Case Analysis

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Legal issue Does the practice of providing legal advice privately to lay justices by legally-qualified clerks in district courts of Scotland violate the right to a fair and public hearing by an independent and impartial tribunal guaranteed by article 6 of the European Convention on Human Rights?

Headnote

CRIMINAL LAW. PROCEDURE OF DISTRICT COURTS. The case considers whether the procedure in Scottish district courts, where a single lay justice presides over a trial but receives advice from a legally-qualified clerk, violates a defendant's rights to a fair and public hearing by an independent and impartial tribunal guaranteed by Article 6 of the European Convention on Human Rights. The court discusses the role of lay justices and legally-qualified clerks in both Scottish and English systems and concludes that the general approach outlined by Lord Hope of Craighead should be followed when a clerk requires to give legal advice to the justice.

Key Paragraphs Highlight key paragraphs

> [64] "... As he has explained, the role which the clerk plays when giving legal advice to the justice in private is part of the ordinary functioning of the court, as the clerk functions on the same side of the court as the justice who must decide the case., But I am less confident that an analogy can be drawn between the giving and receiving of that legal advice and the discussions which take place in private among judges about a decision which they have yet to take., Judges engage in these discussions to exchange views and test opinions, not to obtain legal advice., Unlike the judges, however, the lay justices are not legally qualified...."

> [49] "Section 9 of the 1975 Act, as amended by section 8 of the Bail, Judicial Appointments etc (Scotland) Act 2000, provides for the appointment of all persons to serve as justices of the peace for any local authority area., They are appointed by the Scottish Ministers on behalf of and in the name of Her Majesty., They can only be removed from office by order of a tribunal constituted under section 9A of the 1975 Act, which was inserted by section 9 of the 2000 Act, and then only if the tribunal finds that the justice is unfit for office, by reason of inability, neglect of duty or misbehaviour., Their independence from the prosecutor is assured, as all prosecutions in the district court proceed at the instance of the procurator fiscal who acts under the authority of the Lord Advocate: section 6(3) of the Criminal Procedure (Scotland) Act 1995...."

> [65] "In my opinion a balance must be struck between the rights of the accused and the requirements of the court when it is seeking to administer justice., The rule of law lies at the heart of the Convention, and it is not its purpose to impede any further than is necessary the way in which an independent and impartial court goes about its business in order to achieve a result which complies with the law., It is obviously of prime importance that the justice, who has to take all the decisions, should understand the legal advice which the clerk is offering to him., The giving and understanding of that advice would be unduly inhibited if the entire conversation had to be carried out in public so that the accused could follow every word that was being spoken, and every question asked, on either side...."

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Key Phrases District courts in Scotland. Lay justice of the peace. Europe Convention on Human Rights. Legally-qualified clerk to the court. Legal advice given privately and repeated in open court.

PDF

[2003] UKPC D1

Privy Council

Present at the hearing:-

Lord Bingham of Cornhill

Lord Hoffmann

Lord Hope of Craighead

Lord Hutton

Lord Rodger of Earlsferry

DRA. No. 2 of 2002

Hellen Clark (Procurator Fiscal, Kirkcaldy)
Appellant
and
Christopher John Kelly
Respondent

From

THE HIGH COURT OF JUSTICIARY SCOTLAND

Lord Bingham of Cornhill

This devolution issue raises a question concerning the structure and procedure of district courts in Scotland. Put very shortly, the question is whether, if the complaint of theft made by the Procurator Fiscal, Kirkcaldy, against the minuter proceeds to trial in the District Court sitting at Kirkcaldy before a lay justice of the peace, the minuter's rights guaranteed by article 6 of the European Convention on Human Rights will be violated, that is, whether he will be denied a fair and public hearing by an independent and impartial tribunal. The question is an important one, since district courts so constituted handle a substantial proportion of criminal business in Scotland. Magistrates' courts in England and Wales differ from Scottish district courts in their jurisdiction, in the number of justices who ordinarily sit and in some aspects of their procedure, but the two systems are, in all essentials, similar. Thus the question raised is also one of importance in England and Wales, where a very high percentage of criminal cases begin and end in the Magistrates' court.

In England and Wales the role of justices has evolved over the centuries since the Justices of the Peace Act 1361. In Scotland the system is of more recent growth. But in both countries the systems as they now exist have very few equivalents outside the mainland of Britain. There are two features in particular which distinguish them from almost every trial regime to be found elsewhere. In addressing these features I shall ignore professional stipendiary magistrates who, despite their important role in Glasgow and a number of major English and Welsh cities, are irrelevant to the present issue. I shall adopt, without repeating, the account given by my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry of the relevant Scottish legislation, of the present litigation between the parties and of the litigation between them which preceded it. And I shall, for convenience, assume that the District Court at Kirkcaldy will comprise a single lay justice (although sometimes in Scotland, as almost invariably in England, a lay bench may comprise more than a single justice).

The first key feature of both systems is that justice is administered by (on the assumption made) a person usually lacking any formal legal education or qualification (although the beneficiary of some training). Such person, working voluntarily and without reward, is for all legal purposes a judge: carefully chosen as possessing qualities of judgment, fairness, open-mindedness and common sense; bound to observe a formal judicial oath; and irremovable (below the age of retirement) save for good cause. To such person, and to such person alone, it falls to decide what evidence should be believed and what doubted or rejected, and whether the charge is proved or not. The lay justice is the sole legal decision-maker in the district court.

In very many of the cases which routinely come before district courts, involving minor traffic offences, petty thefts and assaults and matters of that kind, the issue in the case (if it is defended) will turn on the facts and raise no question of law. But it is, of course, true that in any case, however minor, a question of law may arise, whether on the admissibility

of evidence, or the existence of evidence capable of corroborating other evidence, or the ingredients of a common law offence, or the interpretation of an offence-creating statutory provision or, after conviction, on the sentencing powers and duties of the court. In such instances the lay justice, lacking the legal expertise of those representing the prosecutor and the accused before the court, is at a disadvantage.

The solution to this problem, developed and refined over many years, is found in the second key feature of both systems, the legally-qualified clerk to the court, who must in Scotland be an advocate or a solicitor. The task of the clerk is to advise the lay justice on any question of law arising during the case. It is the clerk's duty, as a professional person bound by an exacting code of conduct, to give advice to the best of the clerk's ability, with the independence and impartiality (and also the care) required of any solicitor or advocate expressing a professional opinion. The clerk represents no party and his approach should be wholly unpartisan. He does not enjoy the security of tenure appropriate for a judge. He would (like any professional person) be bound to disqualify himself if, in any case, he found himself subject to any conflict of interest. If anyone were to attempt to influence the opinion of the clerk otherwise than by argument in open court, such conduct would be regarded as wholly improper, and were the clerk to accede it would be recognised as a culpable dereliction of duty. If the clerk were at any point, publicly or privately, to offer any opinion on the facts of any case, that also would be a culpable dereliction of duty, since all factual decisions are for the justice alone (although if the justice wishes to be reminded of the effect of any oral evidence given during the hearing the clerk may properly remind him, provided this is done in open court).

I do not think it helpful to consider one of the questions raised in argument before the Board, namely whether the clerk is part of the tribunal in the district court or not. The clerk is, without doubt, essential to the functioning of the district court. But he is not, equally plainly, a decision-maker. He is an independent and impartial professional adviser. The question whether the minuter's rights under article 6 of the Convention will be violated if he is tried in the district court must be answered not by identifying a pigeon-hole into which the clerk's unique role should be placed but by examining how, properly conducted, the minuter's trial will in practice proceed.

It used not, I understand, to be the practice in Scotland, and it certainly used not to be the practice in England and Wales, for disclosure to be made in open court of legal advice given privately by the clerk to the bench. In both jurisdictions, however, attention has been drawn to the general advisability of disclosing the effect of such advice to the parties and giving them an opportunity to make appropriate submissions: see *Clark v Kelly* 2001 JC 16 at 32, paragraph 24, in Scotland; *Practice Direction (Justices: Clerk to Court)* [2000] 1 WLR 1886, in England and Wales. This judicial guidance builds on existing authority that a clerk should not retire with justices unless clearly requested in open court to do so and should return to court when legal advice has been given (*R v Eccles Justices, Ex p Fitzpatrick* (1989) 89 Cr App R 324) and should not appear to participate in the decision-making process (*R v Eccles Justices, Ex p Farrelly* (1992) 157 JP 77; *R v Birmingham Magistrates, Ex p Ahmed* [1995] Crim LR 503). But the guidance takes the process of procedural development an important stage further by promoting transparency in the tendering of advice by the clerk to the bench and ensuring that any party wishing to challenge that advice has the opportunity to do so. The observations of the Board in *Nwabueze v General Medical Council* [2000] 1 WLR 1760 at page 1775 are very much in point. It may very well be that the response to this judicial guidance in both Scotland and England and Wales has been sluggish and patchy, but the recommended practice has been indicated and if, in any case, a clerk gives legal advice to the bench and does not disclose the effect of it in open court, the representative of either party may ask that disclosure be made. If it is true that the guidance given in *Clark v Kelly* 2001 JC 16 has not as yet been observed in practice to the extent that one might have expected, those responsible for training justices and clerks in Scotland may no doubt wish to take steps to give it greater prominence, and perhaps to reconsider the terms in which guidance is given. I am sure that the observations of my noble and learned friend Lord Hope will carry great weight.

In the ordinary way a lay justice is likely to accept advice tendered by the clerk, but he is not formally bound to do so and in practice an experienced justice will no doubt acquire a good working knowledge of the areas of law with which he commonly deals. His decision may be challenged by a case stated which, although drafted by the clerk, represents

the legal and factual conclusions of the justice, not the clerk. The legal conclusions may be reviewed on appeal. So may the existence of evidence to support the factual conclusions. The law of Scotland does not provide the same extensive right to an appeal hearing *de novo* as is provided by section 108 of the Magistrates' Courts Act 1980 but there is no reason to doubt that any error of law by the justice or any error concerning the sufficiency of evidence or the existence of evidence capable of corroborating other evidence can be effectively corrected on appeal. Thus the right of appeal enables legal errors by the clerk to be corrected and, as my noble and learned friends point out, the bill of suspension procedure gives the High Court a wide power to correct miscarriages of justice.

The European Court of Human Rights has repeatedly emphasised that alleged violations of article 6 (and other articles) must be judged as questions of substance and not of form. So the question is whether, as a matter of substance, trial of the minuter before a court constituted and proceeding as described will violate his right to a fair and public hearing by an independent and impartial tribunal. In agreement with the High Court, and for the reasons given by my noble and learned friend Lord Hope as well as these reasons, I am of the clear opinion that it would not. I would accordingly determine this devolution issue as proposed by Lord Hope in paragraph 71 below.

Lord Hoffmann

The issue in this appeal is whether a Scottish district court is an "independent and impartial tribunal" within the meaning of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. If it is not, then the Lord Advocate, acting by the procurator fiscal, has no power to prosecute anyone before it: see section 57(2) of the Scotland Act 1998. As 31 per cent of summary prosecutions in Scotland in 2001 took place before district courts, the question has considerable practical significance. It also has implications for Magistrates' courts in England.

The challenge to the independence and impartiality of the district court concerns the status and functions of the clerk of court. The court consists of a justice or justices, usually without legal qualification, appointed by the Scottish Ministers. They are assisted by a clerk of court, who is a qualified advocate or solicitor employed by the local authority to act as legal assessor: see section 7(1) of the District Courts (Scotland) Act 1975. The duty of the clerk is "to advise the justices, either at their request or on his own initiative, on matters of law, practice and procedure": see the *Handbook for Justices of the Peace in Scotland* (loose-leaf edition), issued by the Scottish Ministers, at p 25. (Compare section 45(4) and (5) of the Justices of the Peace Act 1997 and the *Practice Direction (Justices: Clerk to Court)* [2000] 1 WLR 1886 in relation to the duties of clerks in English Magistrates' courts.) The features of the clerk's position and duties relevant to this appeal are twofold. First, he is required by statute to be an employee of the local authority. The authority may terminate his employment in the same way as other employees or move him to other duties. Secondly, he advises the justices in private, usually in their retiring room after the evidence and submissions have been heard.

The question has been raised as a devolution issue, referred by the district court to the High Court. The High Court had already considered a reference of the same issue in earlier proceedings between the same parties and given a judgment holding that the employed status of the clerk did not affect the independence of the court: *Clark v Kelly* 2000 JC 16. In the circumstances, the Lord Advocate required the High Court simply to refer the issue in these proceedings to the Judicial Committee.

The Lord Advocate has framed the terms of the reference to raise three points of law: first, whether for the purposes of article 6(1) the clerk is "part of the tribunal"; secondly, whether the private communications between the clerk and the justices are "part of the trial" and thirdly, if the clerk is not part of the tribunal, whether the court surrendered its independence by accepting his advice.

This formulation reflected the shape of the argument advanced on behalf of the appellant, which was a squeeze or Morton's fork. Either the clerk was part of the tribunal or he was not. If he was, then his employed status meant that he

was not independent and neither was the tribunal. On the other hand, if he was not, the tribunal had no business to be taking his advice in private. That transgressed article 6(1) in three respects: it deprived the accused of a public hearing, it compromised the independence of the bench in making it dependent upon an outside source for advice on law and it offended the principle of "equality of arms" which should be applied by an impartial tribunal, because it meant that the justices acted on material, possibly adverse to the accused, which he had had no opportunity to rebut.

The Lord Advocate accepted these rules of engagement. He denied that the clerk was part of the tribunal but conceded that if he was, it was not independent. He submitted that although the clerk was not part of the tribunal, the justices could accept his legal advice in private without surrendering their independence, failing to act impartially or depriving the accused of a public hearing.

The High Court, in the first reference, found in favour of these submissions. It held that the clerk was not part of the tribunal but that the communications between clerk and justices were not part of the hearing which had to be in public. The clerk was impartial and therefore the justices acted impartially in taking his advice.

I propose to start by addressing the first question formulated by the Lord Advocate. Is the clerk part of the tribunal? Well, in some ways he is and in others he is not. That much was recognised in the way the question was drafted. It asked, not whether he was in some abstract sense part of the tribunal, but whether he formed part of it for the purposes of article 6(1). He has no formal power to make decisions. He gives no rulings and takes no part in deliberations on conviction or sentence. The justices are not obliged to take his advice on the law. On the other hand, as he is a lawyer and the justices usually are not, his advice is bound to be influential. The *Handbook* says tactfully, at p 25, that the justices should accept his advice "[u]nless there is good reason for not doing so".

The High Court regarded the lack of decision-making power as decisive. The question had to be determined by "the scope of the clerk's defined duties": see 2000 JC 16, 22, para 9. Section 6(2) of the Criminal Procedure (Scotland) Act 1995 says that the jurisdiction and powers of the district court are "exercisable by a stipendiary magistrate or by one or more justices". It says nothing about a clerk. On the other hand, section 7(1) of the 1975 Act says that the clerk "shall act as legal assessor to that court". That makes it absolutely clear that the clerk is not part of the court.

I am not sure that the High Court gave sufficient weight to the particular formulation of the question, which was, as I have said, not whether in some general or technical sense the clerk was part of the tribunal, but whether he was part of it for the purposes of article 6(1). In order to answer that question, two points have to be borne in mind. First, the purpose of the relevant provisions of article 6(1) is to ensure that the accused has a fair trial. So the question in the present case is not so much whether someone who takes part (to put the matter neutrally) in the judicial process is technically vested with decision-making power but whether his functions are such as to require some degree of independence in order to make the trial a fair one. The second point is that the European Court of Human Rights has stressed that what matters is not the technical rules which constitute the court (things are often not what they seem to be, not least in the United Kingdom) but how it works in practice and how its workings would appear to a reasonable objective observer: see *Delcourt v Belgium* (1970) 1 EHRR 355, affirmed on this point in *Borgers v Belgium* (1991) 15 EHRR 92, 107, para. 24.

Looked at in this light, it seems to me that the position of the clerk, whether one chooses to describe him as part of the tribunal or not, is such as to attract some requirements of independence and impartiality by virtue of article 6(1). I cannot imagine that it would be regarded as acceptable, for example, that the clerk should advise the justices when he is the father or some other close relation of the victim of the offence for which the accused is being tried. *Stone's Justices' Manual* (2002) says in relation to clerks in English Magistrates' courts that "[t]he test of apparent bias which applies to Magistrates'...applies also to the justices' clerk since he is part of the judicial process in the Magistrates' court": see para 1-32A. That seems to me in principle correct.

I would therefore decide that the clerk is part of the tribunal for the purposes of article 6(1). And I think that this view is confirmed by the decision of the European Court of Human Rights in *Mort v United Kingdom* Application No 44564/98 (unreported) 6 September 2001, decided a year after the judgment of the High Court. This was a decision as to admissibility by the Fourth Section of the court, which had the advantage, in understanding the realities of English procedure, of having Sir Nicolas Bratza as one of its members.

Miss Mort had failed to pay a fine and was brought before the magistrates in Corby, England, to be examined as to her means and excuses. There was no prosecutor; the court was acting mero motu to collect the fine. The clerk, on behalf of the bench, subjected her to a vigorous cross-examination. He then retired with the justices, who returned and committed her to prison for 14 days.

Miss Mort complained to the European Court of a violation of article 6(1). Her argument was, as in this case, a variety of the squeeze or fork. If the clerk was part of the tribunal, he had behaved very unjudicially in cross-examining her. If he was not, the principle of equality of arms was infringed by the fact that the clerk retired with the justices and gave advice in private.

The court accepted that it had to decide whether the clerk acted as "prosecutor or party, or as part of the court itself": see p 12 of the judgment. If the clerk was external to the court, he was a party and subject to the principle of equality of arms but did not have to "give guarantees of independence and impartiality". On the other hand, if he was part of the tribunal, the principle of equality of arms did not apply.

The court decided that the clerk was part of the tribunal:

> "The court recalls that the justices' clerk acts solely to assist the magistrates, who are lay judges. This may involve giving advice on law or procedure, taking notes of evidence and on occasion conducting examination of witnesses on the justices' behalf...There is no question of the justices' clerk enjoying any role in the proceedings independent of the justices, or in having any duty with regard to influencing a decision in any particular direction. In that respect, the clerk's position can be distinguished from officers such as the procureur général, avocat général or commissaire du gouvernement, who make submissions to the courts concerning their personal views on the outcome of particular cases...On that basis, no problem arises in the normal course of events if a justices' clerk retires with the justices and it is not known what assistance, if any, he or she in fact furnishes to them. Assuming the clerk fulfils the role provided by law, his or her presence during the deliberations of the justices must be regarded as part of the ordinary functioning of the court."

Having made this assessment of the role of the clerk, the court concluded that the principle of equality of arms was not in play. Miss Mort did not rely upon the requirement of a public hearing, but that would be equally inapplicable to the participation of the clerk as part of the court. It would be no different in principle from the private discussions between the justices themselves. The court therefore proceeded to address what it considered to be the only real issue, namely whether the clerk had observed the requirements of independence and impartiality. The court concluded, fortified by an earlier decision of the Divisional Court in judicial review proceedings brought by Miss Mort, that the clerk's questioning had not exceeded "what would be permissible as a court officer acting on behalf of the justices".

In my opinion, therefore, the question in this case is whether the clerk is sufficiently independent to enable the procedure of trial in a district court to satisfy the requirements of article 6(1). There is no separate allegation of lack of impartiality. The substantive proceedings in the district court had not yet started when the devolution issue was raised. The challenge is a general one; to the independence of any clerk on the ground that, being an employee, he may be subject to, or seen as subject to, the influence of his employer.

It was at this point, as I have mentioned, that the Solicitor General, who represented the Lord Advocate in the proceedings in the High Court, was inclined to give up. He conceded that the district court would fail such a test. But I

do not think that the Judicial Committee is bound by this concession. It must decide the devolution issue, which is whether the district court procedure satisfies article 6(1). It cannot answer the question on what appears to be a false basis.

Although the position of the clerk attracts requirements of independence under article 6(1), it does not follow that those requirements are identical with those of every other person performing judicial duties. Regard must be had to the nature of the judicial process in which he is engaged, the part he plays in it, the part played by others (including an appellate court) and the institutional and practical safeguards which exist to preserve and to demonstrate the preservation of his independence. The importance of examining all these factors is, as I shall show, supported by decisions of the European court.

Let me examine these factors. First, the nature of the judicial process. The district court has jurisdiction to try petty crime. It can impose a sentence of imprisonment for a maximum of 60 days. As the *Handbook* observes, at p 29, "[m]ost cases involve no special difficulties and can be decided without reference to the clerk for any advice". So the court ordinarily functions without any contribution by the clerk into the decision-making process. From a practical point of view, a requirement that the clerk, as a qualified lawyer, should be appointed on the same terms as the justices would make the system of lay justice difficult, if not impossible, to administer.

Secondly, when the clerk does have any input, it is by way of advice on questions of law and procedure. These are not specific to the particular case; the clerk tells the justices in general terms what is the law and what are the procedures of the court. To that extent, he is detached from the decision made by the justices and plays a role similar to that of an expert: compare *Ettl v Austria* (1987) 10 EHRR 255.

Thirdly, the clerk is a professional man performing duties which are regulated by well-understood conventions. It would be contrary to his professional code for him to accept any directions from an officer of the local authority as to how he should advise and, I should have thought, unthinkable that such directions should be given. It is of course true that one is concerned with appearances as well as reality, but the existence of such a professional code is so well known as to be something which any reasonable observer of the Scottish judicial process would take into account. Thus in *Bryan v United Kingdom* (1995) 21 EHRR 342 the court decided that a planning inspector, although employed by the government, was in the context of his functions, the available safeguards and the right of judicial review, a sufficiently independent tribunal to satisfy article 6(1). The court said, at pp 360-361, para 46:

> "In this connection the court would once more refer to the uncontested safeguards attending the procedure before the inspector: the quasi-judicial character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality...Further, any alleged shortcoming in relation to these safeguards could have been subject to review by the High Court."

All this, mutatis mutandis, is equally applicable to the clerk of court in a district court.

Fourthly, there is the right of appeal. Now of course, the fact that there is a right of appeal is usually inadequate compensation for the fact that the court by which one was tried was not independent or impartial. Everyone knows that an appellant starts one down and that an appeal cannot put right everything that may have gone wrong at the trial. Ordinarily, therefore, if there is lack of independence or impartiality on the part of the judge or bench of judges who presided at the trial, the existence of an appeal will not cure the infringement of article 6(1): *De Cubber v Belgium* (1984) 7 EHRR 236; *Findlay v United Kingdom* (1997) 24 EHRR 221, 246, para 79. Thus in *Starrs v Ruxton* 2000 JC 208, 241 Lord Reed said that if, as was held by the High Court (and as to which I make no comment) a temporary sheriff is not an independent tribunal, it does not help that an appeal lies to the High Court of Justiciary, which is undoubtedly independent.

On the other hand, there are tribunals in which the person whose independence is called into question is not in name or substance a presiding judge in the paradigm sense and in which it may be necessary to look at the decision-making process as a whole, including the right of appeal. *Bryan v United Kingdom* 21 EHRR 342 was such a case: there the European court examined the question of the independence of the tribunal deciding English enforcement notice appeals by reference to the respective roles of the planning inspector, the Secretary of State and the courts applying judicial review. The limited functions of the clerk mean that he too cannot be regarded in the same light as a presiding judge and that one must consider how his functions fit into the judicial process as a whole, including the right of appeal.

The striking feature of the relationship between the functions of the clerk and the right of appeal is that they correspond exactly. The clerk's duty is to advise on the law and the accused has the right, if dissatisfied with the decision in point of law, to require the court to state a case (which will be drafted by the clerk) for the opinion of the High Court. An appeal on a point of law presents none of the difficulties which often prevent an appeal on fact from being the same as a full rehearing. The clerk's advice was either right or wrong and if wrong, can be corrected.

Taking all these matters into account, I think that although the clerk is a "part of the tribunal" for the purpose of attracting the requirements of article 6(1), he is sufficiently independent in relation to his functions to satisfy those requirements.

If one approaches the matter in this way, then, as in *Mort v United Kingdom* 6 September 2001, the other questions answer themselves. The fact that the clerk advises the justices in private does not infringe the right to a public hearing because the clerk's presence is for this purpose, as the European court said, "part of the ordinary functioning of the court." Likewise, as the court also pointed out, the principle of equality of arms does not apply to communications between the clerk and the justices and there is no reason why they should be disclosed to the parties any more than the private discussions which take place between judges after judgment has been reserved. The positions of the Belgian procureur général and avocat général, much discussed by the High Court in its judgment on the present issue, are not analogous.

The High Court recommended that the justices or clerk should nevertheless raise in open court any legal advice given or to be given by the clerk which could be perceived as controversial or which rejects some submission made or authority cited on behalf of the parties or which it is thought could be the object of some relevant submission. The recent English *Practice Direction (Justices: Clerk to Court)* [2000] 1 WLR 1886 gives similar guidance: see paragraphs 7 and 8.

I do not wish to detract in any way from these recommendations, which seem to me to promote fairness and reduce the possibility of errors which have to be corrected on appeal. For exactly the same reasons, it is advisable for a judge sitting alone not to maintain total silence but to indicate to the advocate the view which he has provisionally taken and give him the opportunity to comment on any authority on which he proposes to rely. But this practice is far from universally followed in those countries belonging to the Council of Europe in which the maxim curia novit jus prevails and I regard *Mort's* case as authority for saying that once the clerk is accepted as part of the tribunal, it is not required by article 6(1). It follows that a failure to comply with the guidelines given by the High Court or the English Practice Direction, whatever else may be its consequences, will not vitiate the proceedings for failure to comply with article 6(1).

I would therefore dispose of the devolution issue by declaring that the employed status of the clerk of court does not prevent the district court from complying with article 6(1) and that the procurator fiscal is entitled to proceed with the prosecution against the minuter.

Lord Hope of Craighead

We have been asked to determine a devolution issue which has arisen in this case in the District Court at Kirkcaldy. It was referred to the Judicial Committee by the High Court of Justiciary at the request of the Lord Advocate under paragraph 33 of Schedule 6 to the Scotland Act 1998. As Mr Macaulay QC put it at the outset of his submissions for the Lord Advocate, the essence of the devolution issue is whether a trial of the criminal charge against Mr Kelly in the district court will inevitably infringe his rights under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Mr Macaulay did not dispute the proposition in paragraph 2(g) of Mr Kelly's devolution minute that the Lord Advocate has no power to prosecute him in that court if in doing so Mr Kelly is deprived of his rights under article 6(1) of the Convention. There is no longer any doubt that this is the inevitable effect of section 57(2) of the Scotland Act: see *R v HM Advocate* [2002] UKPC D3 2003 SLT 4. But the issue which Mr Sudjic has raised on Mr Kelly's behalf has a much wider significance. It has not been suggested that there is anything peculiar to the circumstances of his trial or about the way in which trials are conducted in the District Court at Kirkcaldy which distinguishes his case from the generality of cases that are brought to trial in the district courts throughout Scotland. So the issue is clearly one of some general interest and importance.

My noble and learned friend Lord Rodger of Earlsferry has described the details of the case and the context in which the issue has arisen, and I gratefully adopt what he has said about this. I should like to add only a few remarks about the evolution and history of the system of lay courts of summary criminal jurisdiction in Scotland. This provides the background to the issue which we have been asked to decide.

Evolution and history

As Sir Thomas Skyrme, *History of the Justices of the Peace* (1991), vol III, pp 58- 61, has observed, Scotland lacked the large and independent squirearchy upon which the Justice of the Peace system was based in England where, from the thirteenth century onwards, it became increasingly powerful both locally and nationally. Justices of the peace were first introduced into Scotland in the late sixteenth century. This was done in an attempt to emulate the English system. It was achieved by an Act of the Scottish Parliament: APS 1587, c 57. Some years later a further Act was passed with a view to establishing the system on a firmer basis: APS 1609, c 14. The reason which was given for its introduction was the great delay which was then being experienced in administering criminal justice due to a lack of courts. The choice of a system of lay justices has been attributed to James VI, who is said to have been an admirer of this method of local administration and to have hoped that it would increase his authority. But the social climate proved to be unfavourable. The system took root and managed to survive north of the border. It preserved public order during the Commonwealth when the country was under the control of the Parliamentarians. But it cannot be said to have flourished there. Instead it was the sheriffs, who were closely connected with the nobility and were local landowners like their English counterparts, who acquired increasing authority. By the end of the seventeenth century they had acquired an extensive criminal and civil jurisdiction, and they were not willing to relinquish their authority to the lay justices. As Skyrme explains, it was the sheriffs, in a refurbished role and with legal qualifications, who in the course of time virtually supplanted the justices.

By the start of the twentieth century the work of the lay justices in Scotland was confined to the burgh courts, police courts, local justice of the peace courts and various other similar courts which exercised a minor criminal jurisdiction and were funded by the local authorities. By contrast the jurisdiction of the sheriff courts presided over by sheriffs who were all legally qualified was very wide, and their cost was funded from general taxation by central government.

By the 1960s thought was being given to the reform of local government. The Royal Commission on Local Government in Scotland presided over by Lord Wheatley did not make any detailed recommendations about what was to be done with these local courts. But the Commission suggested that they could conveniently be reconstituted within the new structure of district authorities which it was recommending as the lower tier of local government which was to be established within each region: (1969) Cmnd 4150, p 264, para 1102. This suggestion was taken further in a White

Paper entitled *Justices of the Peace and justices' Courts* which was presented to Parliament in March 1973: Cmnd 5241. It proposed a system of justices' courts based on the areas of the district and islands authorities which had now been identified in the Local Government etc (Scotland) Act 1972, but which was to be financed by central government. Among its recommendations was that the clerks should be drawn from an extended sheriff clerk service. But this recommendation was not regarded as acceptable because it was clear that the sheriff clerks, who were without legal qualifications, would be unable to provide legal advice to the lay justices. It was then suggested that, as there was some doubt as to whether suitable people could be found for these courts in all areas, the sheriff courts should be expanded instead and that they should be provided with a new type of professional judge to take on the work of the lower courts. But Parliament was dissolved before this proposal could be adopted, and a new government took office in March 1974. It decided that lay participation in the administration of justice should be preserved, and that it should continue to be funded and administered by local authorities. A bill followed, and in due course the District Courts (Scotland) Act 1975 passed into law.

The most important features of the system which was introduced by the 1975 Act for present purposes are these. All the existing inferior courts were abolished and replaced by the establishment of district courts in each local authority area: sections 1(1) and 26 of the 1975 Act, as amended by paragraph 96 of Schedule 13 to the Local Government etc (Scotland) Act 1994. The powers of the district courts are exercisable by a stipendiary magistrate or by one or more justices: Criminal Procedure (Scotland) Act 1995, section 6(2). This arrangement has ensured continuity with the old system. Provision had been made by section 455 of the Burgh Police (Scotland) Act 1892 for the appointment of stipendiary magistrates to sit in the burgh courts. But the only courts where stipendiary magistrates had been appointed to sit were in Glasgow, and it is only in Glasgow that they have been appointed to sit in the district court. The system elsewhere depended and still depends entirely on lay justices. The tradition was for magistrates to sit singly in the burgh courts and for justices of the peace to sit in courts of two or more. This tradition too continues, as does the system for providing the courts with their clerks. In the burghs the clerk was normally the town clerk or a member of his staff. In the counties the clerk, who was known as the clerk of the peace, was usually a local solicitor who provided his services to the local authority as clerk to the court part-time. Section 7(1) of the 1975 Act provides that it is the duty of each local authority to appoint and employ, whether on a full-time or part-time basis, an officer to act as clerk of the district court for their area. It also provides that the clerk is also to act as legal assessor and that any person so appointed shall be an advocate or a solicitor.

Section 9 of the 1975 Act, as amended by section 8 of the Bail, Judicial Appointments etc (Scotland) Act 2000, provides for the appointment of all persons to serve as justices of the peace for any local authority area. They are appointed by the Scottish Ministers on behalf of and in the name of Her Majesty. They can only be removed from office by order of a tribunal constituted under section 9A of the 1975 Act, which was inserted by section 9 of the 2000 Act, and then only if the tribunal finds that the justice is unfit for office, by reason of inability, neglect of duty or misbehaviour. Their independence from the prosecutor is assured, as all prosecutions in the district court proceed at the instance of the procurator fiscal who acts under the authority of the Lord Advocate: section 6(3) of the Criminal Procedure (Scotland) Act 1995. The Lord Advocate has no part to play in their removal or appointment. Their independence from the local authority too is provided for by section 12 of the 1975 Act, as substituted by section 10 of the 2000 Act, which provides that the office of a justice shall not be held by a member of a local authority. Section 14 makes provision for schemes and courses for their training and instruction, and a *Handbook for Justices of the Peace in Scotland* has been issued by the Scottish Ministers with the advice of the Central Advisory Committee for Scotland on Justices of the Peace, of which the Lord Justice-Clerk ex officio is the chairman. There is no requirement that the justices must be legally qualified.

No court can, of course, function without having to take decisions from time to time on matters of law, practice and procedure. The system which the 1975 Act inherited from that which it replaced is that when advice on these matters is required it is supplied to the justices by the clerk of court. Section 7(2) of the 1975 Act transferred to the clerks of the district courts all functions hitherto exercisable by clerks of the existing courts. The following description of the part

which the clerk plays in the proceedings is given in the current loose-leaf edition of the handbook which is issued for the guidance of justices in Part 4, *The Clerk of Court*, at pp 25-26, paras 1-3:

> "1. Confidence and harmony between the bench and the clerk of court are important to the efficiency of the court. In some procedural matters the role of each may vary depending on local practice. The important point is that the conduct of proceedings is the responsibility of the justice, whether he is sitting alone or as chairman of a multiple bench.
>
> 2. The clerk is not a member of the court, and does not share the court's responsibility for its decisions. He is an official who is appointed and employed, on a full-time or part-time basis, by the local authority. He must be an advocate or solicitor. The post may be held by the same person who undertakes the duties of clerk of the peace."
>
> [Note: the functions of the clerk of the peace, who acts as clerk to the justices of the area as a body, are set out in section 18(4) of the 1975 Act.]
>
> "3. It is the clerk's duty, by statute, to advise the justices, either at their request or on his own initiative, on matters of law, practice and procedure, and so he is able to guard them against making mistakes, especially in respect of some of the technicalities of procedure and evidence. He does not offer judgement. Normally, he does not question witnesses although he may suggest questions to the justice. Unless there is good reason for not doing so, justices should accept the clerk's advice on procedural and legal matters. While some cases involve no special difficulties and can be decided without reference to the clerk for advice, there are occasions when there are legal arguments or difficulties in interpreting an Act of Parliament. At these times it is best that the justice retire for consultation with the clerk. However, the clerk takes no part in deliberations on conviction and sentence. On sentencing he is usually only concerned to advise on the powers of the court, though on occasions justices may be informed as to the level of penalty generally imposed by the court."

The devolution issue

The point which lies at the heart of Mr Sudjic's contention that a trial in the district court will inevitably infringe Mr Kelly's rights under article 6(1) of the Convention relates to the part which the clerk plays in these proceedings. His argument proceeded in three stages. First, he submits that the clerk of court is in law part of the tribunal for the purposes of article 6(1) and that, as he lacks the security of tenure which is necessary to ensure his independence, the district court cannot be said to be an independent tribunal within the meaning of the article. Secondly, he submits that the practice by which advice on matters of law, practice and procedure is communicated privately by the clerk of court to the justices infringes the accused's right to a fair and public hearing. Thirdly, he submits that, if the clerk of court is not part of the tribunal, the district court surrenders its independence in accepting advice from someone who is not part of that court.

These arguments raise questions which relate both to structure and to practice. The structural question is whether the functions which are given to the clerk of court by the statute are such that it lacks the independence and impartiality which article 6(1) guarantees. It is tied up inescapably with two crucial facts, that the judges in that court are lay justices and that the clerk who advises them on matters of law, practice and procedure is simply a lawyer employed for the purpose by the local authority. If Mr Sudjic's argument is sound no district court in Scotland can meet the requirements of article 6(1) except one which is presided over by a stipendiary magistrate. The procedural question is whether the system by which advice on matters of law, practice and procedure is given by the clerk of court to the justice not in open court but in private discussion with him is compatible with the requirement that the accused will receive a fair and public hearing. If Mr Sudjic's argument on this point is sound, attention may have to be given to the way in which the proceedings are still being conducted in practice despite recent guidance as to how openness and transparency in the giving of advice is to be properly safeguarded.

Structure

It seems to me that there can only be one answer to Mr Sudjic's argument that the clerk is in law a member of the tribunal constituted by the district court. He is not a member of the tribunal, as he does not sit on it in any judicial capacity. As the handbook explains, he is not a member of the court. He does not give rulings, and he does not share the court's responsibility for its decisions. He is there solely to advise the justices.

But that answer does not resolve the underlying issue, which relates to the court's independence and impartiality. The fact is that the clerk has an essential role to play in the ordinary functioning of the court. As I said earlier, no court can be expected to function without having to take decisions from time to time on matters of law, practice and procedure. The district court would be unable to administer justice according to the laws and usages of this realm if the lay justices lacked the guidance of their clerk on these matters. The decision in *Brown v Neilson* 1907 SC(J) 3, in which it was held that proceedings were a nullity in which advice was taken from someone who was not duly appointed as clerk, illustrates this point. The history which I have outlined shows that a deliberate decision was made that the judges in the district court, other than the stipendiary magistrates, should continue to be drawn from members of the community and need not be legally qualified. A corollary of that decision was that a person appointed to act as clerk to the court must be either an advocate or a solicitor. As the European Court of Human Rights said in *Mort v United Kingdom* Application No 44564/98, 6 September 2001, p 12, assuming that the clerk fulfils the role provided by law, his or her presence must be regarded as part of the ordinary functioning of the court and in that sense as part of the court itself for the purposes of article 6(1) of the Convention.

It does not follow from this, however, that the court lacks the independence and impartiality which article 6(1) requires. The structure of the court has to be looked at as a whole, and this must be done in the context of the procedures which are available for appeal and for the review of its decisions on the ground of an alleged miscarriage of justice.

Looking first at the structure of the court as a whole, it is clear that the system for the appointment and removal of the justices on whom the sole responsibility lies for the taking of its decisions fully measures up to the requirements of article 6(1). Mr Sudjic did not suggest otherwise. The system which has been laid down for the appointment and removal of the justices does not extend to the clerk. But the statute requires more of the clerk than that he must be legally qualified. He must be also be an advocate or a solicitor. He brings with him to the office of clerk all the qualities of the profession to which he belongs by reason of his training and experience. These include an awareness that any conflict of interest must be avoided and that he must be independent and impartial in the advice which he gives in his capacity as clerk.

As for the wider context, section 175 of the Criminal Procedure (Scotland) Act 1995 provides for a right of appeal from decisions of the district court to the High Court of Justiciary. The normal method of appeal is by way of stated case: section 176. The stated case procedure does not enable the High Court to conduct a complete rehearing of the case. But it does enable all decisions on questions of law based on advice which has been given by the clerk to be brought under the review of the High Court. Section 183 provides that the High Court may dispose of a stated case by remitting the case to the inferior court with its opinion and any directions thereon, by affirming the verdict of the inferior court or by setting its verdict aside and quashing the conviction or substituting an amended verdict of guilty. Furthermore, the right of appeal which section 175 affords is without prejudice to the right of appeal to that court under section 191 by bill of suspension where an appeal by stated case would be incompetent or inappropriate on the ground of an alleged miscarriage of justice: section 175(1). This is a process whereby any illegal or improper warrant, conviction or judgment issued by an inferior judge in criminal proceedings may be reviewed and set aside by the High Court. Where proceedings are brought before it for review by way of a bill of suspension, the High Court has a full and unfettered power to set aside any decision or judgment of the lower court which is contrary to law or in any other respect amounts to a miscarriage of justice.

In combination these procedures for judicial control of proceedings in the district court provide an effective safeguard not only against any errors by the clerk on matters of law, practice and procedure but also against any abuse of his

position which might lead to a miscarriage of justice. That, in a criminal case, is a sufficient result for the protection of the accused, and it does not matter that the High Court does not have complete power to rehear the case. The rights of the accused are sufficiently protected in domestic law if the decision or judgment against him is quashed and the proceedings of which he complains are thereby brought to an end.

The question is whether this approach is consistent with the jurisprudence of the European Court of Human Rights. In *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, 542, para 29 the court said:

> "either the jurisdictional organs themselves comply with the requirements of article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of article 6(1)."

Can it be said then that the High Court of Justiciary has "full jurisdiction" over decisions taken by lay justices in the district court when it does not have complete power to rehear the case?

The most helpful case is *Bryan v United Kingdom* (1995) 21 EHRR 342; see also the decision of the Grand Chamber in *Kingsley v United Kingdom* (2002) 35 EHRR 177. *Bryan* is not directly in point in this case, as it was concerned not with criminal proceedings but with a challenge to a decision by an inspector that buildings had been built on land without planning permission. The applicant's appeal on a point of law to the court under section 289(1) of the Town and Country Planning Act 1990 was dismissed. The question was whether judicial review of the inspector's decision by the court was sufficient to comply with article 6(1) of the Convention. But the opinion of Mr Nicolas Bratza, concurring with the majority in the Commission, which was analysed by Lord Hoffmann in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, 1420-1424, paras 101-117, is of general interest as it indicates how the question of full jurisdiction should be approached. At p 354 Mr Bratza said:

> "It appears to me that the requirement that a court or tribunal should have 'full jurisdiction' cannot be mechanically applied with the result that, in all circumstances and whatever the subject matter of the dispute, the court or tribunal must have full power to substitute its own findings of fact, and its own inferences from those facts, for that of the administrative authority concerned. Whether the power of judicial review is sufficiently wide to satisfy the requirements of article 6 must in my view depend on a number of considerations, including the subject matter of the dispute, the nature of the decision of the administrative authorities which is in question, the procedure, if any, which exists for review of the decision by a person or body acting independently of the authority concerned and the scope of that power of review."

As Lord Hoffmann explained in *Alconbury*, at p 1416, para 87, "full jurisdiction" means full jurisdiction to deal with the case as the nature of the decision requires.

Applying that reasoning to the proceedings in the district court, I think that one can draw a clear distinction between the issues of fact and questions of law, practice or procedure. The clerk has no function to perform as regards the issues of fact. Decisions on these issues are a matter entirely for the justice, whose independence and impartiality is not in question. The challenge under article 6(1) is directed to the part which is played in the proceedings by the clerk. But his sole function is to advise the justice on matters of law, practice and procedure. In this situation the fact that the High Court of Justiciary does not have power to rehear the case and reach its own decision on the facts can be seen to be immaterial. What matters is that it has full power to re-examine all questions of law, practice and procedure and to substitute its own decision on these matters for decisions taken by the justice on the advice of the clerk. I think that its jurisdiction is wide enough in this context to satisfy the test which was laid down in *Albert and Le Compte* 5 EHRR 533. It has full jurisdiction to do all that is needed to ensure that the guarantees of article 6(1) are provided to the accused.

For these reasons I would hold that the structure for the district courts which has been laid down by the statute, including the provision which it makes for the appointment of a clerk of court to act as legal assessor in that court, is not incompatible with Mr Kelly's rights under article 6(1) of the Convention.

Practice

Mr Sudjic's complaint is that the practice whereby the clerk gives legal advice to the justice in private offends against the right of the accused to a fair and public hearing. There are two aspects to this complaint. One is that the accused is put at a disadvantage because he is not informed as to the subject matter or content of that advice and so has no opportunity to comment on it. The other is that the practice of holding private discussions of this kind while the trial is still in progress, whether they take place in the retiring room or while the justice in on the bench, contravenes the principle of open justice. The giving of advice to the justice in private is said for these reasons to be incompatible with the accused's rights under article 6(1) of the Convention.

I agree with Lord Rodger of Earlsferry that there is no true analogy between the functions which clerk of the district court performs and those of the public official in cases such as *Borgers v Belgium* (1991) 15 EHRR 92 who has the right to intervene and make submissions to the court. As he has explained, the role which the clerk plays when giving legal advice to the justice in private is part of the ordinary functioning of the court, as the clerk functions on the same side of the court as the justice who must decide the case. But I am less confident that an analogy can be drawn between the giving and receiving of that legal advice and the discussions which take place in private among judges about a decision which they have yet to take. Judges engage in these discussions to exchange views and test opinions, not to obtain legal advice. Unlike the judges, however, the lay justices are not legally qualified. The provision of legal advice by the clerk is a step in the proceedings which does not occur in a hearing which is conducted before judges (by "judges" I mean all judicial officers who are legally qualified, including sheriffs and stipendiary magistrates). All matters of law, practice and procedure can be debated with the judges directly. But a party to proceedings in the district court cannot participate in the giving of legal advice to the justice unless he is made aware of the advice that is being given to the justice by the clerk. It is that aspect of the matter which seems to me to engage the accused's right under article 6(1) to a fair and public hearing.

In my opinion a balance must be struck between the rights of the accused and the requirements of the court when it is seeking to administer justice. The rule of law lies at the heart of the Convention, and it is not its purpose to impede any further than is necessary the way in which an independent and impartial court goes about its business in order to achieve a result which complies with the law. It is obviously of prime importance that the justice, who has to take all the decisions, should understand the legal advice which the clerk is offering to him. The giving and understanding of that advice would be unduly inhibited if the entire conversation had to be carried out in public so that the accused could follow every word that was being spoken, and every question asked, on either side. The fact that the conversation takes place in private, and even in the retiring room if the justice thinks that this would be appropriate, is not in itself objectionable. What is objectionable is depriving the accused of his right to know what is going on during his trial, and in particular his right to know what legal advice is being given to the justice so that he can have the opportunity of commenting on it.

In *Montgomery v HM Advocate* 2001 SC (PC) 1, 13 I said that the Board should defer to the High Court of Justiciary in matters of practice when it was exercising its jurisdiction under Part II of Schedule 6 to the Scotland Act 1998. Among the reasons I gave for taking this view was that the High Court has power under section 305 of the Criminal Procedure (Scotland) Act 1995 to regulate the practice and procedure in relation to criminal procedure in the Scottish courts and that a Criminal Courts Rules Council has been established under section 304 of that Act with the function of keeping the practices and procedures of the courts exercising criminal jurisdiction under review. But I feel less inhibited in expressing an opinion as to the terms in which guidance might be given to clerks and justices in this matter of practice, as this bears directly on the devolution issue which we have been asked to determine.

In *Clark v Kelly* 2001 JC 16, 32, para 24 Lord Milligan, delivering the opinion of the High Court of Justiciary, said that the court found nothing objectionable in the practice of private communications between the clerk as legal assessor and the justice provided that care was taken not only to confine such communications to the provision of legal advice but also to recognise and raise in open court any matter upon which the defence, or indeed the prosecution, might

reasonably wish to make material comment. I agree with these observations. But I have more difficulty with the advice which he gave when he said in the immediately preceding passage in his opinion that the court was concerned to ensure that the following matters were raised in open court:

> "(1) The content of any advice on the law given privately by the clerk to the justice which the clerk, or indeed the justice, perceives as possibly controversial; (2) Observation by the clerk that some authority has been cited, or submission made, which is inaccurate as to the current position in law; and (3) More generally, any matter which the clerk, or indeed the justice, perceives could be the object of relevant submission by one or other or both of the defence and the prosecution."

It respectfully seems to me that this wording is unduly complicated, and that it leaves too much to what the clerk or the justice perceives as controversial or as likely to be the object of submission by the parties. The parties may quite legitimately have different views as to whether the advice which is being given by the clerk is controversial or in need of correction. I would favour a simpler and more precise formula which was capable of being applied uniformly by every court.

In *Practice Direction (Justices: Clerk to Court)* [2000] 1 WLR 1886, which was issued by Lord Woolf CJ on 2 October 2000 on the coming into force of the Human Rights Act 1998, the following guidance is given to justices' clerks and authorised legal advisers in England and Wales:

> "8. At any time, justices are entitled to receive advice to assist them in discharging their responsibilities. If they are in any doubt as to the evidence which has been given, they should seek the aid of their legal adviser, referring to his/her notes as appropriate. This should ordinarily be done in open court. Where the justices request their adviser to join them in the retiring room, this request should be made in the presence of the parties in court. Any legal advice given to the justices other than in open court should be clearly stated to be provisional and the adviser should subsequently repeat the substance of the advice in open court and give the parties an opportunity to make any representations they wish on that provisional advice. The legal adviser should then state in open court whether the provisional advice is confirmed or if it is varied the nature of the variation."

Mr Macaulay said that he saw no difficulty in applying this guidance in Scotland. It is also consistent with the guidance which the Board gave to the Professional Conduct Committee of the General Medical Council which, like the district courts, is composed of lay members who are advised by a legal assessor on matters of law, in *Nwabueze v General Medical Council* [2000] 1 WLR 1760, 1775.

I suggest that the practice which should be followed by the clerks and justices in the district court in this matter should be as follows. Any advice which the clerk gives to the justice in private on matters of law, practice or procedure should be regarded by them as provisional until the substance of that advice has been repeated in open court and an opportunity has been given to the parties to comment on it. The clerk should then state in open court whether that advice is confirmed or is varied, and if it is varied in what respect, before the justice decides to act upon it. It would be helpful if guidance on this matter could be incorporated in the handbook and brought to the attention of justices and clerks by issuing an appropriate circular. It will, of course, be open to the parties to bring such guidance to the attention of the court if there is reason to think that it is not being observed by either the justice or the clerk at the trial.

I would hold that, if these steps are taken in this case when it comes to trial, the giving of advice by the clerk to the justice will be compatible with the accused's Convention rights.

Conclusion

I think that it is unnecessary for answers to be given to the questions which have been included as points of law in the reference. I would determine the devolution issue which has been raised under paragraph 1(d) of Schedule 6 to the Scotland Act 1998 by finding that it would not be incompatible with Mr Kelly's rights under article 6(1) of the Convention for the complaint against him to proceed to trial in the District Court at Kirkcaldy.

Lord Hutton

I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hope of Craighead. I am in agreement with the reasons which he gives for holding that it would not be incompatible with Mr Kelly's rights under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms for the complaint against him to proceed to trial in the District Court at Kirkcaldy. In particular, I am in agreement with the view which he states in paragraph 69 above that any advice which the clerk gives to the justice in private on matters of law, practice or procedure should be regarded by them as provisional until the substance of that advice has been repeated in open court and an opportunity has been given to the parties to comment on it; and further that the clerk should then state in open court whether that advice is confirmed or is varied, and if it is varied, in what respect, before the justice decides to act upon on it.

Lord Rodger of Earlsferry

The issue in this case, which concerns the role of clerks of court in district courts, comes before the Board by a somewhat circuitous route, culminating in a reference from the High Court of Justiciary under paragraph 33 of schedule 6 to the Scotland Act 1998.

In 1999 the minuter, Mr Christopher John Kelly, was charged on summary complaint with an alleged theft on 21 February 1999 and an alleged breach of the peace on 25 March 1999. The complaint called in the district court at Kirkcaldy on 15 July 1999 when the minuter pled not guilty. He failed to appear at an intermediate diet and was arrested and charged with a contravention of section 150(8) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). He appeared in the district court in that connexion on 22 November 1999. This was not long after the decision in *Starrs v Ruxton* 2000 JC 208, holding that courts presided over by temporary sheriffs were not independent and impartial tribunals for the purposes of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. On this occasion the minuter's solicitor sought leave to raise a devolution issue to the effect that, because of its constitution, the district court at Kirkcaldy was not an independent and impartial tribunal in terms of article 6(1) of the Convention. The district court granted the minuter leave to raise the devolution issue and on 13 December referred it to the High Court of Justiciary. On 18 August 2000 the High Court gave judgment, answering the questions in the reference unfavourably to the minuter: *Clark v Kelly* 2001 JC 16. The High Court refused leave to appeal to your Lordships' Board, but the Board subsequently granted the minuter's petition for special leave. It was then discovered that, due to an oversight, the instance in the proceedings on the complaint had fallen, with the result that the proceedings had come to an end. The appeal to the Board in respect of the reference in those proceedings could therefore not go ahead.

That was not, however, the only complaint against the minuter. On 6 April 2000 another complaint against him at the instance of the procurator fiscal had called in the same district court. This time he was charged with stealing two boxes of chocolates on 2 November 1999. The court adjourned the diet without plea and did so repeatedly, apparently to await the outcome of the reference on the devolution issue in the other proceedings. On 7 September 2000, after the decision of the High Court, the minuter sought a further continuation on the ground that he was seeking leave to appeal to the Privy Council, but the district court refused the continuation. On 9 March 2001, however, shortly before the trial was due to take place, the district court granted the minuter leave to withdraw his previous plea of not guilty and allowed him to raise a devolution issue on the same matter as in the other proceedings, which had by this time come to an end. The minuter contended that in trials in the district court legal decisions were effectively taken by the clerk of court who lacked the necessary independence for purposes of article 6(1) of the Convention. Moreover, the clerk's advice was tendered in private, in breach of the guarantee of a public hearing under that article. On 19 April the district court decided to refer the issue to the High Court of Justiciary. The reference was transmitted to the High Court in June and on 11 October 2001 the advocate depute told the High Court that, in the particular circumstances, the Lord Advocate would require the High Court to refer the issue to this Board. Eventually on 12 April 2002 the High Court approved the terms of the reference and referred 3 questions for the determination of the Board.

The 3 questions set out in the reference for the determination of the Board are:

> "1 Is the clerk of court to the district court at Kirkcaldy in law part of the tribunal which constitutes that court for the purposes of article 6(1)?
>
> 2 Are private communications between the clerk of court and the justice of the peace part of the trial then proceeding before the court?
>
> 3 If the clerk of court is not part of that tribunal, is the district court surrendering its independence in accepting advice from someone who is not part of that court?"

Your Lordships are not bound by the terms of the questions and can determine the issues that arise in whatever seems the most appropriate form. As Mr Macaulay QC submitted for the Lord Advocate, the essential issue can be satisfactorily encapsulated in a single question to this effect: will a trial of the criminal charge against the minuter in the district court at Kirkcaldy inevitably infringe his rights under article 6(1) of the Convention? If so, then the Crown has no power to bring the minuter to trial: section 57(2) of the Scotland Act 1998; *R v HM Advocate* [2002] UKPC D3 2003 SLT 4. The questions in the reference do no more than highlight certain of the arguments that were presented in relation to this issue.

As Lord Hope of Craighead has explained, the District Courts (Scotland) Act 1975 ("the 1975 Act") replaced the earlier, less satisfactory, arrangements for trying those charged with minor offences. The Bail, Judicial Appointments etc (Scotland) Act 2000 ("the 2000 Act") made important changes to the system in the 1975 Act. In particular, the amended section 9 of the 1975 Act divided justices into two categories, full justices and signing justices. Full justices can perform any act, including any function of a judicial nature. Signing justices can perform only the very limited formal functions specified in section 15(9) of the 1975 Act. Despite the changes, the district court system continues to be essentially local and decentralised. Under section 6(1) of the 1995 Act it is the local authorities which determine when and where the district courts sit and which have to provide suitable and sufficient premises and facilities for the purpose (section 8(1) of the 1975 Act). While the devolution minute and the reference mention the fact that the local authorities receive certain of the fines imposed in the district courts and are paid a handling charge in respect of the other fines which have to be remitted to the Consolidated Fund, before the Board the minuter did not argue that these financial interests compromised the independence or impartiality of the courts.

Only in Glasgow does the local authority appoint stipendiary magistrates. Elsewhere the district court is constituted by one or more full justices: section 6(2) of the 1995 Act as amended. In practice in Kirkcaldy one full justice sits. The full justices are appointed by the Scottish Ministers in the name of Her Majesty: section 9(2) of the 1975 Act. They can be removed from office, or restricted to having the functions of a signing justice, only if an independent tribunal, comprising members appointed by the Lord President of the Court of Session, finds that by reason of inability, neglect of duty or misbehaviour, they are unfit for office or, as the case may be, for performing functions of a judicial nature: section 9 of the 2000 Act. The justices have no legal qualifications but none the less require to determine any questions of law, as well as any questions of fact, which arise in the cases before their court. The Scottish Ministers provide training courses for full justices on basic law and other matters in accordance with section 14 of the 1975 Act.

In addition to providing the necessary court premises and other facilities, every local authority must appoint a clerk, part of whose functions is to assist the justices on legal questions. Section 7(1) of the 1975 Act provides:

> "It shall be the duty of each local authority to appoint and employ, whether on a full-time or part-time basis, an officer to act as clerk of the district court for their area, who shall also act as legal assessor in that court, and any person so appointed shall be an advocate or a solicitor."

As that provision indicates, the clerk carries out all the usual administrative and other duties of a clerk of court but also acts as a legal assessor, giving legal advice to the justice. In addition, where someone appeals on a point of law against his conviction in a trial presided over by a justice, it is the clerk's job to prepare and issue the draft stated case: section 179(1) of the 1995 Act. The justice cannot make any alterations to the draft without a hearing to consider them (section

179(4)) but it is ultimately the duty of the justice to state and sign the case which the clerk sends to the appellant and copies to the other side: section 178(7) and (8). In practice clerks of court, whether part-time or full-time, are employed by the local authority under contracts which do not give them the kind of security of tenure now enjoyed by the justices. Many clerks are indeed members of the legal staff of the local authority whose duties include acting as clerk to the district court as and when required.

The reference as approved by the High Court states that it is the practice of the clerk of the district court at Kirkcaldy to advise the justice on matters of law, practice and procedure. It goes on to say that this legal advice is invariably given in private, outwith the presence of the accused, his legal advisers and the procurator fiscal. At the hearing before the Board counsel for both parties confirmed that this does indeed remain the position even after the decision of the High Court in *Clark v Kelly* 2001 JC 16, 32D, para 24 indicating that care should be taken to raise in open court any matter on which the defence, or indeed the prosecution, might reasonably wish to make material comment. Mr Sudjic said that this guidance was frequently ignored in other district courts also. For these reasons the hearing proceeded on the basis that, if a point of law arose during his trial, the clerk would give the legal advice to the justice in private and would not give any indication of the tenor of that advice in open court.

The charge against the minuter concerns the theft of two boxes of chocolate. Although it has already given rise to a legal controversy worthy of consideration by this Board, Mr Sudjic recognised that he could not say that any (other) point of law would necessarily arise at the trial, if one eventually did take place. Any dispute might well prove to be one of fact, turning simply on the credibility and reliability of the witnesses. On the other hand, a legal question might arise, for example, as to the sufficiency of the Crown evidence to meet the requirement for corroboration. It was too early to tell. That being so, it must equally be too early to tell whether the clerk will in fact have to give any legal advice to the justice in private in the course of the minuter's trial. On one view, therefore, the point now focused in the reference might have been better taken after a trial in which such advice had been given, rather than in advance of a trial where there may be no need for such advice. In this particular instance, however, where the point affects district courts throughout Scotland and where the Lord Advocate has required the High Court to refer it to the Board, much the better course is for the Board to determine the issue at this stage, even if it is, technically, premature.

The first question in the reference asks whether the clerk of court is in law part of the tribunal which constitutes that court for the purposes of article 6(1). As Mr Macaulay explained, the significance of that question lies in the concession which the then Solicitor General for Scotland, Mr Davidson QC, made in the course of the hearing before the High Court in the first proceedings. In *Clark v Kelly* 2001 JC 16, 21E–F, para 6 Lord Milligan recorded:

> "It was understood to be conceded by the Solicitor General that as matters stand, if a district court clerk was held to be a member of the district court as a matter of law, then the necessary security of tenure of office for article 6(1) purposes would be absent."

It followed that, if the clerk were held to be a member of the district court, the district court, so constituted, would not be an independent and impartial tribunal in terms of article 6(1). The Solicitor General had confirmed that he made this concession.

This concession by the then Solicitor General forms the substratum of the first question in the reference. The effect of that concession, if applied in the present proceedings, would be that, if the Board concluded that the clerk was part of the district court for article 6(1) purposes, the district court would not be regarded as independent and impartial. Even although the Crown have not repeated the concession in the present proceedings, Mr Macaulay clearly felt embarrassed by it. It is, however, a concession on a matter of law which, even if repeated, could not bind the Board in deciding the legal issue referred for determination. The concession is therefore irrelevant for present purposes.

As the questions in the reference indicate, the contention that the minuter could not get a fair trial was put on two broad bases, one relating to the alleged lack of independence of the clerk of court, the other relating to the fact that the clerk would tender any legal advice in private, with the result that the parties could not make submissions on

it. Although different, both bases relate to the position of the clerk as legal assessor within the structure of the district court.

In his submission on behalf of the minuter Mr Sudjic concentrated on identifying the role of the clerk of court under the various statutory provisions to which I have already referred. These showed, he said, that the clerk was properly to be regarded as part of the district court for article 6(1) purposes. For the Crown, Mr Macaulay argued that article 6(1) was concerned solely with the independence and impartiality of the decision-maker in a tribunal. The clerk might tender advice on the law and the justice would, no doubt, usually follow it, but the justice was not bound to do so and could take a different view. The critical point was, accordingly, that all decisions, not only on matters of fact but also on matters of law, were ultimately taken by the justice and not by the clerk. Therefore the clerk should not be regarded as part of the tribunal for purposes of article 6(1).

In *M v Cumming* 1999 JC 171, 175F Lord Prosser observed:

> "One may note that the clerk and legal assessor is not of course an actual member of the court, with responsibility for the ascertainment of facts."

Of course, it needs no citation of authority to show that the clerk is not a decision-maker in the cases that come before a district court. All the decisions, both of law and of fact, are taken by the justice. What article 6(1) requires, however, is a fair and public hearing by an independent and impartial "tribunal". That guarantee should not be construed narrowly. While the main focus must, of course, be on the position of the judges in a tribunal, it would be wrong to concentrate exclusively on them. A court or tribunal will in practice have a greater or lesser number of officials carrying out administrative and other duties. If the administrative decisions taken, the advice given or the documents prepared, by those officials can affect the independence or impartiality of the members of the tribunal in determining a case, the role of those officials is in my view relevant for purposes of article 6(1). It is therefore necessary to examine the role of the clerk of court as legal assessor, with this approach in mind.

A district court can be presided over either by a stipendiary magistrate or by a full justice. A stipendiary magistrate, being legally qualified, can sit without a legal assessor, but a justice needs to have a legal assessor to advise on the law and to draft any stated case. The importance of this role of the clerk duly appointed under statute is illustrated by *Brown v Neilson* 1907 SC (J) 3, which was decided under section 67 of the Glasgow Police Act 1866. In that case the true clerk of court was absent for some reason and the magistrate appointed another lawyer to act in his place, but did not sign the entry of his appointment until after the end of the trial in which the accused was convicted. During the trial the magistrate asked the lawyer for advice, which he gave. The accused appealed by bill of suspension. The High Court held that there had been a fundamental nullity in the proceedings and quashed his conviction. Lord Justice Clerk Macdonald said, at p 6:

> "I am of opinion that no clerk had been appointed at the time the case had concluded. The person whose advice the magistrate asked for and received was not duly made clerk of court in any sense. It is new to me that a person can have and act upon an appointment as clerk of court when there is no writing constituting his appointment."

Lord Low added, also at p 6:

> "I agree that Mr Brown was never appointed clerk of court, and as he acted as only a duly appointed clerk of court was entitled to act, in the way of giving advice, the conviction must be suspended."

As this decision suggests, although the clerk of court is not a decision-maker, he holds an influential office that is enshrined in statute and that gives him the exclusive right and duty to advise the justice, qua decision-maker, on matters of law. In practice the justice can be expected to follow the clerk's legal advice in most cases. The official handbook issued for the guidance of justices advises that "unless there is good reason for not doing so, justices should accept the clerk's advice on procedural and legal matters": *Handbook for Justices of the Peace in Scotland* (loose-leaf

edition), Part 4, p 25. So the clerk is an official of the district court whose advice is intended to have an impact on the decisions reached by the justices. Therefore the independence or impartiality of the justices in taking decisions might be impaired if the clerk were not seen to act independently and impartially in giving advice on which the justices then acted. A clear example would be if the clerk gave advice in a case where he was a close relative to the victim of the assault for which the accused was being tried.

I find general support for that approach in the admissibility decision of the European Court in *Mort v United Kingdom* Application No 44564/98 (unreported) 6 September 2001 which deals with the position of a clerk of court in a Magistrates' court in England. The applicant had failed to pay a fine. After various procedural steps she eventually appeared, without legal representation, in a means inquiry before the Magistrates' court. At the hearing it was the clerk of court who asked almost all the questions about her income and about any possible excuses for her failure to pay. Some of the questioning was robust. After it was over, the justices asked the clerk to follow them into their retiring room and he did so. When they emerged, the justices made an order committing the applicant to prison for 14 days, suspended on condition that she pay the fine in certain weekly instalments. She failed to pay and eventually she was arrested and transferred to prison. She sought judicial review of the court's decision on the ground inter alia that the role played by the clerk in the proceedings gave rise to the appearance of a lack of independence and impartiality. The Divisional Court rejected her claims. She then applied to the European Court, alleging that the hostile questioning by the clerk and the fact that he retired with the justices when they were considering their decision were contrary to the principles of adversarial proceedings and equality of arms and cast doubt on the independence and impartiality of the Magistrates' court. The European Court held that the complaints under article 6(1) fell to be rejected as manifestly ill-founded.

In their decision the court observed:

> "that the applicant has invoked both the principle of equality of arms and the requirement of independence and impartiality in respect of the role of the justices' clerk in her case. It would point out that equality of arms, an important element in ensuring the adversarial nature of proceedings, applies vis-à-vis the other parties in the proceedings. It does not apply as regards the tribunal or court. Conversely, it is not required of the prosecutor or other parties in proceedings to give guarantees of independence and impartiality, which attach to the members of the court which determines the issues in the case. It has therefore examined whether the justices' clerk acts as prosecutor or party, or as part of the court itself.
>
> The Court recalls that the justices' clerk acts solely to assist the magistrates, who are lay judges. This may involve giving advice on law or procedure, taking notes of evidence and on occasion conducting examination of witnesses on the justices' behalf .... There is no question of the justices' clerk enjoying any role in the proceedings independent of the justices, or in having any duty with regard to influencing a decision in any particular direction. In that respect, the clerk's position can be distinguished from officers such as the procureur général, avocat général or commissaire du gouvernement, who make submissions to the courts concerning their personal views on the outcome of particular cases [see *Borgers v Belgium* Series A no 214, *Lobo Machado v Portugal* Reports 1996-I § 31 and *Kress v France* 7 June 2001]. On that basis, no problem arises in the normal course of events if a justices' clerk retires with the justices and it is not known what assistance, if any, he or she in fact furnishes to them. Assuming the clerk fulfils the role provided by law, his or her presence during the deliberations of the justices must be regarded as part of the ordinary functioning of the court."

The European Court went on to reject the applicant's argument that, on the facts of the particular case, the justices' clerk had failed to observe "the requirements of independence and impartiality required of him, as an integral part of the Magistrates' court". The court took the view that the clerk had not overstepped what would be permissible for him "as a court officer acting on behalf of the justices".

If that analysis is applied to the position of the clerk of court in a Scottish district court, many of the same features are to be noticed. The clerk acts solely to assist the justice, who is a lay judge. The assistance may involve giving advice on law or procedure. There is no question of the clerk enjoying any role in the proceedings that is independent of the

justice or of the clerk having any duty with regard to influencing a decision in any particular direction. For purposes of article 6(1), the clerk is therefore to be regarded as a court officer and as an integral part of the district court who must, accordingly, act independently and impartially.

It does not, by any means, follow, however, that – as the minuter contends - the district court will lack the necessary independence and impartiality under article 6(1) if the clerk does not enjoy the same security of tenure as the justice. It is well known that, in both the Court of Session and the High Court of Justiciary, the clerks often assist the judges on matters of procedure and in the correct formulation of court orders. It has never been suggested that the independence and impartiality of these courts are compromised just because the clerks do not enjoy the same tenure as the judges. Similarly, the European Court of Human Rights itself uses the services of legal secretaries whose terms of appointment differ from those of the judges. The judges of the European Court of Justice in Luxembourg also enjoy the services of assistant rapporteurs who even help to prepare judgments but whose terms of appointment, again, differ from those of the judges. These examples indicate that, in principle, a court or tribunal will not lack independence and impartiality in terms of article 6(1) just because those whose job it is to tender advice and assistance to judges on procedural and legal matters do not enjoy the same security of tenure as the judges themselves.

The position of a clerk in a district court is, of course, particularly sensitive since the legal advice is tendered to lay justices. Nevertheless, the decision in *Mort v United Kingdom* suggests that this is not, in itself, a reason to conclude that the tribunal infringes the article 6(1) guarantee of independence and impartiality simply because the clerk lacks the security of tenure of a judge. What matters is whether the clerk is seen to perform the statutory role of legal assessor independently and impartially. If not, the justice who relies on the clerk's advice may not be regarded as independent and impartial in reaching his or her decision.

District courts have operated since 1975 when they replaced the old system of burgh courts and justice of the peace courts. During that time they have increasingly gained the confidence of the public, the legal profession and the High Court of Justiciary. At present they handle about 31% of summary prosecutions and, before the introduction of fixed penalties and similar initiatives to remove less serious cases from the court system, that figure was considerably higher. If the district court system has indeed worked satisfactorily, this has been due, in no small measure, to the skill and enthusiasm of the clerks. It has never been suggested that the clerks in fact tend to act in a way that makes the justices' decisions partial or lacking in independence. This is indeed no more than what one would expect since section 7(1) of the 1975 Act incorporates the safeguard that the clerks must be either advocates or solicitors. As such, they can be expected to act in a professional manner and to perform their duties independently and impartially, spurning any illegitimate outside influences. Should they fail to do so, not only would they be subject to the discipline of their appropriate professional body but the relevant decision of the district court would be liable to be quashed by the High Court of Justiciary on a bill of suspension.

In these circumstances I see no basis upon which a fair-minded and informed observer, having considered the facts relating to the terms of appointment and employment of the clerks of court, would conclude that there was a real possibility that, by virtue of the clerks' role in advising the justices, district courts lacked the independence and impartiality required by article 6(1). I would accordingly reject the minuter's contention that the district court at Kirkcaldy is not an independent and impartial tribunal in terms of article 6(1) because the clerk is employed by the local authority and does not enjoy the same security of tenure as the justices whom the clerk advises on matters of law.

Mr Sudjic's main challenge related, however, to the clerks' practice of giving their legal advice to the justices in private without revealing the substance of that advice in open court so that the parties could, if so advised, make submissions on it. This challenge was focused in Question 2. The terms of that question ("part of the trial") reflect the language of section 153(1) of the 1995 Act. Any question as to whether private communications between the clerk and the justice form part of the trial in terms of that subsection is not, in itself, a devolution issue. It is accordingly a matter for the High Court of Justiciary and not for this Board.

In his written case, however, the minuter also advances the point about the clerks' private communications with the justices as an issue under article 6(1), which guarantees "a fair and public hearing". The argument can be put in two ways. First, the hearing is not public in terms of article 6(1) if at any time before the justice reaches his or her verdict the clerk gives advice in private. Secondly, a fair hearing must be an adversarial hearing in which equality of arms is observed. That guarantee is breached if the clerk gives advice which is contrary to the accused's interests and the accused's representative has no opportunity to make submissions on that advice.

In *Clark v Kelly* 2001 JC 16 the minuter advanced arguments to a similar effect under reference to a series of cases in the European Court dealing with the position of certain public officials in various Continental systems who had the right to intervene and make submissions before their respective supreme courts. The parties had no opportunity to respond to those submissions. In some systems the official even had the right to retire with the members of the court when they were deliberating. The officials acted in these ways, not to support one side or the other as such, but in order to ensure that the court interpreted and applied the law correctly and consistently. In that sense their role was neutral and disinterested. Despite this, since *Borgers v Belgium* (1991) 15 EHRR 92, 108, para 26, the European Court have consistently held that, because in any given case the official argued that the appeal should be decided in a particular way, he became, objectively speaking, the ally or opponent of the accused. Article 6(1) therefore required that the rights of the defence and the principle of equality of arms should be respected. Since, however, there was no opportunity for the parties to comment on the official's observations, those rights were infringed. Examples of that approach being followed in various contexts are to be found in *Lobo Machado v Portugal* (1996) 23 EHRR 79, *JJ v Netherlands* (1998) 28 EHRR 168 and *Vermeulen v Belgium* (1996) 32 EHRR 313.

The argument for the minuter in the earlier proceedings against him was that the clerk of court was to be compared with the public official in these cases. So, just as a party's article 6(1) rights were infringed if he had no opportunity to deal with the (neutral) observations of these public officials, so equally the minuter's article 6(1) rights would be infringed if he had no opportunity to comment on the (neutral) legal advice which the clerk offered to the justice in private. Although Mr Sudjic did not specifically refer to that line of authority either in the minuter's written case or in his oral submissions before the Board, Mr Macaulay cited and analysed the cases. Under reference to *Mort v United Kingdom*, he argued, however, that there was no true analogy, for the purposes of article 6(1), between the position of the public officials in these cases and the clerk of court in a Scottish district court.

I accept Mr Macaulay's submission. In the passage from their decision in *Mort v United Kingdom* that I have already quoted, the European Court distinguished the *Borgers v Belgium* line of authority. The court held that the justices' clerk formed an integral part of the Magistrates' court and that it was in his capacity as a court official that the clerk questioned the applicant and gave the advice to the justices. The justices' clerk enjoyed no role in the proceedings that was independent of the justices. In that situation the principle of the equality of arms had no application, since it applies only vis à vis the other parties in the proceedings and not as regards the tribunal or court. Similarly, in the district court, the clerk functions on the justice's side of the line that separates the court from the parties who appear before it. Accordingly, when the clerk gives legal advice to the justice in private in the normal way in accordance with his statutory duty, that is part of the ordinary functioning of the court rather than part of the proceedings before the court. In that respect the giving and receiving of legal advice by the clerk and justice can be compared with the private discussion among judges about a prospective decision, whether that decision falls to be taken at the end, or in the course of, the proceedings. There is therefore no requirement, in terms of article 6(1), for the clerk's advice to be given in public. Moreover, since the clerk operates within the court rather than as a party before the court, the adversarial principle is not engaged and the parties have no right under article 6(1) to be informed of the clerk's advice or to have an opportunity to comment on it.

A further point must be borne in mind. The role of the clerk is to give legal advice. If the justice follows that advice, it will be reflected in the public decision of the court. If the advice is unsound and the accused is convicted, he can apply for a stated case under section 176 of the 1995 Act. If the High Court of Justiciary grant leave to appeal and it turns out that the clerk's advice was unsound, then the court has a wide range of powers to ensure that justice is done, including

the power to quash the conviction: section 183(1) of the 1995 Act. This wide-ranging statutory power to correct errors of law and the common law power to deal with procedural irregularities by bill of suspension ensure not only that the procedure and decisions in district court proceedings are legally correct but also that they comply with the article 6(1) requirement that the charge against an accused should be determined in a fair hearing by an independent and impartial tribunal.

2 For these reasons, as well as for those given by my noble and learned friend Lord Hoffmann, I would determine the issue referred to the Board by saying that the trial of the charge against the minuter in the district court at Kirkcaldy would not infringe his rights under article 6(1) of the Convention, even if the clerk gave legal advice to the justice in private.

3 The Convention does no more than set minimum standards to be observed by the signatory states. Not infrequently, a state may choose to observe higher standards. That is the position which the legal systems of the United Kingdom have adopted with regard to the role of justices' clerks. In England and Wales Lord Woolf CJ issued *Practice Direction (Justices: Clerk to Court)* [2000] 1 WLR 1886 to coincide with the Human Rights Act 1998 coming into force. The Lord Chief Justice stated inter alia:

> "8. At any time, justices are entitled to receive advice to assist them in discharging their responsibilities. If they are in any doubt as to the evidence which has been given, they should seek the aid of their legal adviser, referring to his/her notes as appropriate. This should ordinarily be done in open court. Where the justices request their adviser to join them in the retiring room, this request should be made in the presence of the parties in court. Any legal advice given to the justices other than in open court should be clearly stated to be provisional and the adviser should subsequently repeat the substance of the advice in open court and give the parties an opportunity to make any representations they wish on that provisional advice. The legal adviser should then state in open court whether the provisional advice is confirmed or if it is varied the nature of the variation."

By requiring that any advice given in private should be repeated in open court and that the parties should have an opportunity to make representations on it, the practice direction goes further than article 6(1) requires.

4 Similarly, in *Clark v Kelly* 2001 JC 16, 32, para 24 the High Court of Justiciary recorded that the discussion in that case had left them with one area of concern:

> "This area of concern relates to ensuring that the following matters are raised in open court:- (1) The content of any advice on the law given privately by the clerk to the justice which the clerk, or indeed the justice, perceives as possibly controversial; (2) Observation by the clerk that some authority has been cited, or submission made, which is inaccurate as to the current position in law; and (3) More generally, any matter which the clerk, or indeed the justice, perceives could be the object of relevant submission by one or other or both of the defence and the prosecution. We make these observations because we find nothing objectionable in the practice of private communications between clerk, as legal assessor, and justice provided that care is taken not only to confine such communication to the provision of legal advice but also to recognise and raise in open court any matter upon which the defence, or indeed the prosecution, might reasonably wish to make material comment."

Here again, though not going so far as Lord Woolf CJ, the High Court have gone further than article 6(1) requires. In both instances the intention is to afford greater protection to the accused. As Lord Hope of Craighead observes, in both instances too the approach is broadly in line with the one that the Board has commended in relation to the legal assessor's advice to the Professional Conduct Committee of the General Medical Council: *Nwabueze v General Medical Council* [2000] 1 WLR 1760, 1775.

5 Mr Macaulay, while founding on the decision of the European Court in *Mort v United Kingdom*, did not repudiate the more liberal approach which the High Court had adopted in this passage in *Clark v Kelly*. Indeed, he presented his argument for the Crown on the basis that an approach of that kind was appropriate and should be followed if any legal

point arose for decision at the minuter's trial: the misfortune was that, it appeared, district courts were not following the guidance given by the High Court. At the same time, Mr Macaulay acknowledged that the more general approach contained in the practice direction might well have advantages over the particular formulation in *Clark v Kelly*. He could see no differences in principle that would make that approach inappropriate in Scotland, except where the practice direction dealt with specific matters on which practice in the two jurisdictions differed.

6 It is possible to identify respects in which the somewhat tentative formulation adopted by the High Court may be open to criticism. For instance, if parties are to have the opportunity to make relevant submissions on legal advice tendered by the clerk, then it may be unwise to limit that opportunity to cases where the clerk or justice perceives that the advice may possibly be controversial: the parties may be in a better position to judge what is in controversy. That being so, the High Court might well wish to refine the guidance in this and other respects if a suitable opportunity arose. Since, however, the issue has been ventilated before the Board, I see advantages in following the course proposed by Lord Hope of Craighead. I accordingly agree that, when a clerk requires to give legal advice to the justice, the general approach outlined by Lord Hope of Craighead should be followed. It may be that the District Courts Association or the Central Advisory Committee for Scotland on Justices of the Peace, which is chaired by the Lord Justice Clerk, could take steps to ensure that this guidance is not only made known to justices and clerks but is also followed by them.