6(1). But that question is no longer in issue, as the Lord Advocate has accepted the court's decision on this point. The only question which has been brought before the Judicial Committee, with the leave of the High Court, relates to the consequences of that finding.

34. In my opinion the jurisdiction which has been given to the Judicial Committee by paragraph 13 of Schedule 6 is not confined to answering the single question which the definition of the expression "devolution issue" in paragraph 1(d) has identified. It extends also to any other matter which may reasonably be said to be incidental to the determination of a devolution issue. For example, section 100(1) of the Scotland Act provides that a person is not entitled to bring any proceedings in a court or tribunal on the ground that an act is incompatible with the Convention rights unless he would be a victim for the purposes of article 34 of the Convention if proceedings in respect of the act were to be brought in the European Court. This raises a preliminary question which, if it is put in issue, it would be open to the Judicial Committee to determine under paragraph 13 of Schedule 6. So too are questions which are consequential upon the determination of a devolution issue, such as the question as to the appropriate remedy for breach of a Convention right which has been raised by this case. The fact that the principal question is no longer in dispute does not deprive the Judicial Committee of its jurisdiction to examine the question whether the appropriate remedy for the breach which has been established in this case is the quashing of the conviction. As I said in *Dyer v Watson* 2002 SLT 229, 249L, para 109, the question of remedy forms part of the devolution issue.

The facts

35. Before I deal with the question as to the appropriate remedy in this case, I must say a little more about the facts. No complaint has been made in this case about pre-trial delay. Nor is there any complaint about delay in the appeal process up to the date of the diet of 6 May 1999 which had been originally fixed for the hearing of the fresh evidence. It is the delay which occurred during the period after that date that has been criticised.

36. The interlocutor of 6 May 1999 states that the court continued the appeal to a date to be afterwards fixed pending further preparations by the Crown. These preparations were to include the precognition of the appellant's witnesses, the recovery of certain

productions used during the trial and an application to the Deputy Principal Clerk of Justiciary for the extension of the whole of the evidence in the trial including the speeches to the jury by both the Advocate Depute and counsel for the accused. Transcripts of the evidence at the trial were obtained and received in the Justiciary Office on 13 August 1999. On 19 August 1999 the Deputy Principal Clerk of Justiciary wrote to the Crown Office saying that, due to a misunderstanding, only the evidence and not the speeches had been extended. He said that some delay might be anticipated in obtaining a transcript of the speeches as the shorthand writer responsible for taking notes of part of the trial had left the employment of the firm of shorthand writers. He had already written to the firm of shorthand writers asking for the speeches to be transcribed as a matter of urgency. The precise date when a transcript of the speeches reached the Justiciary Office has not been identified, but it appears that they became available in December 1999. That date marks the beginning of the period which is under scrutiny on the ground that there was a delay which was unreasonable. It ends on 9 May 2001 when the court began hearing the fresh evidence.

37. The appellant accepts that it would not have been possible for the court to hear the fresh evidence as soon as the transcript of the speeches became available. The Crown was entitled to a little more time to complete its preparations for the appeal. A fresh diet then required to be fixed by the court, in accordance with the direction to this effect in the interlocutor of 6 May 1999. But, as Lord Coulsfield has explained, it would ordinarily have been expected that the hearing on the fresh evidence would take place within two or three months of the date of the request for a fresh diet: 2001 SLT 1359, 1362F, para 6. So the case has been argued on the basis that there was a delay of about twelve months prior to the hearing of the appeal for which the Crown was unable to give any explanation. The court held that a breach of article 6 by the Lord Advocate had been established because there had been a failure by the Crown to intimate when its preparations were complete: p 1362K-L, para 8.

38. But this narrative would be incomplete without taking the following facts also into account. The appellant was admitted to bail on 6 May 1999. He was not recalled to custody to serve the remainder of his sentence until the court disposed of his remaining grounds of appeal on 1 August 2001. In the event his appeal against sentence was rejected on the ground that it was not excessive having regard to the serious nature of the offence: 2001 SLT 1359, 1363K-L, para 14. His appeal against conviction on the

ground of fresh evidence was held to have been entirely without merit: 1363L, para 15. No other grounds have been put forward for suggesting that his conviction for the offences of which he was found guilty at his trial was a miscarriage of justice, nor has it been suggested that the result of the appeal would have been any different but for the delay. The effect of the breach of his article 6(1) right to a hearing within a reasonable time must be measured against the fact that, had there been no delay, he would have known that his appeal would be refused approximately one year earlier.

Remedy

39. Mr Bell QC did not seek to find authority for his argument that the conviction should be quashed in the jurisprudence of the European Court. He relied instead on the decision of Privy Council in *Darmalingum v The State* [2000] 1 WLR 2303. But it is necessary first to examine the jurisprudence of the European Court on the question of remedy, as the breach which has been established in this case is a breach of the reasonable time guarantee in article 6(1) of the European Convention for the protection of Human Rights and Fundamental Freedoms. A convenient starting point for this examination is to be found in article 50 of the Convention. It is in these terms:

“If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.”

40. Article 50 provides the background to the many cases which are to be found in the jurisprudence of the European Commission on Human Rights and the European Court of Human Rights on this issue. The Convention leaves it to each contracting state, in the first place, to secure the enjoyment of the rights and freedoms which it enshrines. The machinery of protection established by the Convention is of a subsidiary character: *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1, 24, para 66. The court observed in that case, at the end of paragraph 66, that the subsidiary character is all the more pronounced in the case of states which have incorporated the Convention into their domestic legal order and which treat the rules of the Convention as directly applicable. It is, of course, open to the victim of a breach found by the court first to seek compensation within the domestic legal order: *Eckle v*

Germany (Just Satisfaction) (1983) 13 EHRR 556, 557, para 14. Measures taken in the domestic legal order, such as a reduction of his sentence by the domestic court or a discontinuance of the prosecution, will then be taken into consideration by the European Court for the purpose of assessing the extent of the damage which he has suffered. The question for decision by the European Court is whether, after taking account of such reparation as may have been obtained in the domestic legal order, an award of just satisfaction should be made under article 50.

41. The remedy which the appellant seeks for the unreasonable length of the proceedings is the setting aside of his conviction. But in none of the cases in which alleged or admitted breaches of the right to a trial within a reasonable time have been considered by European Commission and the European Court has it been held that this is a necessary consequence of a breach of this guarantee. On the contrary, in *Bunkate v The Netherlands* (1993) 19 EHRR 477, where it was held that no satisfactory explanation had been offered by the government for a period of delay between the filing by the appellant of his appeal against the judgment of the Court of Appeal and the receipt of the case file fifteen and a half months later by the registry of the Supreme Court, the claim for just satisfaction was dismissed. The appellant had been sentenced to sixteen months imprisonment for forgery. His claim was for non-pecuniary damages for each of the days that he served his sentence, for the cost of proceedings in which he had sought an injunction prohibiting execution of the prison sentence pending the proceedings in Strasbourg and for travel expenses incurred during home leave from prison. At p 484, para 25, the court said:

“The applicant’s claims are based on the assumption that a finding by the court that a criminal charge was not decided within a reasonable time automatically results in the extinction of the right to execute the sentence and that consequently, if the sentence has already been executed when the court gives judgment, such execution becomes unlawful with retroactive effect.

That assumption is, however, incorrect. The court is unable to discern any other basis for the claims and will therefore dismiss them.”

42. In *Beck v Norway*, Application No 26390/95, (unreported) 26 June 2001, the applicant complained that criminal proceedings against him, which had lasted for seven years and seven months, had not been concluded within a reasonable time as required by

article 6(1) of the Convention. The court noted that it did not appear that there was any period of inactivity between the date when the criminal proceedings against him were instituted in the City Court and the rejection of his appeal by the Supreme Court. The period of delay for which there was no satisfactory explanation occurred between the issue of the indictment and the institution of the proceedings in the City Court. But the City Court took account of the length of the proceedings as a mitigating circumstance when it sentenced the applicant to a period of imprisonment which was at the lower end of the scale of punishment which had been authorised for the offences. The European Court noted in paragraph 28 of its judgment that the City Court had expressly upheld the substance of the applicant's complaint under article 6(1) of the Convention that the proceedings had exceeded a reasonable time and had said that it was satisfied that he had been afforded adequate redress for the alleged violation of article 6(1) by the reduction in sentence. This decision shows that the European Court is likely to find that just satisfaction has already been afforded where, as in the present case, the domestic court has expressly recognised that there was a breach of the applicant's right to a trial within a reasonable time under article 6(1) and has reduced the length of his sentence appropriately in order to give effect to his right to be compensated for the effects of the delay. It is wholly inconsistent with the appellant's argument that the remedy to which he is entitled is the quashing of his conviction.

Darmalingum

43. The appellant relies instead in support of his appeal on the following passage in the judgment of the Board in *Darmalingum v The State* [2000] 1 WLR 2303, 2310D:

“The normal remedy for a failure of this particular guarantee, viz the reasonable time guarantee, would be to quash the conviction.”

He has invited the Judicial Committee to depart from the decision of the Privy Council in *Flowers v The Queen* [2000] 1 WLR 2396 in so far as the decision in that case is not compatible with the authority of the European Court and the decision in *Darmalingum*.

44. The decisions in *Darmalingum* and *Flowers* are inconsistent with each other in two respects. This fact has attracted the attention of various commentators: see Alistair Webster QC “*Delay and Article 6(1): an end to the requirement of prejudice?*” [2001] Crim L R 786; P W Fergusson, Advocate, “*Trial without a Reasonable Time*”, 2001 SLT (News) 141. The first inconsistency relates to the

question whether it is necessary for the person who complains that there has been a breach of his right to a trial within a reasonable time to show that he has been prejudiced by the delay. In *Darmalingum* the Board held that section 10(1) of the Constitution of Mauritius, which is the equivalent of article 6(1) of the European Convention, contained three separate guarantees. It also held that, while the reasonable time guarantee may be applicable where a defendant has been prejudiced by inordinate delay, its reach is much wider as it may be applicable in any case where the delay has been inordinate and oppressive, and that a breach of the guarantee cannot be justified even if the defendant's guilt is manifest: [2000] 1 WLR 2303, 2307G-2308A. In *Flowers* a differently constituted Board held, with reference to the right given by the equivalent provision in section 20(1) of the Constitution of Jamaica, that one of the factors to be taken into account was prejudice to the defendant and that the strength of the case against the appellant was such that the possibility of prejudice to him due to the delay could be substantially discounted: [2000] 1 WLR 2396, 2411H-2413A. At p 2414H-2415A the Board said that the right given by section 20(1) of the Constitution must be balanced against the public interest in the attainment of justice and that the right to a trial within a reasonable time is not a separate guarantee but rather, with the other elements of section 20(1), forms part of one embracing form of protection afforded to the individual.

45. The second inconsistency relates to the question of remedy. In *Darmalingum*, in the passage which I have already quoted, the Board said that the normal remedy for a failure of the reasonable time guarantee would be to quash the conviction: [2000] 1 WLR 2303, 2310D. Lord Steyn went on to say in the judgment which he delivered for the Board, of which I too was a member, at p 2310E-F that their Lordships did not wish to be overly prescriptive on this point and that they did not suggest that there might not be circumstances in which it might arguably be appropriate to affirm the conviction but substitute a non-custodial sentence. But these qualifications did not contradict the proposition that the normal remedy would be to quash the conviction. In *Flowers*, on the other hand, the Board held that it was right to take into account the fact that the public interest in Jamaica required that persons convicted of the crime of murder in the course of a robbery should be convicted and punished: [2000] 1 WLR 2396, 2413B-C. It was pointed out that the defendant had been proved on strong evidence to be guilty of murder in the course of an armed robbery, that that type of offence was very prevalent in Jamaica and that it posed a serious threat to the lives of innocent persons: p 2415B. The Board held

that, taking account of these various factors, the defendant's conviction should not be quashed by reason of the delay: p 2415E-F.

46. I have already said more than once that in my opinion, in the context of article 6(1), the way in which the reasonable time guarantee was construed in *Darmalingum* is preferable: *Porter v Magill* [2002] 2 WLR 37, 86D, para 109; *Dyer v Watson* 2002 SLT 229, 247H-J, para 94. I do not wish to say any more on this point, except that I agree with all that Lord Steyn has said on this issue in his judgment. The point which requires further examination in the present case relates to the second inconsistency.

47. The facts in *Darmalingum* were that the defendant, who had been found guilty of embezzlement and forgery and had been sentenced to a total term of four years' imprisonment, had had the shadow of the proceedings hanging over him for a period of about 15 years. There had been a flagrant breach of the reasonable time guarantee. The Board was invited to hold that the appropriate remedy was to affirm the conviction and to remit the matter of sentence to the Supreme Court so that it might substitute a non-custodial sentence. It was not suggested that a sufficient remedy for the delay would be for his sentence of imprisonment to be reduced. The Board did not find it necessary to examine the decisions of the European Court on the question of the appropriate remedy. It was, of course, exercising its jurisdiction as the court of final appeal from the Supreme Court of Mauritius.

48. The decision of the Board in *Flowers* on the question of remedy, on the other hand, was heavily influenced by its view that the right to be tried within a reasonable time was not an absolute right but must be balanced against the public interest in the attainment of justice: [2000] 1 WLR 2396, 2413C-D. Here again the question of a reduction in sentence was not in issue. The appellant asked for his conviction to be quashed, but he had been convicted of murder. For reasons which were unconnected to the breach of the reasonable time guarantee his conviction of capital murder was set aside, a verdict of non-capital murder was substituted and the case was remitted to the Court of Appeal to pass a custodial sentence for non-capital murder. It was not suggested that the custodial sentence should be reduced to any extent to take account of the breach of the guarantee. The breach was recognised, but the appellant was left without any other remedy.

49. I do not think that any weight should be attached to either of these two decisions in the present context. For the reasons which I have already indicated, I consider that the proposition in *Flowers* that the choice of remedy should be influenced by balancing the interests of the defendant against the public interest is inconsistent with the jurisprudence of the European Court. On the other hand, the proposition in *Darmalingum* that the normal remedy is to quash the conviction goes too far. This has already been recognised by the Board in *Taito v The Queen*, 19 March 2002, para 22, in which *Darmalingum* was described as a wholly exceptional case. It would be more accurate to say that it is one of a variety of possible remedies, the choice between which must depend on the circumstances of each case.

50. This point applies also to the choice of remedy in the event of a breach of the right to a fair hearing. While a conviction which was obtained in breach of the right to a fair trial must be quashed, the position is different where the breach occurs at the stage of an appeal. This can be demonstrated by what happened in *Hoekstra v HM Advocate (No 2)* 2000 JC 387. In that case it was held that one of the judges who sat to hear the appellants' appeals on grounds alleging that their rights under articles 6 and 8 of the Convention had been violated at their trial could not properly be regarded as impartial. The remedy which was regarded as appropriate in these circumstances was to set aside the interlocutor of the court which heard the appeals so that these grounds of appeal could be dealt with again by a differently constituted court. It was not suggested that, once the breach of the appellant's right to a fair hearing of their appeal had been established, the remedy to which they were entitled was to have their convictions quashed. That would plainly have been an extravagant and unnecessary remedy. The proceedings in which the appellants were convicted were not affected in any way by the fact that the appellants did not receive a fair hearing at the stage of the appeal.

Conclusion

51. The approach which I would take to the question which has been raised in this appeal is first to identify the remedy which would ordinarily be thought to be appropriate in domestic law for a breach of the kind which has taken place, and then to consider whether the remedy which has thus been identified would achieve just satisfaction for the breach as indicated by the jurisprudence of the European Court. I think that it is important to start with the position in domestic law because, as was emphasised in *Eckle v Federal Republic of Germany* 5 EHRR 1, 24, para 66, the Convention

leaves to each contracting state, in the first place, the task of securing the enjoyment of the rights and freedoms which it enshrines. The machinery of protection established by the Convention, of which article 50 forms part, is of a subsidiary character.

52. In a case of pre-trial delay, for example, one of the remedies which is available in domestic law is to uphold the accused's plea in bar of trial. This was familiar ground long before the coming into effect of the Scotland Act 1998. It is available under the common law where there is such a grave risk of prejudice at the trial due to undue delay that no direction by the trial judge can be expected to remove it; see *McFadyen v Annan* 1992 JC 53; *Normand v Rooney* 1992 JC 93. It is available also where the point is taken as a devolution issue under the Scotland Act, for which purpose it is not necessary for the person charged to show that he has suffered, or will suffer, any actual prejudice: *Dyer v Watson, K v HM Advocate* 2002 SLT 229, 245I-J, para 79. In *K v HM Advocate*, where a breach of the article 6 guarantee was established, the Board held that to dismiss the indictment was the only appropriate course in the circumstances. As Lord Rodger of Earlsferry said, at p 262K, para 182, it was, in the circumstances of that case, the only effective remedy. But different considerations apply where the delay has occurred between the date of a conviction and an appeal. There is no precedent in domestic law for the setting aside of a conviction which has been upheld on appeal as a sound conviction on the ground that there was an unreasonable delay between the date of the conviction and the hearing of the appeal.

53. The circumstances of the present case provide a clear example of a situation where the setting aside of the conviction would be regarded in domestic law as both unjustified and unnecessary. It would be regarded as unjustified because the appellant's appeal against his conviction was, as the High Court of Justiciary said in this case, at p 1363L, para 15, wholly without merit. No grounds exist for regarding the conviction itself as unsound, nor is there any question of its having been affected in any way by the delay. And the setting aside of the conviction would be regarded as unnecessary, because the effects of the delay can be recognised perfectly well by a reduction in the appellant's sentence. Here again we are on familiar ground, as delay in bringing the accused to justice is widely recognised as a mitigating factor that can be taken into account when he is being sentenced.

54. The way in which effect can be given to this mitigating factor is plain in the present case. The purpose of the reasonable time guarantee is to avoid a person charged remaining too long in a state of uncertainty about his fate: *Stögmüller v Austria* (1969) 1 EHRR 155, 191, para 5. It has been held that article 6 does not require the person charged to co-operate with the judicial authorities: *Eckle v Federal Republic of Germany* 5 EHRR 1, 30, para 82. The appellant was under no obligation to take steps to obtain an earlier hearing of his appeal, and it cannot be held against him that if he was concerned about the delay he should have made an application to the court. So the only matter that needs to be examined is the extent to which the appellant has been prejudiced by the delay. As Lord Coulsfield observed, it might perhaps be said that the delay involved two elements of prejudice to him: 2000 SLT 1359, 1363L-1364A, para 15. One was the anxiety resulting from prolongation of the proceedings. The other was that his life had changed during the period of the delay. This could lead to additional problems and possibly hardships for himself and his family if he had to return to prison. Taking account of all these factors the court held that a reduction in sentence of nine months, leaving him with about six months of the original sentence to serve before he became eligible for parole, would produce an equitable result.

55. The question then is whether there is anything in the jurisprudence of the European Court which suggests that the reduction in sentence which was held to be appropriate in domestic law would be regarded as providing the appellant with less than just satisfaction for the purposes of article 50 of the Convention. The jurisprudence of the European Court indicates very clearly that the fact that an appeal against conviction on a criminal charge has been held not to have been decided within a reasonable time does not mean that the execution of the sentence has become unlawful: *Bunkate v The Netherlands* 19 EHRR 477, 484, para 25. On the other hand, it has been held that a person may be deprived of his status as a victim within the meaning of article 34 of the Convention if the national authorities have acknowledged in a sufficiently clear way the failure to observe the reasonable time requirement and have afforded redress by reducing the sentence in an express and reasonable manner: *Eckle v Federal Republic of Germany* 5 EHRR 1, 24, para 66; *Beck v Norway*, Application No 26390/95, 26 June 2001, para 27. It seems to me that these two requirements have been fully satisfied in this case.

56. I would hold therefore that the decision of the High Court of Justiciary to reduce the appellant's sentence by nine months in

order to compensate him for the effects of the delay was an appropriate and sufficient remedy. It meets with the requirements indicated by the jurisprudence of the European Court. I would dismiss the appeal.

Lord Scott of Foscote

57. I have had the advantage of reading the opinions of my noble and learned friends Lord Steyn and Lord Hope of Craighead. I agree with them and that for the reasons they have given this appeal should be dismissed.

