Neutral Citation No: [2025] NIKB 34 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **TRE12767** *ICOS No:* *Delivered:* **03/06/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY KYLE WEIR FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF DISTRICT JUDGE E KING

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Fiona Doherty KC with Sean Mullan (instructed by Donnelly & Wall) for the Applicant
Neasa Murnaghan KC with Ashleigh Jones (instructed by the DSO)
Philip Henry KC (instructed by the PPS)
Laura Curran (instructed by the CSO)

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Before: Treacy LJ and Humphreys J

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TREACY LJ (*delivering the judgment of the court)*

Introduction

[1] The question raised in this judicial review is whether or not a district judge has the legal power to make an order for severance of criminal charges in the magistrates' court.

Factual background

[2] The applicant in the present proceedings was charged by the PSNI with multiple offences which occurred on three separate dates. The offences charged were as follows:

- Fraud by False representation x 2
- Theft

- Tendering counterfeit currency x 2
- Driving whilst disqualified
- Using a motor vehicle without insurance x 2

[3] All of these offences were charged by police on one charge sheet dated 27/2/2020.

[4] On 17 June 2021, the PPS advised the magistrates' court that it had decided to proceed with the charges on indictment. From that date onwards therefore the primary role of the district judge was to conduct a Preliminary Enquiry and determine whether the accused should be returned for trial to the crown court.

[5] This meant that none of the matters on the charge sheet were matters that would be determined in any substantive way by the district judge. The district judge would not be the trier of fact in any of the matters charged.

[6] On the 1 June 2023, while the case was still before the magistrates' court, the applicant's solicitor served notice that he intended to make an application for severance to the district judge. It was made clear that the purpose of this application was to allow this case to provide the basis for a judicial review in respect of the power of district judges to sever charges. The application was made to enable the present case to replace a pre-existing judicial review raising the same issue in the case of Lionel Close, who, by then, was sadly deceased. District Judge King refused the application to sever on the basis that he was not satisfied that he had the requisite power to make a severance order

[7] The sole issue in the present case is whether or not the district judge was correct in law when he decided that he did not have the power to sever.

[8] Leave to apply for judicial review of that decision was granted by this court on the basis of the public interest in having clarity about the powers of district judges.

[9] Subsequent to the grant of leave, the Preliminary Enquiry took place on 14 December 2023 and the applicant was returned for trial in the crown court. That therefore concluded any matters before the magistrates' court related to this judicial review.

[10] The PPS directing officer had acknowledged that the alleged offending related to separate and distinct groups of offences, however, she had been told that she could not move an application to sever or split the charges on the charge sheet before the magistrates' court. As a result, the directing officer indicated her intention to make a 'misjoinder application' at the crown court once the defendant had been returned for trial. This would then split the matters into separate bills of indictment.

[11] After the grant of leave in these proceedings the applicant was returned for trial to the crown court, where the prosecution applied for severance to split the bill of indictment. This was ordered by the crown court and the original bill was split to create two new bills of indictment. The applicant pleaded guilty to certain offences on each of the new indictments and he received suspended sentences against each indictment.

The statutory position governing severance in the crown court

[12] The severance of Bills of Indictment occurs regularly in the crown court where there is express statutory provision granting the court power to take that course.

[13] Section 5(3) of the Indictments Act (NI) 1945 provides:

> "Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in the indictment, the court may order a separate trial of any count or counts of such indictment."

[14] No equivalent statutory power is granted in relation to the magistrates' court

[15] The magistrates' court is a creature of statute whose powers are set out in the Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order") and the Magistrates' Court Rules (NI) 1984 ("the 1984 Rules"). Neither the 1981 Order nor the 1984 Rules expressly confer on district judges any power equivalent to Section 5(3) of the Indictments Act.

Article 155

[16] The applicant contends that Article 155 of the Magistrates' Courts (Northern Ireland) Order 1981 impliedly confers such a power. Before considering this provision, it is necessary to set out the context within which it appears and also Articles 154 and 156 which are grouped together with Article 155 as Part XIII of the 1981 Order under the rubric of "Forms"

> **"Objections as to want of form or variance between complaints, etc., and evidence adduced**
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> 154.—(1) No objection shall be allowed in any proceedings before a magistrates' court to any complaint, summons, warrant, process, notice of application or

appeal or other document for any alleged defect in substance or in form or for variation between any complaint, summons, warrant, process notice or other document and the evidence adduced on the part of the complainant, plaintiff, applicant or appellant at the hearing, unless the defect or variance appears to have misled the other party to the proceeding.

(2) Without prejudice to the generality of Article 161 or 163, where a party to the proceeding has been misled by such defect or variance as is mentioned in paragraph (1) the court may, if necessary and upon such terms as it thinks fit, adjourn the proceedings.

Amendment of complaint or other documents

155. A magistrates' court may during any proceeding upon such terms as it thinks fit, make any amendment in any complaint, summons, warrant, process, notice of application or appeal or other document which is necessary for the purpose of raising the real questions at issue and arriving at a just decision.

Validity of documents issued in proceedings

156. A summons, warrant, decree or other document issued by a resident magistrate or lay magistrate shall not be void by reason of the person who signed the document subsequently dying or ceasing to hold or becoming disqualified for holding office."

[17] It is clear that Article 155 has been drafted broadly, however, it is one of a trio of provisions grouped together as Part XIII of the 1981 Order under the rubric of "Forms." Article 154 makes it clear that no objection can be raised to any defect in the substance or form of any complaint, unless the defect appears to have misled the other party to the proceedings. Article 156 concerns the validity of documents issued in proceedings. Ms Murnaghan KC argues that the positioning of Article 155 suggests that the gravamen of Part XIII and Articles 154, 155 and 156 is primarily to avoid the situation whereby a defendant might escape justice on the basis of a technicality, which is capable of being corrected by the proper exercise of the judicial discretion to amend a defective document (per *Doonan v McCarney* [1991] NI 213). She contends that Part XIII of the 1981 Order relates to the correction of administrative errors, rather than the more substantive issue of severance of a charge sheet, following the exercise of judicial discretion in a manner comparable to the provisions of section 5(3) of the Indictments Act (Northern Ireland) 1945.

[18] In 'Criminal Practice and Procedure in Magistrates' Court of NI' at para 2.36 the author, JF O'Neill, contended that the interpretation of Articles 154 and 155 should be considered in line with the authority of *New Southgate Metals Ltd v London Borough of Islington* [1996] Crim LR 334, which was discussed in Blackstone at D21.7. In that case, the approach taken to the analogue provisions in England and Wales was that the amendments envisaged by these provisions related to errors in relation to the technical phrasing of offences. We agree that such technical amendments are the true target of Part XIII and their main objective is to ensure that defendants do not evade prosecution on the basis of mere technical errors in the grounding documentation. We consider that such amendments are fundamentally different from the more substantive power to sever charges for the purpose of avoiding legal risk to defendants.

[19] The applicant however argues that Article 155 empowers the district judge to sever charges in much the same way as section 5(3) of the Indictments Act empowers crown court judges to sever indictments and for the same purpose, namely to ensure that defendants are not embarrassed or prejudiced in their defence. We note however that Article 155 makes no reference to the avoidance of prejudice or embarrassment to defendants whereas section 5(3) of Indictments Act expressly identifies that as its main objective. If it had been the intention of the legislature to confer such a substantive power on district judges for this purpose we consider that it would have been provided clearly and expressly and in similar terms to those by which that power is conferred on the Crown Court. The conferment of a substantive power to sever, thought to require primary legislation and supporting rules in respect of trials on indictment, cannot sustainably be read into or inferred from the discretionary power to amend a technically defective complaint contained in Article 155.

[20] Therefore, we conclude that severance applications are not permissible in the magistrates' court in Northern Ireland under Article 155 of the Magistrates' Courts (NI) Order 1981.

[21] In the alternative Ms Doherty KC submitted that the power to sever also arises under common law. Whilst the magistrates' court is a creation of statute its operation also comprises common law. By way of example as to how the common law can augment the approach of the district judges she referenced abuse of process applications, '*Galbraith*' applications, '*Newton hearings*' '*Rooney hearings*' and '*McAleenan warnings.*' The respondent accepts that there can be practice and procedure in the magistrates' court that is not strictly related to underpinning statutory provisions.

[22] As we noted earlier when addressing the applicant's central argument based on the interpretation of Article 155, if it had been the intention of the legislature to confer such a substantive power on district judges we consider that it would have been provided expressly. We also observed that the conferment of a substantive power to sever, by primary legislation and supporting rules in respect of jury trials

could not sustainably be read into or inferred from the power to amend a complaint in Article 155. When the legislature has proceeded in this manner differentiating between the powers of judges conducting jury trials where the trier of fact is the jury and summary trials where professional, experienced judges are the triers of fact, we see little scope for the common law providing the basis for such a power. Accordingly, we reject the applicant's argument that the power to sever arises under the common law.

[23] We also note Ms Murnaghan's contention that the power to sever has historically never been considered necessary for district judges and it appears that until now district judges have been able to avoid any potential unfairness by using their administrative and case management powers to list charges either on different dates or before different triers of fact. The decision as to whether to hear all matters together is that of the district judge, having regard to any submissions by the prosecution or defence. The judge must decide whether it is in the interests of justice to hear all alleged offences together [see *Chief Constable of Norfolk v Clayton* [1983] 2 AC 473]. This system appears sufficient to meet the requirements of justice without requiring the adoption of procedures thought appropriate for the crown court but not for summary trials.

Conclusions

[24] We are satisfied that the decision of the district judge to decline jurisdiction was correct, involved no breach of Article 155 and no issue of common law or Convention unfairness arises. The district judge was correct to hold that he did not have power to make an order of severance of criminal charges in the magistrates' court.