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Judgment: approved by the Court for handing down | *Delivered:* **25/11/2003**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

A WALLACE

(Complainant) Respondent

and

NOEL GERARD QUINN

(Defendant) Appellant

Before: Carswell LCJ, Nicholson LJ and McCollum LJ

CARSWELL LCJ

[1] This matter comes before the court as an appeal by way of case stated from the conviction of the appellant by Mr Eamonn P King, a deputy resident magistrate sitting as a magistrates' court at Newry on 27 November 2002. The appellant Noel Gerard Quinn appeared at that court to answer two charges of driving a motor vehicle on 25 August 2001 while disqualified, contrary to article 167(1)(*b*) of the Road Traffic (Northern Ireland) Order 1981, brought in the name of the respondent, a chief inspector in the Police Service of Northern Ireland. The magistrate found the appellant guilty on both charges and fined him £100.00 on each, with a disqualification from driving for three years.

[2] The appellant was arrested on 25 August 2001 and interviewed in the presence of his solicitor in respect of a charge of rape, on which he was subsequently tried in the Crown Court and acquitted. At the outset he was cautioned under Article 3 of the Criminal Evidence (Northern Ireland) Order

1988 and stated that he understood the caution. He was asked to account for his movements in the early hours of the same day and gave a detailed account, partly in response to a series of questions posed by the interviewing officer. In the course of the account the appellant recounted that the complainant made to make arrangements to go home from the place of entertainment where they had spent some time, and walked to a telephone box. The following exchange took place, as recorded in the transcript of interview, which was put before us by agreement:

> "QUINN She went up to the phone box.
> Walked.
> QUINN Yeah.
> And you walked after her.
> QUINN No I drive actually.
> You drove after her.
> QUINN Yeah.
> Okay you drove your own car.
> QUINN Yeah."

At a later stage in the interview the appellant described taking the complainant home the next morning, whereupon the interviewing officer asked him if he drove his own car again, to which the applicant answered "Yeah". Later again the officer was in the process of challenging the veracity of the appellant's account and the following exchange was recorded:

> "So totally at odds with what we're actually speaking about here but so here you're a man that has been drinking.
>
> QUINN Yeah.
> You say you've taken half an E.
> QUINN Yeah.
> Eh you're a disqualified driver.
> QUINN Yeah.
> Eh this girl has come back to your house your room with you.
> QUINN Yeah.
> Eh she had left.
> QUINN Yeah.
> You had made contact with your ex-girlfriend to find out where she lived.
> QUINN Yeah.
> You got into your car after drinking, allegedly taking half an E, a disqualified driver and you went looking for her.
> QUINN Yeah.

	Sorry.
QUINN	Yes.
	Well sure we'll come on to those other things after we're finished with this one.
QUINN	Yeah."

[3] **I**n relation to the officer's state of knowledge and intention in dealing with the appellant's driving the magistrate made the following findings of fact in paragraph 3 of the case:

> "Constable McAnespie acknowledged that in discussions prior to interview with the Defendant/Appellant's Solicitor no reference was made that the Defendant/Appellant was a disqualified driver and that he (the Constable) was aware of this.
>
> The Constable also accepted that he had a reasonable suspicion that the Defendant/Appellant had been driving a motor vehicle on the 25th August 2001.
>
> Both the defence and prosecution agreed that the main purpose of the interview was the more serious matters of which the Defendant/Appellant was later acquitted.
>
> Defence Counsel acknowledged that Constable McAnespie was not acting malafide or maliciously and that the interview was conducted in accordance with the Police and Criminal Evidence (Northern Ireland) Order 1989."

[4] Counsel for the appellant asked the magistrate to refuse to admit the evidence comprising the appellant's admissions of driving while disqualified, submitting that in the absence of a caution directed towards that offence there was a breach of Code C made under the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE) and that the magistrate should exercise his discretion under Article 76 of the Order to rule out the evidence. The magistrate declined to rule it out and held the charges proved.

[5] The appellant sought to appeal against the conviction by way of case stated, and on 10 December 2002 duly served on the clerk of petty sessions in Newry a requisition whereby he applied to the magistrate to state a case on a point of law for the opinion of this court. The appellant's solicitor claims that he sent a copy of the requisition to the respondent by ordinary first class post, not by registered or recorded delivery post. No trace of that requisition has

been found in the respondent's office, the Central Process Office at Gough Barracks, Armagh. The solicitor has been unable to produce any definite proof of posting or any copy of a covering letter. The magistrate furnished a draft case to the appellant's solicitor on 19 March 2003, but the solicitor did not serve a copy on the respondent, and therefore no representation was made on behalf of the respondent in respect of the content of the draft. The magistrate signed the case on 2 May 2003 and the court office in Newry transmitted it to the appellant's solicitor on 22 May 2003. The solicitor set the appeal down for hearing, but did not serve a copy of the case by registered or recorded delivery post on the respondent. He avers that again he sent him a copy by ordinary first class post, but no trace of this has been found in the Central Process Office and the solicitor has been unable to produce any proof of posting or any copy of a covering letter. The appellant's counsel conceded at the hearing before us that he could not establish that either the requisition or the completed case was received by the respondent at the times when the appellant's solicitor claimed to have sent them. The issue of compliance with the time requirements was argued before us as a preliminary issue, but we also heard submissions from the parties on the substance of the appeal.

[6] The time requirements in relation to appeals from magistrates' courts by way of cases stated are contained in Article 146 of the Magistrates' Courts (Northern Ireland) Order 1981 (the 1981 Order), paragraphs (1), (2) and (9) of which provide:

> "146.-(1) Any party to a summary proceedings dissatisfied with any decision of the court upon any point of law involved in the determination of the proceeding or of any issue as to its jurisdiction may apply to the court to state a case setting forth the relevant facts and the grounds of such determination for the opinion of the Court of Appeal.
>
> (2) An application under paragraph (1) shall be made in writing by delivering it to the clerk of petty sessions within fourteen days commencing with the day on which the decision of the magistrates' court was given and a copy shall be served on the other party within the same period.
>
> (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."

By virtue of section 24 of the Interpretation Act (Northern Ireland) 1954, as amended, postal service of documents may be effected by registered post or recorded delivery post. Under rule 160(2) of the Magistrates' Courts Rules (Northern Ireland) 1984 the magistrate is to refer copies of the draft to the parties, and by rule 160(3) any party may make representations on the draft within such time as the magistrate may fix.

[7] In *Dolan v O'Hara* [1975] NI 125 and *Pigs Marketing Board v Redmond* [1978] NI 73 this court held that the requirements of section 146(8) of the Magistrates' Courts Act (Northern Ireland), whose terms were identical with those of Article 146(9) of the 1981 Order, were mandatory and that failure to comply with them was fatal, in that it deprived the court of jurisdiction to hear the appeal. In *Foyle, Carlingford and Irish Lights Commission v McGillion* [2002] NI 86, however, we held that such a result would be in breach of Article 6(1) of the European Convention on Human Rights. We were of the opinion that although the provisions of Article 146(9) did not impair the "very essence" of the appeal and had the reasonable aim of preventing delays in the process of appeal, there was not a reasonable relationship of proportionality if the appellant was altogether barred from proceeding with the appeal solely because he had failed to serve a copy of the case stated within the prescribed time on the other party. In accordance with the jurisprudence of the ECtHR contained in such cases as *Société Levage Prestations v France* (1996) 24 EHRR 351, we therefore concluded that there would be a breach of Article 6(1) of the Convention if we continued to construe Article 146(9) as mandatory. We decided that we should accordingly construe Article 146(9) in such a way as to avoid that consequence, as required by section 3 of the Human Rights Act 1998, and held that the provision must be regarded as directory.

[8] Mr Lynch QC argued on behalf of the appellant that we should construe Article 146(2) in the same fashion and hold that the time requirements contained in it should now be regarded as directory rather than mandatory. He acknowledged that the object of Article 146(2) was not identical with that of Article 146(9), in that one of its aims was to give the respondent an opportunity to consider the terms of the draft case and make submissions as to its content and the questions to be asked. He pointed out nevertheless that if the time requirement for service of the requisition on the respondent were to be construed strictly as a mandatory provision an applicant for a case stated who missed the deadline by a single day could find his right of appeal barred. He submitted that this could rarely cause any prejudice to the respondent and was so disproportionate that it would constitute a breach of Article 6(1) of the Convention.

[9] Mr Valentine for the respondent argued that if we accepted the applicant's basic proposition about proportionality, that should only apply if there was a period of delay in complying with Article 146(2), not where there had been a complete failure to observe its terms by serving the requisition on the respondent. He therefore submitted that the terms of Article 146(2) should be mandatory in respect of requiring service, even if they could be regarded as directory in respect of the time within which service was to be effected. He accepted that he could not point to any of the contents of the case stated in respect of which the respondent might have sought an amendment of the draft, but observed that it is very difficult after the lapse of time to be certain of that. Moreover, the appellant's failure to serve the case stated meant that the respondent heard of the setting down of the appeal purely by chance and might otherwise have failed to attend the hearing.

[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 within a reasonable time the step may be regarded as validly taken: see, eg, *Smith v Jones* (1830) 1 B & Ad 328 at 334, per Littledale J; *Cullimore v Lyme Regis Corporation* [1961] 3 All ER 1008. There has in recent years been criticism of the rigid dichotomy between mandatory and directory provisions, as to which see the Australian cases of *Tasker v Fullwood* [1978] 1 NSWLR 20 and *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

[11] This has 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. In *London and Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 at 882-3 Lord Hailsham of St Marylebone LC deplored the rigidity of the categories, likening them to "a bed of Procrustes invented by lawyers for the purposes of convenient exposition." Lord Woolf MR subjected the doctrine to further analysis in *R v Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All ER 231, in which he posed the difficulty at page 235:

> "The conventional approach when there has been non-compliance with a procedural requirement laid down by a statute or regulation is to consider whether the requirement which was not complied with should be categorised as directory or mandatory. If it is categorised as directory it is usually assumed it can be safely ignored. If it is categorised as mandatory then it is usually assumed the defect cannot be remedied and has the effect of rendering subsequent events dependent on the requirement a nullity or void or as

> being made without jurisdiction and of no effect. The position is more complex than this and this approach distracts attention from the important question of what the legislator should be judged to have intended should be the consequence of the non-compliance. This has to be assessed on the consideration of the language of the legislation against the factual circumstances of the non-compliance. In the majority of cases it provides limited, if any, assistance to inquire whether the requirement is mandatory or directory."

He went to say at pages 238-9:

> "… 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: 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.) 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. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences questions.)
>
> 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 dependent 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."

We respectfully agree with and adopt this approach to the construction of the requirements of Article 146 of the 1981 Order.

[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.

[13] Where an applicant for a case stated has completely failed to serve the requisition, with the consequence that the respondent is unaware until later that a case stated has been sought and prepared and has had no opportunity to make representations on its terms, we find it very difficult to suppose that this can be regarded as substantial compliance, and we consider that it was the legislative intention that almost, if not completely, invariably in such cases the appeal will be barred. This is what occurred in the present case and it was only fortuitous that the respondent even discovered that the appeal was to be listed for hearing. In these circumstances we must conclude that the appellant cannot be regarded on any footing as having complied with Article 146, with the consequence that the time requirement should not be waived and the appeal should be dismissed. We do not consider that such a result would involve any breach of Article 6(1) of the Convention.

[14] This conclusion is sufficient to dispose of the appeal, but since the substantive issue in the case stated was fully argued before us and since the strength of the case is a relevant factor in considering applications to extend time, we shall express our opinion briefly on that issue.

[15] Section 10 of the Code of Practice made under PACE requires a caution to be given if there are grounds to suspect a person of an offence before any questions are asked of him. It is clear that ordinarily a second caution should be given if the interviewing officers want to ask questions of a suspect

concerning a separate offence which is more serious than that about which they had hitherto questioned him: cf *R v Kirk* [1999] 4 All ER 698. If that other offence is less serious, or if the subject comes into the interview in an incidental fashion, it becomes a matter for the discretion of the trial judge whether the admission of anything said would be sufficiently unfair to require him to exercise his discretion under Article 76 of PACE.

[16] Mr Lynch submitted that the magistrate had not directed his mind to the correct factors in deciding whether to exercise his discretion to exclude the admissions. He argued that he should have had regard to the principle set out by this court in *R v McKeown* [2000] NIJB 139 at 152, where we held that the appellant would not have made the admissions in question if he had been properly cautioned before the supplementary conversations began. We would only observe that our decision on this point should be seen in the light of the facts of the case. That issue was a significant factor because the police in *R v McKeown* deliberately let the appellant talk in a conversation outside the formal interview and he plainly regarded himself as free to make admissions in that conversation which would not be held admissible against him. It is not to be classed, however, as a factor which will be determinative of every such case, and we do not consider that the magistrate was in error in failing to advert specifically to it.

[17] In the present case the appellant volunteered the information about his driving the car in the context of explaining his movements and there was no question, certainly at the time of the first admission, that the interviewing officer was trying to establish that he had driven while disqualified. We would also observe that the proof of his disqualification could readily have been obtained from outside evidence and that the police were not dependent on obtaining an admission from the appellant that he was disqualified in order to mount a case against him.

[18] We accordingly should have been ready to hold, if considering the substance of the case, that the first admission at least was not obtained in any improper or unfair fashion, notwithstanding the absence of a caution directed to the offence of driving while disqualified. In our opinion the magistrate was entitled to exercise his discretion to admit that admission, and once it was in evidence the other admissions did not strengthen the case against the appellant and so did not have a material effect on the case.

[19] For the reasons which we have given, however, we shall dismiss the appeal without adjudication, on the ground of the appellant’s failure to comply with the requirements of Article 146 of the Magistrates’ Courts (Northern Ireland) Order 1981.