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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

APPEAL BY WAY OF CASE STATED BY A COUNTY COURT JUDGE
IN ACCORDANCE WITH ARTICLE 61 OF THE COUNTY COURTS
(NORTHERN IRELAND) ORDER 1980

BETWEEN:

PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND

Complainant/Respondent

and

LEE BROWN

Defendant/Appellant

Mr McGleenan KC with Mr Henry KC (instructed by the Public Prosecution Service) for
the Complainant/Respondent

Ms Quinlivan KC with Mr Moriarty (instructed by Madden & Finucane Solicitors) for the
Defendant/Appellant

Before: Keegan LCJ and Colton LJ

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

Introduction

[1] The court is familiar with the background to this case having delivered a judgment in a related case stated application.

[2] This can be found in the judgment of Keegan LCJ in *Lee Brown and Public Prosecution Service for Northern Ireland* [2022] NICA 5:

“[4] In this case the conviction arises as a result of events on 20 October 2018. On that day the appellant

assisted in the distribution of leaflets to households in Ballymena on behalf of a far right political party called Britain First. The first page of the leaflet contained some images of people from an ethnic minority background and the following narrative:

‘The people of Ballymena are furious at the massive influx of gypsy migrants from Eastern Europe. Anti-social behaviour has become common place and there have been attacks by migrants on local residents. Many local houses that could have been given to local people have been handed out to bus-loads of these migrants. Most of these migrants are given benefits draining council resources that could have been spent on the people of Ballymena. This is not just a few migrants, but a deluge of immigrants that has virtually changed the face of Ballymena. The local politicians, council and police are ignoring the complaints of local residents who are fed up of this enormous influx into the local area. Britain First is leading the campaign against this huge wave of immigration and we are demanding an immediate halt to any further migrant placement in Ballymena. Enough is enough, this is our town! It is time we forced the politicians to listen to the people of Ballymena!’

[5] The second page or back page of the leaflet was entitled ‘Britain First Ballymena Rally Saturday 27 October 3pm.’ This contained some images of a previous rally in Ballymena and the following narrative:

‘Britain First will be holding a residents’ rally on Saturday 27 October to give a voice to local people. Everyone in Ballymena is welcome to attend! At our last rally in Ballymena, around 150 local residents attended (below). The rally was addressed by Britain First leader, Paul Golding, this time we want to increase the turnout to put pressure on the politicians to listen to the people of Ballymena! We are calling on the local residents of Ballymena to attend our rally – if you want things to change then attending a rally is the only option! See

you next Saturday (27th), make sure to bring a friend or family member! Ballymena is our town, it is time to take it back! No surrender!

[6] The appellant was subsequently arrested and charged with one offence, the particulars of which were as follows:

‘That you, on the 20th of October 2018, within the vicinity of Moat Road, Ballymena, distributed written material which was threatening, abusive or insulting, intending thereby to stir up hatred or arouse fear or having regard to all the circumstances hatred was likely to be stirred up or fear was likely to be aroused thereby, contrary to Article 10(1) of the Public Order (Northern Ireland) Order 1987.’”

[3] Article 10 of the Public Order (Northern Ireland) Order 1987 (“the 1987 Order”) provides as follows:

“Publishing or distributing written material

10.-(1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if -

- (a) he intends thereby to stir up hatred or arouse fear;
or
- (b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.

(2) In proceedings for an offence under this Article it is a defence for an accused who is not shown to have intended to stir up hatred or arouse fear to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

(3) References in this part to the publication or distribution of written material are to its publication or distribution to the public or a section of the public.”

[4] On 6 June 2019, the appellant was convicted of the offence at Ballymena Magistrates' Court. On 25 July 2019, he was sentenced to a probation order for one year. His co-accused, Mr Paul Golding, was similarly convicted and received a suspended sentence of imprisonment.

[5] The appellant and Mr Golding appealed against the conviction and sentence. The appeal was heard in the county court before the learned trial judge, Her Honour Judge McColgan KC ("the judge") on 3 March 2020. At this hearing the judge dismissed the appeal against conviction but varied the sentences of both appellants. The appellant was fined £100 and given 26 weeks to pay. Golding had his sentence varied to a fine of £1,000.

[6] The appellant appealed this outcome by way of case stated. The matter came before the Court of Appeal (see para [2] above) who required the judge to state a case in the following terms:

"Was the appellant's conviction under Article 10 of the Public Order (Northern Ireland) Order 1987 compatible with article 10 of the European Convention on Human Rights and Fundamental Freedoms?"
[See [2020] NICA 55.]

[7] It is apparent from its judgment of 31 January 2022 that the Court of Appeal extensively reviewed the relationship between the proportionality of any interference with article 10 Convention rights or freedom of expression and determination of the criminal charge against the appellant.

[8] The Court of Appeal concluded that the judge had failed to properly analyse the article 10 issue and its disposal was as follows:

"Disposal

[79] We answer the question posed in the case stated as presented to us - No.

[80] In light of our answer to the case stated we consider that the proper course is to remit the case to the learned trial judge with a direction that she provide relevant and sufficient reasons. We trust that this judgment will provide guidance as to what is required. The learned trial judge will be able to consider the relevant European case law. We direct that counsel prepare updated legal arguments and apply for a date to appear before the learned trial judge to make submissions dealing with the legal issues we have raised.

[81] In our view the following matters remain to be dealt with by the learned trial judge. We set this out by way of the following questions:

- (i) Whether the material was threatening, abusive or insulting.
- (ii) Whether under the first limb of the statutory test the appellant intended to stir up hatred or arouse fear. Or, under the second limb whether hatred was likely to be stirred up or fear aroused in all of the circumstances.
- (iii) Whether this was political speech.
- (iv) Whether or not any interference with freedom of expression, which would be occasioned by conviction, was necessary on the basis of a legitimate aim found in article 10(2) of the Convention.
- (v) Whether any interference was proportionate, balancing individual rights against the public interest bearing in mind the entire context and the severity of the sanction.
- (vi) In addition to the above the learned trial judge must provide relevant and sufficient reasons to justify any interference with the right to freedom of expression."

[9] The matter therefore came back before the county court. For various reasons the matter was not reheard by the judge until 8 September 2023. She delivered a lengthy written judgment on 22 September 2023 in which she addressed the questions directed by the Court of Appeal. She again upheld the conviction. She imposed a fine of £100.

History of proceedings leading to this application

[10] Subsequent to the judge's decision, a written application on behalf of the appellant to the county court to state a case for the opinion of the Court of Appeal pursuant to Article 61 of the County Courts (Northern Ireland) Order 1980 ("the 1980 Order") was lodged on 11 October 2023.

[11] Rather than reply within a further 21 days as required, the PPS made no submissions on the application until 24 June 2024.

[12] The judge acceded to the application to state a case in relation to a number of questions set out in correspondence from the appellant dated 7 November 2023.

[13] On 5 January 2024, a draft case stated was sent to the judge. A request was also made to her to review her position as regards the questions that she was prepared to state. This was declined on 7 January 2024 with the court directing that the PPS had three weeks from 5 January 2024 to return the draft case stated to the appellant's solicitors together with any proposed draft of its own.

[14] Despite correspondence being sent to the PPS on the appellant's behalf on 22 February 2024 and 6 June 2024, no response was received. As a result, the appellant sought to have the case listed before the county court on 14 June 2024. The county court office responded to that request on 19 June 2024 indicating that the judge had directed that prosecution counsel file their response to the case stated by 24 June 2024.

[15] Thereafter, there was a further significant delay in sending the case stated in its final form to the judge. This was eventually sent to her on 6 November 2024. She signed the case stated on 22 November 2024 and it was dispatched by the Chief Clerk to the appellant on that date.

[16] Her case stated includes her account of the county court ruling as follows:

“County Court Ruling

8. My ruling, delivered on 22 September 2023, runs to 28 pages and 128 paragraphs. I began (at paragraphs 1-11) by setting out the appellate background to this case and the reason why the remitted appeal before me was adjourned to await the Supreme Court's decision in the case of *Abortion Services (Safe Access Zones)* [2022] UKSC 3, where the court considered the recent jurisprudence in *Zeigler* [2021] UKSC 23 and *Cuciurean* [2022] EWCA 736.
9. I then moved to consider the legal framework to the present appeal (paragraphs 12-19) before then considering the evidence.
10. I found that the language used in the leaflet was pejorative and discriminatory and directed towards an ethnic group. I found that the use of the word 'gypsy' was emotive and was a racial slur and that the language used throughout was highly

emotive and inflammatory. The language used referred to a 'massive influx, a 'deluge of immigrants', 'an enormous influx' and accused the ethnic group of anti-social behaviour and attacks on local residents. (paragraphs 29-32)

11. I found that the authors of the leaflet and those who subsequently distributed it to the local residents can have had no intention other than to inflame tensions and stir up hatred and arouse fear of the Roma community (paragraph 33).
12. As regards remarks made about the migrants, I referred to the fact that the opening line of the main text mentioned the migrants as 'gypsy migrants.' In addition, the leaflet suggested that the migrants were responsible for an upsurge in anti-social behaviour for which I noted that there was no evidential basis. As a matter of fact, I found it to be a statement without foundation. The leaflet also alleged that the migrants were responsible for attacks on local residents for which there was again no evidential basis. As a matter of fact, I found it to have been a statement without foundation. Finally, the leaflet alleged that the social needs of the migrants were a drain on council resources. I observed that the social needs of every member of the community represents a resource requirement but that this assertion must be placed in the context of the words used elsewhere within the leaflet to refer to migrants.
13. I found that these particular remarks in the leaflet were abusive and insulting (paragraphs 46-52).
14. As regards the remarks made about the volume of migrants, I referred to the fact that there were expressions used that included 'massive influx', 'busloads of migrants', 'a deluge of immigrants', 'enormous influx', and a 'a huge wave of immigration.' I referred to the fact that no evidence was presented in support of those assertions and found that the remarks were unfounded. I proceeded to then find that the use of this wording was designed only to inflame and

incense or enrage the local population (paragraph 53).

15. As regards the action that it was proposed be taken in relation to the migrants, I referred to the headline on the first page of the leaflet. It stated in bold print: 'STOP THE INFLUX OF MIGRANTS INTO BALLYMENA ... NOW!'
16. The following wording also appeared: 'Enough is enough, this is our town!'; 'Ballymena is our town, it's time to take it back!'; 'No surrender.' I found that those remarks were threatening (paragraph 56).
17. From paragraphs 57-76, I set the context for finding that those who distributed the leaflets intended to stir up hatred or arouse fear and also why, in any event, having regard to all the circumstances hatred was likely to be stirred up or fear is likely to be aroused thereby.
18. The context of the offending was an important consideration.
19. In the circumstances, I considered that the elements of the offence were made out in the circumstances (paragraph 77).
20. As regards the content of the leaflet, I accepted that it was political speech (paragraph 81).
21. After summarising the legal principles to emerge from the *Abortion Services* case as well as *OPP v Eastburn* [2023] EWHC 1063 and the *Colston* case [2022] EWCA Crim 1259 and some of the arguments of the appellant and respondent thereon (paragraphs 85-109), I found that the elements of the offence covered a broad category of offending to prevent public disorder and protect the vulnerable and that such behaviours as contravened the legislation cannot be accepted in a democratic society and are to be regarded as always justifying an interference via conviction if the ingredients are proven (paragraph 110).

22. I went on to find that the elements of the offence were proved to the criminal standard and that the ingredients of the offence, once proven, will always justify an interference by way of conviction i.e. no separate proportionality exercise was required. I furthermore found that that was then the end of the matter and that the conviction should be affirmed (paragraph 112).
23. With the previous direction of the Court of Appeal in mind to answer the questions posed, I moved to consider whether or not Article 10 of the Public Order (NI) Order 1987 can be read, pursuant to section 3 of the Human Rights Act 1998, so as to require a separate proportionality exercise. As the only defence contained within the legislation relates to lack of knowledge of the contents of the impugned material which does not go to the issue of any legitimate aim or justification, I therefore found that a section 3 reading cannot be adopted to import a proportionality balance into the Article 10 offence.
24. In the event that I was wrong and a separate proportionality exercise was required, I moved to reiterate the specific findings made by me already in respect of the contents of the leaflets and that, based thereon, there was an intent to stir up hatred or arouse fear and that in all the circumstances hatred was likely to be stirred up or fear was likely to be aroused (paragraphs 132-133).
25. Referring to the content of article 10 ECHR and the legitimate aims therein that I found to be in play, namely, the prevention of disorder or crime, and the protection of the reputation or rights of others, I found that the interference in this case by way of conviction was necessary in a democratic society in the circumstances (paragraph 136).
26. Applying the *Bank Mellat v HM Treasury No 2* [2013] UKSC 39, principles to this case (paragraphs 137-156), I proceeded to find that the interference with the appellant's article 10 right to freedom of expression by means of a conviction was proportionate."

[17] She certified the following questions for the Court of Appeal:

- (i) In the context of this case, including how the language was used, was it *Wednesbury* unreasonable to characterise the term “gypsy” as “emotive and a racial slur?”
- (ii) In circumstances where the court accepted that the impugned speech was political, which attracts enhanced protection, was it *Wednesbury* unreasonable to affirm the conviction?
- (iii) Did the court err in law by concluding that the necessary balance for proportionality was struck by the terms of the Article 10 offence itself, meaning that it did not require a separate proportionality exercise?
- (iv) Did the court err in law by concluding that the nature of the potential defence provided for within the legislation could not be read, pursuant to section 3 of the Human Rights Act 1998, to permit a separate proportionality exercise?

The transmission of the case stated to the Court of Appeal – Article 61 of the County Courts (Northern Ireland) Order 1980

[18] The procedure for bringing a case stated from the county court to the Court of Appeal is dealt with in Article 61 of the 1980 Order.

[19] For the purposes of this appeal, the relevant article is 61(3) which provides:

“(3) Within a period of fourteen days commencing on the date on which the chief clerk despatches to the applicant the case stated (such date to be stamped by the chief clerk or by a member of his office staff on the front of the case stated) the applicant shall transmit the case stated to the Master (Queen’s Bench and Appeals) and serve on the respondent a copy of the case stated with the date of transmission endorsed thereon.”

To comply with this provision, the case stated should have been transmitted to the court by 5 December 2024.

[20] On 20 December 2024, an enquiry by the appellant was sent to the Court of Appeal to seek confirmation that it had received the case stated of 22 November 2024.

[21] A reply was sent from the Court of Appeal office on 22 December 2024 in the following terms:

“The Crown Court (sic) have not served the case stated with the Court of Appeal. As per Order 61 Rule 1 of the Rules of the Court of Judicature it is for the solicitor for the appellant to lodge the case stated with the Court of Appeal. A requisition in the form of the attached template and the court fee of £775.00 is also required.”

[22] As matters transpired, the case stated was not transmitted to the Court of Appeal until 29 September 2025. Thus, the case stated has been transmitted in excess of nine months beyond the 14-day time limit.

[23] Having received the case stated, the Lady Chief Justice directed that if the appellant was to proceed, he should make an application for an extension of time in relation to the lodging of the requisition.

[24] In accordance with further directions from the court the parties filed written submissions on the applicable law on the extension of time in the context of a failure to comply with the statutory requirement.

[25] On receipt of these submissions, the court directed an oral hearing in relation to the issue of the appellant’s application for an extension of time for the transmission of the case stated to the Court of Appeal.

The legal question

[26] The starting point is Article 61(3) of the 1980 Order which is drafted in mandatory terms – “... the applicant shall transmit the case stated ...” [our underlining]

[27] Self-evidently, the appellant has failed to comply with the 14-day time limit and is very substantially out of time. The question for the court is what is the effect of the appellant’s non-compliance with the statutory requirement?

[28] The issue of statutory time limits in the context of a case stated has been considered by the Court of Appeal in a number of cases.

[29] Chronologically, the first such case was *Foyle, Carlingford and Irish Lights Commission v McGillion* [2002] NI 86. That case concerned a case stated from the magistrates’ court.

[30] The court notes that the relevant provision in the magistrates’ court is Article 146(9) of the Magistrates’ Courts (NI) Order 1981 (“the 1981 Order”) which provides:

“(9) Within fourteen days from the date on which the clerk of petty sessions dispatches the case stated to the applicant (such date to be stamped by the clerk of petty

sessions on the front of the case stated), the applicant shall transmit the case stated to the Court of Appeal and serve on the other party a copy of the case stated with the date of transmission endorsed on it.”

It will be noted that in all material respects this is identical to the text of Article 61(3) of the 1980 Order (see para [19] above).

[31] In *Foyle*, the appellant had failed to serve a copy of the case stated on the respondent within 14 days of the case being dispatched by the Clerk of Petty Sessions to the applicant as was required by Article 146(9) of the 1981 Order.

[32] The preliminary point for the Court of Appeal was whether the consequence of this failure was “that the appeal could not be entertained” by the court – p130 para (e) of the judgment of Carswell LCJ.

[33] The court noted that in *Dolan v O’Hara and Pigs Marketing Board (Northern Ireland) v Redmond* [1975] NI 125, it was determined that the requirements of the predecessor of Article 146(9) of the 1981 Order were imperative and had to be observed if the Court of Appeal was to acquire the statutory jurisdiction to hear and determine a case stated.

[34] *Dolan* was decided before the Human Rights Act 1998 (“the 1998 Act”). The court in *Foyle* determined that it was incumbent by virtue of section 3 of the 1998 Act to read and give effect to legislation in a way that was compatible with Convention rights. Focusing on the requirements contained in Article 146(9), the clear object of the obligation to serve a copy of the case stated on the respondent was to prevent delays in the process of appealing by way of case stated. Importantly, at page 131 para (h) of the judgment, the court said:

“We do not find it possible, however, to accept that there is a reasonable relationship of proportionality when the applicant is altogether barred from presenting his appeal because he fails for a period to serve a copy of the case on the other party, even though no prejudice has accrued to that party. We consider that this would constitute a breach of article 6(1) of the Convention. It is incumbent upon us by virtue of section 3 of the Human Rights Act 1998 to read and give effect to legislation in a way that is compatible with the Convention rights. This can be done by construing Article 146(9) as directory rather than mandatory, contrary to the previous case-law, whose binding authority is overridden by the 1998 Act.”

[35] It will be seen therefore that notwithstanding the use of the word “shall” the court analysed the statute through the prism of the 1998 Act to interpret the requirement in Article 146(9) as directory rather than mandatory.

[36] It is noted that although the court was dealing with a failure to serve a notice, it did not distinguish between that requirement and the requirement to transmit the case stated.

[37] In the case of *Wallace v Quinn* [2003] NICA 48; [2004] NI 164, the Court of Appeal considered a failure by an appellant to serve a copy of the requisition to the magistrate to state a case on the opposing party within the 14-day time limit in Article 146(2) of the 1981 Order.

[38] In the court’s judgment, Carswell LCJ again returned to the theme of interpreting statutory requirements in the context of them being classified as either mandatory or directory. At para [10], he says:

“[10] The traditional rule was that if a statutory provision specifying the time within which a step is to be taken is to be regarded as mandatory, failure to comply with its requirements means that a step taken outside that time is not valid. Where the provision is classed as directory, however, substantial compliance is sufficient, and if the requirement is complied with within a reasonable time the step may be regarded as validly taken ...”

[39] Foreshadowing subsequent Supreme Court decisions which are discussed later in this judgment, he refers to recent cases that have been critical of the “rigid dichotomy between mandatory and directory provisions.” He goes on to say that these decisions have “caused the courts to re-examine the doctrine and to focus rather on attempting to determine the intention of Parliament in respect of the consequences of failure to observe the statutory requirements” – see para [11].

[40] The court concluded that the proper approach to the construction of statutory requirements was that set out by Lord Woolf MR in *R v Immigration Appeal Tribunal, ex parte Jeyanthan* [1999] 3 All ER 231 as follows:

“I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test: The questions which are likely to arise are as follows:

- (a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)
- (b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.
- (c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)

Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependant on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.”

[41] In carrying out the statutory construction exercise, the court went on to say, reflecting its approach in the *Foyle* case:

“[12] We consider that if the requirements of Article 146(2) were applied so rigidly that any failure to observe the time limits meant that the appellant for a case stated was debarred from proceeding with his proposed appeal, this would be disproportionate and would constitute a breach of article 6(1) of the Convention. It is therefore necessary for us to construe the provision in a way which does not bring about such a result. This may be done by adopting a similar approach to Article 146(2) to that which we accepted as valid in respect of Article 146(9) in *Foyle, Carlingford and Irish Lights Commission v McGillion*. As we have indicated, we do not consider that to label the time requirement as directory is now the preferred approach, but a similar avenue may be followed by asking what consequence (consistent with the Convention

requirements) Parliament may be supposed to have intended if the applicant for a case stated failed to observe the time limits. The conclusion which we have reached is that the provision may be regarded as sufficiently complied with if the appellant has served the requisition within a reasonable time. The length of time which may be regarded will depend on the facts of the case, and in particular, on the degree of prejudice which the delay in service may have caused to the respondent.”

[42] The case of *PPS v Bryson* [2016] NICA 11, also dealt with the requirements of Article 146(9) of the 1981 Order. In *Bryson*, the case was not transmitted to the Court of Appeal until approximately 15 weeks outside the statutory time limit. Further a copy of the case stated was not served on the PPS until approximately 17 weeks outside the statutory time limit.

[43] Thus, unlike the *Foyle* and *Wallace* cases, the court was dealing with both transmission to the court and service on the respondent.

[44] In the judgment of the court, Morgan LCJ noted that Article 146(9) had received “extensive consideration by this court in *Foyle* ...” He noted that the issue had been further refined in *Wallace v Quinn* [2003] NICA 48, [2004] NI 164.

[45] In *Bryson*, the court concluded:

“[11] In this case the requirements of Article 146(2) have been complied with. The respondent has been given an opportunity to have an input to the draft case stated. The provisions of Article 146(9) are directed towards the issue of delay. The procedure in the magistrates’ courts is summary. The case stated procedure may require the court to resume the hearing in order to determine the case according to law. The time limits are designed to ensure that there is reasonable expedition in the determination of the charge and that the uncertainty for those involved in the case is not prolonged. The failure to transmit the case to the Court of Appeal introduced delay in the listing of the case stated and has consequently impacted upon the achievement of those objectives.

[12] We are satisfied that in the circumstances the failure to transmit the case as required meant that there was no substantial compliance with the statutory requirements. We consider that in order to look at whether we should proceed despite the delay it is necessary to consider the extent of the failure, the reasons

for it, any specific prejudice caused by the delay, the nature and importance of the issue to be determined in the proceedings and the general prejudice arising from any delay. The delay in this case is substantial having regard to the statutory scheme. In considering whether or not to proceed despite the delay it is appropriate to take into account the absence of specific prejudice but also to recognise the general prejudice associated with considerable delay in summary proceedings. We accept that the delay was not the fault of the appellant personally. The issue in this case is one that may be helpful in removing any doubt about the law. We consider that this case is very close to the borderline. If we conclude that the delay is irremediable we would be deprived of jurisdiction. On balance we have decided that we can address the questions despite the delay.”

Therefore, in relation to transmission under Article 146(9) of the 1981 Order, the court determined that notwithstanding the non-compliance it could deal with the substance of the case.

[46] The only case which has expressly considered the provisions of Article 61(3) of the 1980 Order is the case of *Sean Dillon v The Chief Constable of the PSNI* [2016] NICA 15. There the court was dealing with a civil claim. The appellant had failed to comply with the requirement to transmit the case stated within 14 days as required. So, the court was confronted with the same issue as this court.

[47] In the court’s judgment, Weatherup LJ referred to the *Foyle* case at para [28]:

“[28] The appellant relies on *Foyle Carlingford and Irish Lights v McGillion* to contend that the requirements of Article 61(3) are to be regarded as directory rather than mandatory and therefore the Court of Appeal has power to extend the 14 day time limit for the appellant to transmit the case stated to the court and should exercise its discretion to do so in the present case. *McGillion* was concerned with Article 146(9) of the Magistrates’ Courts (NI) Order 1981 which has the same framework as Article 61(3) and includes the twin requirements that the appellant should serve a copy of the case stated on the other party and should transmit the case stated to the court. *McGillion* was concerned with the failure of the appellant to serve a copy of the case stated on the other party. The Court of Appeal concluded that it was disproportionate to prevent the appellant from presenting

his appeal by reason of the failure to serve a copy of the case stated on the other party. Carswell LCJ stated:

‘We do not find it possible, however, to accept that there is a reasonable relationship of proportionality when the applicant is altogether barred from presenting his appeal because he fails for a period to serve a copy of the case on the other party, even though no prejudice is accrued to that party. We consider that this would constitute a breach of article 6(1) of the Convention. It is incumbent upon us by virtue of section 3 of the 1998 Act to read and give effect to legislation in a way that is compatible with Convention rights. This can be done by construing Article 146(9) as directory rather than mandatory, contrary to the previous case law, whose binding authority is overridden by the 1998 Act.’”

[48] Having done so, the court went on to consider the consequences of the appellant’s non-compliance and said as follows:

“[31] Next it is necessary to consider the appellant’s non-compliance with the requirement to transmit the case stated to the court within 14 days of 14 April 2014. As we have found, the case stated of 14 April 2014 was not a nullity and the requirement to transmit the case to the court applied. There was non-compliance with that requirement. The requirement is clearly directed towards the avoidance of delay in the processing of appeals by way of case stated. The obligation on the appellant is the administrative act of transferring the case stated to the court. In general the courts have adopted a strict approach to time requirements for appeals. This is an instance of a statutory time limit with no express provision for extension of time. Such compliance with the requirement as occurred was not until transmission of the amended case stated on 16 June 2015. That transmission, over a year late, could not be said to amount to substantial compliance with the requirement.

[32] As to whether that non-compliance was capable of being waived or should be waived in this particular case, we turn to the circumstances in which there was non-compliance. The failure to transmit the case stated was

said to be an administrative oversight. Thus, there was no excuse for non-compliance. Thereafter there were said to be issues with legal aid. The absence of sympathy for such a factor in explaining delay is apparent from the recent decision of the Court of Appeal in England and Wales in *R (Kigen) v Secretary of State* [2015] EWCA Civ 1286. Then the matter lay in abeyance pending instructions to new counsel. Then a novel approach was adopted on behalf of the appellant in seeking to have the county court make an Order that would have purported to correct the non-compliance with the requirements. Thereafter the matter was returned to the Chief Clerk for the reissue of the case stated in a manner that purported to comply with the requirements. By this means the appellant secured a copy of the case stated with the date of despatch stamped on the front as 8 June 2015.

...

[34] This is not a case where non-compliance with a statutory time limit should be waived.

[35] The legal consequence of non-compliance with the statutory time limit is that the court lacks jurisdiction to hear the appeal."

[49] It is, in our view, clear that although the court concluded that the legal consequences of non-compliance was that "the court lacks jurisdiction to hear the appeal", it nonetheless addressed the issue in the context of the previous case law and carried out a balancing exercise to determine whether in the circumstances of the case the time limit should be waived. We do not understand the court to be saying that any failure to transmit the case stated automatically means the court has no jurisdiction to hear the appeal.

[50] The mandatory/directory classification has been considered in two important cases, namely *R v Soneji and another* [2006] 1 AC 340 and *A1 Properties v Tudor Studios RTM Ltd* [2025] AC 107. The *Soneji* decision was not referred to by the court in either the *Bryson* or *Dillon* cases. We consider, however, that these cases are relevant to the court's approach to the issue raised in this case.

[51] In *Soneji*, the court was considering a failure to make a confiscation order in criminal proceedings within a six-month period as required by Proceeds of Crime legislation. The House of Lords held that the correct approach to an alleged failure to comply with the provision prescribing the doing of some act before a power was exercised was to ask whether it was the purpose of the legislature that an act done in breach of that provision should be invalid. In the key passages of the judgment Lord Steyn says:

“VI. The Core Problem

14. A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance. ...

VII. A New Perspective

15. In *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182, 189E-190C Lord Hailsham [of St Marylebone LC] put forward a different legal analysis:

‘When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the subject viewed in the light of a concrete state of facts and a continuing chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting

authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like 'mandatory,' 'directory,' 'void,' 'voidable,' 'nullity,' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless, I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind.'

This was an important and influential dictum. It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably, one must be considering objectively what intention should be imputed to Parliament.”

[52] The judgment goes on to analyse cases including *Wang v Comr of Inland Revenue* [1994] 1 WLR 1286, *Charles v Judicial and Legal Services Commission* [2003] 2 LRC 422 and *Attorney General's Reference (No.3 of 1999)* [2001] 2 AC 91, the New Zealand case of *New Zealand Institute of Agricultural Science v Ellesmere County* [1976] 1 NZL 630, and the Australian High Court case of *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] 194 CLR 355. In particular, Lord Steyn quoted from this judgment where it concluded at para [93]:

“[93] In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* [[1978] 1 NSW 20, 23-24], in criticising the continued use of the ‘elusive distinction between directory and mandatory requirements’ and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had

to ‘the language of the relevant provision and the scope and object of the whole statute.’”

[53] Lord Steyn says at para [21] of the judgment:

“This reasoning contains an improved analytical framework for examining such questions. In the evolution of this corner of the law in the common law world the decision in *Project Blue Sky* is most valuable.”

[54] This revised framework was endorsed by the Supreme Court in the recent case of *AI Properties Ltd v Tudor Studios RTM Co Ltd* [2025] AC 1075. At para [61], in their joint judgment Lord Briggs and Lord Sales say:

“[61] The point of adoption of the revised analytical framework in *Soneji* was to move away from a rigid category-based approach to evaluating the consequences of a failure to comply with a statutory procedural requirement and to focus instead on (a) the purpose served by the requirement as assessed in light of a detailed analysis of the particular statute and (b) the specific facts of the case, having regard to whether any (and what) prejudice might be caused or whether any injustice might arise if the validity of the statutory process is affirmed notwithstanding the breach of the procedural requirement. We therefore consider that in the present statutory context *Osman v Natt* needs to be considered and applied with some caution, particularly in its suggestion that cases where it becomes necessary to infer the intended consequences of non-compliance can for that purpose be divided into distinct and watertight categories and its apparent suggestion (para 31) that in the second category the possibility of a middle position as identified in *Soneji* between outright validity or outright invalidity is excluded. Instead, it is appropriate to go back to the basic principled approach as explained in *Soneji*, as applied in light of the particular statutory context and the specific facts of the case.

[62] This does not mean that application of procedural rules in every statutory context turns on detailed examination of the consequences arising from the particular facts of the case, nor that a test of substantial compliance is properly to be applied in relation to every procedural rule. Examination of the purpose served by a particular statutory procedural rule may indicate that

Parliament intended that it should operate strictly, as a bright line rule, so that any failure to comply with it invalidates the procedure which follows. An example would be the notice requirements for extending business tenancies under the Landlord and Tenant Act 1954, where failure to serve a notice in proper time means that the tenant loses their right to extend. The procedural rules there apply in a context where there is an established bilateral relationship between landlord and tenant, where the tenant is in a position to know clearly what it has to do and where both parties need to know clearly what property rights they have and may dispose of in the market.

[63] Often, however, analysis according to the *Soneji* approach does not lead to such a clear-cut result. The statutory regime may reflect, and balance, a number of intersecting purposes, both as to substantive outcomes and as to the procedural protections inherent in the regime. In that situation, a more nuanced analysis may be called for. *Soneji* itself is an example of this. The purpose of depriving convicted offenders of the proceeds of their crimes had to be balanced against sufficient compliance with procedural protections available to them before they could be deprived of their property. A test of substantial compliance with a procedural rule may be an appropriate way to allow for such a balance to be struck between competing purposes. If there has been substantial compliance with the rule, so that the purpose served by it has largely (if not completely) been fulfilled, it may more readily be concluded that fulfilment of the competing substantive purpose of the legislation should be given priority. But we would observe that reference to “substantial compliance” begs the question of what purpose was supposed to be served by the rule and expresses a conclusion arising from the relevant analysis, rather than stating a test in itself. Statutory regimes involving procedural obligations are many and are highly varied, and there is no simple shortcut which avoids the need to undertake the analysis referred to in *Soneji* having regard to the particular provisions, scheme and purposes served by the statute in question.”

Consideration

[55] On behalf of the PPS, Mr McGleenan argues that the requirement to transmit the case stated in accordance with Article 61(3) of the 1980 Order is a hard edged, bright-line rule. Thus, failure to comply with it invalidates the procedure which follows. This is because he argues that the requirement to transmit the case stated goes to jurisdiction. He contends that the failure to comply with the statutory time limit means that the court does not have jurisdiction to hear and determine the case stated. He says that this is entirely consistent with the purpose of the statute namely, to ensure the avoidance of delay in the processing of criminal appeals by way of case stated.

[56] He argues that the *Foyle* and *Wallace* cases do not assist because they were dealing with the question of the serving of notice on respondents. That element (notice on a respondent as opposed to transmission) of what was described in *Dillon* as the “twin requirements” raised issues of fairness and prejudice which are distinct from the issue of jurisdiction.

[57] In relation to the general principles enunciated in *Soneji* and *A1* he points out as per para [62] of *A1 Properties Ltd*, that the examination of the purpose served by a particular statutory procedure rule may indicate that Parliament intended that it operate strictly, as a bright-line rule, so that any failure to comply with it invalidates the procedure which follows. Mr McGleenan says that this is such a rule.

[58] When asked if *Bryson* was wrongly decided, Mr McGleenan responds that there the court was dealing with a different statutory provision which dealt with the case stated procedure from the magistrates’ court as opposed to the county court in this case.

[59] We do not consider this is a valid distinction. The language of both provisions is identical in all material respects. They both deal with a procedure for a case stated, the only difference being the originating court. They adopt the same framework. Such provisions should be interpreted consistently.

[60] As for the *Dillon* case, although the court clearly carried out a balancing exercise as anticipated in *Foyle*, *Wallace* and *Bryson*, having done so it concluded that as per para [35] of the judgment the legal consequence of non-compliance with the statutory time limit was that the court lacked jurisdiction to hear the appeal. Mr McGleenan contends that this was the correct conclusion, but it should have been based on the proposition that default automatically meant the court lacked jurisdiction.

[61] In our view, it is clear from the reading of the judgment in *Dillon* that the court approached the matter consistently with the *Foyle*, *Wallace* and *Bryson* approach and considered that it had the power to waive the statutory time limit but that in the circumstances of the case it was not appropriate to do so.

[62] We consider that the Court of Appeal authorities in this jurisdiction together with the decisions of the House of Lords and the Supreme Court in *Soneji* and *A1 Properties*, support the proposition that it was not the intention of Parliament (consistent with Convention requirements) to provide that failure to comply with the time limit in relation to transmission was fatal. Such a rigid application would be disproportionate. We do not consider, for example, that if due to some unforeseen circumstance a case stated was transmitted one or two days late that Parliament intended the court would have no jurisdiction to deal with the matter.

[63] These authorities support the conclusion that failure to comply with the time limit in Article 61(3) of the 1980 Order does not have the automatic consequence of defeating the appellant's appeal. It is open to the court, depending on the circumstances, to deal with the case stated, notwithstanding the non-compliance with the statutory time limit and, in effect, extend the time for compliance. Approaching the matter through the prism of statutory construction, having regard to the requirements of section 3 of the 1988 Act and article 6(1) of the Convention and applying the principles established in the authorities set out above, the question for us is whether on the specific facts of this case, the legal consequence of non-compliance means the court should decline to hear the case stated. We accept, of course, that the court will be careful before extending time and will start with the proposition that the time limit should be obeyed.

[64] We agree, as contended by Ms Quinlivan, that in considering the consequences of the non-compliance in this case, we should adopt the approach taken in *Bryson* as set out in para [12] of the judgment and take into account the extent of the failure, the reasons for it, any specific prejudice caused by delay, the nature and importance of the issue to be determined in the proceedings and the general prejudice arising from any delay. This is not to be taken as an exhaustive list of the factors to be taken into account but should be sufficient in most cases where this issue arises.

What are the consequences of the non-compliance in this case?

The delay

[65] The starting point is that statutory time limits should be observed. The delay in this case can only be described as substantial. The court is dealing with a delay in excess of nine months in the context of a 14-day limit.

Reasons for the delay

[66] The court then looks to the explanation for the delay. In the written submissions the appellant says that when the case stated was received from the judge it was understood, incorrectly, that it would be sent by the county court to the Court of Appeal. This misunderstanding was corrected by the Court of Appeal

office on 22 December 2024 in the correspondence referred to at paras [20] and [21] above.

[67] Thus, as early as 22 December 2024, the appellant was alert to the fact that the case stated had not been transmitted.

[68] Having received the communication from the Court of Appeal, counsel was asked to provide an opinion in support of an application for legal aid on 16 January 2025. This was received on 17 February 2025. Legal aid was applied for on 13 March 2025. There then were exchanges with LSANI in which it was suggested that the LAMS process was difficult to navigate. It is then asserted that the application was accepted on 1 May 2025. Thereafter some two months after the application had been rectified, on 7 July 2025, the appellant was advised that a new adjudicator was coming to the matter afresh. Various queries were raised and responded to in the period July 2025 to September 2025. On 1 September 2025 legal aid was granted.

[69] Thereafter, a requisition form was lodged as indicated on 17 September 2025 electronically and in hard copy on 29 September 2025.

[70] Thus, it will be seen that the appellant attributes the delay in large part to the late receipt of legal aid. Before turning to the question of whether awaiting legal aid justifies a delay it should be noted that in the context of a 14-day time limit there were significant delays in processing the application. There was a gap between 22 December 2024 and a request for an opinion in support of an application. When counsel's opinion was obtained on 17 February 2025 the application for legal aid was not made until 13 March 2025. When legal aid was granted on 1 September 2025 the necessary requisition was still not lodged within 14 days.

[71] Importantly, at no stage was any application made to the court for an extension of time, whilst the legal aid application progressed.

[72] When the requisition was lodged it was not accompanied by an application for an extension of time. The application by way of written submission was only made pursuant to a direction of the court.

[73] In relation to delay in receiving legal aid as a basis for an extension of time earlier authorities indicate that efforts to obtain legal aid for an appeal can be a good excuse for a delay see *Norwich v Steed* [1991] 1 WLR 449. As was said in the *Dillon* case, the absence of sympathy for such a factor in explaining delay is apparent from the recent decision of the Court of Appeal in England & Wales in *R (Kigen) v Secretary of State* [2015] EWCA Civ 1286. Lack of funds to instruct legal representatives cannot on its own provide a good reason for failing to comply with the rules. Delay in obtaining legal aid may still be a factor to be taken into account, but no more.

[74] The court finds that there is no reasonable excuse for the delay in transmitting the case stated. The court accepts that this was not the fault of the appellant personally.

Prejudice

[75] An important factor in consideration of this issue relates to the question of prejudice. The court recognises that there is no specific prejudice to the PPS, as respondent. The PPS was aware of the intention to state a case after the judge delivered her judgment. Indeed, they have contributed to the overall delay in this case by reason of their failure to comply with directions of the judge in the preparation of the case stated. The PPS can deal with the legal arguments that arise in the case.

General prejudice/the public interest

[76] That said when considering prejudice an important factor is the prejudice to the good administration of justice caused by delay. This was a significant factor in both the *Dillon* and *Bryson* cases.

[77] There is a clear public interest in the efficient and expeditious administration of justice. The fact that the time limit at play in this case is expressed in terms of days points to the importance of expedition. As was said in *Bryson*, the requirement to transmit the case to the court is clearly directed towards the avoidance of delay in the processing of appeals by way of case stated and to avoid uncertainty for those involved in the case. This must be seen in the context of summary criminal proceedings, where expedition is particularly important.

[78] The court recognises that if the time limit in this case is not waived it will have the effect of denying the appellant the opportunity to persuade the court as to the merits of his case stated.

The nature and importance of the issue to be determined

[79] The appellant argues that the judge by stating the case accepts that there are significant triable points of law at issue. Of course, that in itself is not a reason for extending the statutory time limit, as otherwise any delay in the transmission of a case stated could be excused.

[80] In general terms, the court is satisfied that there is ample guidance in the Supreme Court decision in *Abortion Services Safe Access Zone* [2022] UKSC 32, on the proper approach for courts in examining article 10 issues in the context of assessing criminal charges involving interference with freedom of expression.

[81] Although we have not heard argument on the merits, having analysed the very detailed judgment of the judge it is clear that those principles have been fully

considered and applied by her. She has fully addressed the questions directed by the Court of Appeal. We take this opportunity to compliment the judge on her detailed and careful analysis of the legal issues relevant to her decision.

[82] The appellant in this case has now been convicted on three separate occasions of the summary offence for which he was charged.

[83] We have carefully considered the case stated by the judge. We do not consider that the issues raised are sufficient to justify extending the time limit for transmitting the case stated in this appeal.

Conclusion

[84] Having taken all relevant circumstances into account, we conclude that the non-compliance with the statutory time limit in this case is irremediable and as a consequence we are deprived of jurisdiction. In summary, the delay is substantial, it should not have occurred, permitting the case stated to proceed would be contrary to the purpose of the requirement to ensure the avoidance of delay in the processing of appeals by way of case stated and there is no significant issue arising from the case stated which requires consideration or guidance from the court.

[85] In this case we consider that the legal consequence of non-compliance with the statutory time limit to transmit the case stated to the Court of Appeal is that the court declines to hear the case stated.