**Neutral Citation no. [2007] NICA 51** | *Ref:* **KER7016**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **18/12/07**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**APPEAL BY WAY OF CASE STATED UNDER THE MAGISTRATES COURTS (NORTHERN IRELAND) ORDER1981**

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**Between:**

**Director of Public Prosecutions**

**Complainant/Appellant**

**And**

**Stephen Harris**

**Defendant/Respondent**

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**Before Kerr LCJ, Higgins LJ and Morgan J**

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**KERR LCJ**

*Introduction*

**[1]** This is an application by the Public Prosecution Service (PPS) for an order directing a resident magistrate to state a case for the opinion of the Court of Appeal, he having refused to do so notwithstanding a requisition to him by PPS of 27 September 2007. PPS contends that the decision by the magistrate to grant a direction of no case to answer in favour of the defendant in a summary trial (the respondent in this appeal) was wrong in law. A preliminary point arose concerning the failure of PPS to serve a copy of the requisition on the respondent within the time fixed by article 146(2) of the Magistrates Courts (Northern Ireland) Order 1981. This court heard submissions on this point and deferred argument on the question of directing the magistrate to state a case.

*The hearing before the magistrate*

**[2]** On 14 September 2007 a complaint against the respondent on a charge of criminal damage was heard by the resident magistrate at Larne Magistrate's Court. The prosecution evidence consisted entirely of written statements which had been served in advance. No issue was taken on the content of the statements. They established the following: -

(a) Blood was found on the interior window sill of the kitchen of a house at 40 Lealies Drive Larne;

(b) The house was damaged. A kitchen window had been smashed, a sink blocked, a tap was left running and the floor had been flooded. This had occurred sometime between 8pm on 8 October 2006 and 11am on 9 October 2006;

(c) In police interviews the respondent claimed to have no recollection of ever having entered 40 Lealies Drive Larne; he lived at 8c Gardenmore House Larne;

(d) DNA tests showed that the likelihood of the DNA characteristics of the blood found on the interior window sill belonging to a person unrelated to the respondent were less than one in one billion.

**[3]** After hearing submissions the magistrate acceded to the respondent's application for a direction that there was no case to answer and the charge was dismissed.

*The requisition*

**[4]** On 27 September 2007 PPS decided to ask the magistrate to state a case on the following point of law:

> "Whether I was correct in law in finding that on the evidence there was not a prima facie case of the charge of criminal damage contrary to Article 3(1) of the Criminal Damage (NI) Order 1977?"

**[5]** On the same day a senior public prosecutor in PPS directed that the application should be served on the clerk of petty sessions, the respondent and the solicitors on record for him, McAllister Keenan. The application was duly served that day on the clerk of petty sessions. Unfortunately, it was not served on McAllister Keenan but on another firm of solicitors, James Ballentine and Son, who, apparently, were acting for the respondent in another matter. A member of staff in the office of James Ballentine and Son

accepted the documents intending to forward them to the respondent. It appears that this was not done, however.

**[6]** On 11 October 2007 the magistrate refused to state a case on the basis that no point of law was involved and directed that his decision be sent by facsimile transmission to PPS because of a postal strike.

**[7]** On 26 October 2007 the senior prosecutor was informed that the respondent had not been served personally with the requisition and that he may have transferred his instructions to James Ballentine & Son. On the same day a Notice of Motion was issued which sought a direction from the Court of Appeal to the magistrate requiring him to state a case. This was served on the magistrate, the clerk of petty sessions and James Ballentine and Sons. On 1 November 2007 James Ballentine and Sons wrote to PPS indicating that they were not on record for the respondent in this matter. Papers were then forwarded on 6 November 2007 to McAllister Keenan solicitors. They responded on 9 November 2007 confirming that they had authority to accept service without prejudice to the fact that the papers were served outside the statutory time limit.

*The statutory framework*

**[8]** The right to apply to a magistrates' court to state a case for the opinion of the Court of Appeal is to be found in article 146 of the 1981 Order: -

> "146. – (1) Any party to a summary proceeding 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]** Where the magistrates' court refuses to state a case article 146 (7) of the 1981 Order provides a power to apply for a direction that a case be stated:-

> "(7) Where the magistrates' court refuses or fails to state a case under paragraph (6), the applicant may

> apply to a Judge of the Court of Appeal for an order directing the magistrates' court to state a case within the time limited by the order and where the Judge of the Court of Appeal makes such order the magistrates' court shall state the case upon the applicant entering into any recognizance required by Article 149."

**[10]** When the magistrate has stated the case, article 146 (9) deals with the requirements for its transmission to the Court of Appeal and the respondent. It 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."

*The relevant case law*

**[11]** Article 146 of the 1981 Order or its earlier equivalent has been considered by this court on no fewer than four occasions. The first decision is *Dolan v O'Hara* [1975] NI 125. In that case an application for a case stated was made pursuant to a provision identical to article 146 (2) of the 1981 Order. The case was dispatched to the appellant but was not transmitted to the Court of Appeal as required by the statutory provisions now contained in article 146 (9). The court held that the requirement was mandatory as to time. Lowry LCJ set out the following principles: -

> "1. A time limit is likely to be imperative where no power to extend time is given and where no provision is made for what is to happen if the time limit is exceeded;
> 2. Requirements in statutes which give jurisdiction are usually imperative;
> 3. Where the act is to be done by a third party for the benefit of a person who will be damnified by non-compliance, the requirement is more likely to be directory;
> 4. Impossibility may excuse non-compliance even where the requirement is imperative."

**[12]** In *Pigs Marketing Board (NI) v Redmond* [1978] NI 73 a magistrate prepared a case stated at the request of the appellant. The case, dated 8 December 1977, was dispatched by the clerk of petty sessions to the appellant's solicitor on 13 December 1977. On 22 December the solicitors transmitted a copy of the case to the Court of Appeal and sent a copy to the town agents of the respondent's solicitors. The date of transmission of the case was not endorsed on the latter copy. The relevant statutory provision was identical to article 146 (9) of the 1981 Order in requiring that the date of transmission be endorsed by the appellant on the copy to be sent to the other party. The court held that this requirement was imperative. Lowry LCJ stated: -

> "… all the requirements of subsection (8) are imperative and must be observed if the Court of Appeal is to acquire the statutory jurisdiction to hear and determine a case stated. Examples abound of seemingly strict decisions to the effect that, where a statue creates a jurisdiction, full and literal compliance by the party wishing to resort to the jurisdiction is required. In subsection (8) it appears both practically and grammatically obvious that the two time limits are imperative (although the second is of less importance than the first), and I consider that it would need a strained interpretation in favour of the appellant to switch from an imperative to a directory construction in relation to a further requirement annexed to the second requirement in the subsection."

**[13]** Article 146 was again considered in *Foyle, Carlingford and Irish Lights Commission v McGillion* [2002] NI 86. In that case a defendant applied to the magistrate to state a case on whether he had been correct in finding that the standard of proof required to make an order of forfeiture was on the balance of probabilities. The magistrate stated the case on 29 March 2001 and it was transmitted to the Court of Appeal within the statutory period but not served on the respondent until 9 July 2001. Carswell LCJ considered the *Dolan* and *Pigs Marketing Board* decisions in the following passage at pp 90/1: -

> "In *Dolan v O'Hara* and *Pigs Marketing Board (Northern Ireland) v Redmond* the provision construed was s 146 (8) of the Magistrates' Courts Act (Northern Ireland) 1964, which in all material respects was identical to art 146 (9) of the 1981 Order. The decision in each case was based squarely on the ground that all the requirements of s 146 (8) 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: see the judgment of Lowry LCJ in the *Pigs Marketing Board* case ([1978] NI 73 at 79). These decisions are binding upon us and we are obliged by the doctrine of precedent to follow them. There is accordingly no room for reconsideration of the conclusion reached in those cases on the ground that the modern approach to construction of such provisions tends to be more flexible, as argued by Mr McCann in reliance on more recent English cases, and that persuasive authority to the contrary may be found in *Hughes* (*Inspector of Taxes*) *v Viner* [1985] 3 All ER 40."

**[14]** Matters did not end there, however, because the court went on to consider the argument that, to prevent the appellant from prosecuting his appeal because he had failed to serve a copy of the case on the other party where no prejudice had accrued, would constitute a violation of the appellant's rights to a fair trial guaranteed by article 6 of the European Convention on Human Rights. The Court of Appeal concluded that section 3 of the Human Rights Act 1998 required the court to interpret the provision in a way compatible with convention rights. Counsel for the appellant had argued that the time requirement in relation to service on the respondent impaired the very essence of the right to appeal. This argument was not accepted but the court held that, in the particular circumstances of the case, the statutory provision, if applied strictly, would have a disproportionate impact on the applicant's right of appeal; it should therefore be interpreted in a way that was compatible with the requirements of article 6. At page 91 Carswell LCJ said: -

> "The requirement contained in article 146 (9) could not be said to impair the very essence of the right to appeal. The case stated is to be transmitted to the Court of Appeal within 14 days of being dispatched by the clerk of petty sessions to the applicant. Within the same time he is to serve a copy on the other party. Its clear object is to prevent possible delays in the process of appealing by way of case stated. That is in our opinion a legitimate aim. 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 s 3 of the 1998 Act 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."

**[15]** In *Wallace v Quinn* [2004] NI 164 the appellant sought to appeal by way of case stated two convictions imposed by a magistrate, on the grounds of the magistrate's admission of certain evidence which the appellant contended had been in breach of the Police and Criminal Evidence (Northern Ireland) Order 1989. On 10 December 2002 the appellant served a requisition on the clerk of the petty sessions. His solicitor claimed that a copy of that requisition had been sent to the respondent by ordinary first class post but no trace of the requisition could be found in the respondent's office, and the appellant's solicitor was unable to produce any definite proof of posting or copy of a covering letter. The magistrate supplied a draft case to the appellant's solicitors on 19 March 2003, but the solicitor did not serve a copy on the respondent. The magistrate signed the case on 2 May 2003 and transmitted it to the appellant's solicitor. The solicitor set the appeal down for hearing but failed to serve a copy of the case by registered or recorded delivery post on the respondent. The issue of compliance with the time requirement for service of documentation in appeals by way of case stated was argued by way of preliminary issue.

**[16]** Following the approach of the court in the *Foyle* case, this court held 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, that would be disproportionate and constitute a breach of article 6 (1) of ECHR. On the facts of the *Wallace* case, however, this did not arise since there had not been substantial compliance with the time requirements. It was therefore not disproportionate that the appellant should be debarred from pursuing his appeal. At paragraph [13] Carswell LCJ said: -

> "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."

*The submissions of the parties*

**[17]** For PPS Mr Valentine submitted that since the decisions in *Foyle* and *Wallace* were inconsistent with those in *Dolan* and *Pigs Marketing Board* it was now open to this court to choose to follow either line of authority. He relied on *Hughes (Inspector of Taxes) v Viner* [1985] 3 All ER 40 as authority for the existence of a discretion in relation to the requirement of service on the respondent and submitted that such an approach was encouraged by the observations of Lord Woolf MR in *R v Immigration Appeal Tribunal, ex p Jeyeanthan* [2000] 1 WLR 354. Secondly, he submitted that the article 8 rights of the victim were engaged as a result of the commission of the crime. He asserted that respect for this right imposed a positive duty to permit an extension of the period allowed for appeal.

**[18]** For the respondent Mr Dermot Fee QC, who appeared with Mr Robert Blackburn, submitted that the earlier decisions of this court were consistent and binding. PPS as a public body had no convention rights, Mr Fee argued. There was therefore no basis on which section 3 of the Human Rights Act could be invoked to require this court to follow the line of reasoning in *Foyle* and *Wallace*.

*Conclusions*

**[19]** It is logical to deal first with the arguments based on article 8 of the convention. Mr Valentine has accepted that article 6 does not create any right to a fair trial for the prosecutor or the victim of crime. The only gateway to section 3 of the Human Rights Act, therefore, is article 8. It provides: -

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such

> as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

**[20]** Article 8 is intended to protect individuals from arbitrary interference with their private and family life, their home and correspondence. In order to ensure that effective respect for the interests protected by article 8 is afforded, positive obligations may be imposed upon the state. In particular the state may be obliged to provide criminal law sanctions to deter private individuals from committing serious harm to the person or home of others (see *X and Y v Netherlands* (1985) 8 EHRR 235).

**[21]** In the present case there can be no dispute that the criminal law was available and was deployed to deal with the intrusion into the victim's home. This led to an effective police investigation and a fair trial before the magistrate. An appeal mechanism was in place enabling a challenge to erroneous decisions by the magistrate to be made. An element of that process was a time limit within which the appeal should be launched. This had the legitimate aim of preventing delay in the appeal procedure. The provisions requiring timeous prosecution of the appeal did not, in the words of Carswell LCJ in *Foyle's* case, impair the very essence of the right to appeal.

**[22]** We have concluded that the measures instituted by the state for the prosecution of offenders who intrude on the private homes of members of our society constitute effective steps to provide proper respect for the interests of the victim. The positive obligations under article 8 do not require the imposition of a discretion to permit the prosecuting authority to proceed outside the statutory time limit.

**[23]** We turn then to the argument that the *Foyle* and *Wallace* cases are inconsistent with the decisions in *Dolan* and *Pigs Marketing Board*. In *Foyle's* case Carswell LCJ expressly stated (in the passage quoted at [13] above) that *Dolan* and *Pigs Marketing Board* were binding on this court. They were not followed in *Foyle's* case because a convention right was in play which required the court to apply section 3 of the 1998 Act to interpret the provision in a manner that would accord respect to the appellant's convention rights. In *Wallace v Quinn* this court followed the same approach and explained the reasons for doing so in this passage: -

> "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) 1964, whose terms were identical with those of art 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 for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act 1998). 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 European Court of Human Rights contained in such cases as *Société Levage Prestations v France* (1996) 24 EHRR 351, we therefore concluded that there would be a breach of art 6(1) of the convention if we continued to construe art 146(9) as mandatory. We decided that we should accordingly construe art 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."

**[24]** Since no convention rights arise in the present case, there is no basis on which we may decline to follow the binding decisions of *Dolan* and *Pigs Marketing Board*. This is perhaps unfortunate since the general cursus of recent jurisprudence follows a less rigid path on the question of the consequence of a failure to comply with a time limit such as that involved in the present appeal. In light of the binding authority of these decisions, however, we consider that we have no option but to hold that, because of the failure of the appellant to serve a copy of the application for a case stated on the respondent within the time limit imposed by article 146(2) of the 1981 Order, this court does not have jurisdiction to hear the appeal and it must therefore be dismissed without adjudication.