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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Quigley (Arthur), McCusker (John Joseph) and Quigley's (Seamus) Application [2010] NIQB 132

IN THE MATTER OF AN APPLICATION BY ARTHUR QUIGLEY, JOHN JOSEPH MCCUSKER AND SEAMUS QUIGLEY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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McCLOSKEY J

I INTRODUCTION

[1] This is an application for leave to apply for judicial review of a decision of a District Judge whereby the summary trial of the Applicants was adjourned. The relevant factual matrix, at this stage of the proceedings, is uncontentious.

II FACTUAL MATRIX

[2] The Applicants are charged with assorted public order offences. These include two charges of assaulting two separate police constables in the execution of their duties. It is alleged that these offences occurred on 13th April 2009. The Applicants are prosecuted pursuant to a summons dated 30th August 2009. Some fifteen months later, their trial still has to take place.

[3] The course of the Applicants' prosecution to date has entailed the adjournment of the summons at Enniskillen Magistrates' Court, all at the instigation of the prosecution, on three separate occasions. The first of the adjournments under scrutiny occurred on 9th December 2009. This was followed by two further adjournments, on 13th May and 30th September 2010. All of these adjournments have two particular features in common. The first is that on each occasion the case had been specially listed for the purpose of a contested hearing. The second is that, again on each occasion, the reason proffered for the adjournment application and the intention to apply for an adjournment was not expressed until the morning of trial. On the occasion of the first and third adjournments, the reason advanced concerned

the unavailability of a prosecution witness to attend court. The second adjournment was based upon a representation to the court by the prosecution that some further material had just been received from the police and that this could bear on the prosecutor's duty of disclosure.

[4] The Applicants seek leave to apply for judicial review of the third of the aforementioned adjournments of their summary trial. While this decision was made on 30th September 2010, there was some delay in initiating these proceedings. Papers were not filed until 12th November 2010. In the particular circumstances, this may be viewed as somewhat tardy, though probably not fatally so, bearing in mind the by now well known requirement enshrined in Order 53, Rule 4(1) of the Rules of the Court of Judicature, which provides that an application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, unless the court considers that there is good reason for extending time. In the events which have occurred, this delay has given rise to certain practical consequences of significance.

[5] When the papers were initially lodged, the court signalled that there were certain deficiencies in the Order 53 Statement and, simultaneously, requested information on the date when the Applicants' adjourned trial is to proceed. The propriety of initiating three separate judicial review applications, where it appeared that a composite application on behalf of all three Applicants would suffice, was also raised. This stimulated the provision of an amended Order 53 Statement, now containing adequate particulars, while also addressing the court's concern about a multiplicity of applications. Furthermore, the court was informed that the Applicants' trial is now scheduled for 12th January 2011 and will also be the subject of a review hearing on 20th December 2010. Accordingly, the Applicants are scheduled to be tried approximately five weeks hence.

III <u>THE COURT'S ASSESSMENT OF THE ISSUES</u>

[6] One of the main issues debated during the *inter-partes* leave hearing was whether, in these circumstances, there is any practical and effective remedy which can be granted by this court. The primary relief sought by the Applicant is an Order of Certiorari quashing the adjournment decision of 30th September 2010. It seems to me important to reflect on the relevant practical realities. On 30th September 2010, the "cast" in attendance at the lower court consisted of a specially designated District Judge; prosecuting counsel; Applicants' counsel and solicitor; all prosecution witnesses, except one; and all three Applicants. This raises a question of an intensely pragmatic nature: if the impugned decision is quashed, how is the District Judge to proceed? This would *not* be a case of a Minister or senior public official or other public authority having to reconduct a purely paper, desktop exercise in reaction to a quashing order of the High Court. Rather, the context of the present challenge is one where the District Judge, in the presence of the aforementioned cast, had only two choices: either to accede to the adjournment application or to refuse it. The

latter course would have required the prosecution to proceed on the morning in question, unless the summons had been withdrawn or the prosecutor had elected to tender no evidence. Having regard to the evidence before this court, neither seems a realistic possibility. If this court were to quash the impugned adjournment decision at this stage, it is far from clear how, at a practical level, the District Judge would be required to react and proceed. The prospect of recreating the context in which the impugned decision was made seems quite unrealistic, particularly where a new trial date is now imminent. An Order of Certiorari at this remove would, in my view, simply engender uncertainty and confusion on the part of all concerned.

[7] Furthermore, it is well established that the effect of an Order of Certiorari is *to quash* the impugned decision. It is an equally entrenched principle that, in judicial review proceedings, the High Court does not substitute its opinion for that of the decision making authority. Nor does it substitute its own decision on the merits. Thus the normal effect of a quashing order is to require the decision making authority to reconsider the matter, duly guided and educated by the judgment of the High Court, and to make a fresh decision (see Anthony, Judicial Review in Northern Ireland, paragraph 8.13). However, this is not the *invariable* result: see Judicial Remedies in Public Law (Lewis, 3rd Edition, paragraph 6-016). In the present context, there would plainly be significant practical obstacles (including established court lists and the availability of witnesses, Applicants and legal representatives) in the way of recreating the situation in which the impugned decision was made. Moreover, if, in a reconsideration context, all of the prosecution witnesses were to attend, the exercise would have an aura of absurdity: the prosecutor would be representing to the District Judge that the trial is ready to proceed, while the defence lawyers would be urging the judge to reconsider the decision made some three months previously to vacate the earlier hearing date. One asks, rhetorically, how, in these circumstances, an Order of Certiorari would be a practical, effective or sensible order.

[8] I also take into account the principle that *where (a*s here) the impugned decision is made *intra vires* - see the power of adjournment conferred by Article 161 of the Magistrates Courts (NI) Order 1981 - the effect of an Order of Certiorari is to quash prospectively only and not retrospectively (see Lewis, *op. cit.*, paragraph 6-035). This may be linked to the *omnia praesumuntur* principle, which expresses the rule that all acts of a public authority are presumptively valid, unless and until set aside and the doctrine of legal certainty. In the present context, during the period of presumptive validity of the impugned decision, the District Judge has arranged a fresh trial date (12th January 2011). On any sensible showing, this has overtaken the impugned decision and has created a significantly altered context. On the basis of the evidence before the court and having regard to practical realities, including court listing arrangements, particularly where contested summary trials are concerned and the imminent Christmas and New Year holidays, I am satisfied that the Applicants could not, realistically, secure a better outcome if the court were to quash the impugned decision. In all these circumstances, I consider that an Order *o*f

Certiorari would simply (to borrow Lord MacDermott's expression) "*beat the air*": ***R (McPherson) –v- The Ministry of Education*** [1980] NI 115, p. 121:

> "*Certiorari is a discretionary remedy and does not usually issue if it will beat the air and confer no benefit on the person seeking it*".

[9] The second remedy sought in the revised Order 53 Statement is framed as "*A declaration that the Accused should be acquitted of all criminal charges before the Magistrates Court*". In support of the Applicants' claim for this discrete remedy, Mr. Fahy (of counsel) helpfully brought to the attention of the court the decision of the English Provisional Court in ***Visvaratnam –v- Brent Magistrates Court*** [2009] EWHC 3017 (Admin), where, on *28th October 2009*, the Divisional Court made an order quashing the decision of the Magistrates Court made on *6th June 2008* to adjourn the summary trial of the Applicant, charged with driving whilst unfit due to drug consumption, upon the application of the prosecution. The adjournment application had been based on the unavailability of a crucial prosecution witness, the examining medical practitioner. The decision of the Divisional Court to quash the adjournment decision seems to me to have been mainly motivated by the primacy which the court determined to accord to the values of efficiency, expedition and avoidable delay. As will become apparent presently, the orientation of the relevant decisions in this jurisdiction is somewhat different. The decision in ***Visvaratnam*** truly fired a warning shot across the bows of the CPS in England: see in particular paragraphs [17] – [19]. In making the quashing order, Oppenshaw J, with whom Elias LJ concurred, stated:

> "[20] *I have no doubt that the magistrates were wrong to grant this adjournment and I would quash their decision to do so.* ***It must follow that the claimant should be acquitted***".

[My emphasis].

The highlighted sentence provided the stimulus for Mr. Fahy's submission that it is open to this court, in the present challenge, to declare that the Applicants should be acquitted of the charges against them.

[10] Any suggestion that the Divisional Court in ***Visvaratnam*** was ordering the acquittal of the accused person seems to me questionable. The only remedy granted was an order quashing the Magistrates' adjournment decision. The second sentence in paragraph [20] of the judgment is probably, in my opinion, simply a statement by Oppenshaw J of what he considered would be the consequence of the quashing order. In my view, this statement is properly characterised an incidental, or *obiter*, observation, neither intended to have, nor having, binding legal effect. Furthermore, I somehow doubt whether the Divisional Court's quashing order had the legal effect of terminating the prosecution. In the absence of further illumination, it seems to me that only the Magistrates' Court could order this, with the result that

some further intervention by that court was required pursuant to the order of the Divisional Court. Finally, it is possible that there was some ingredient in the matrix of that particular case, not apparent in the text of the judgment, which would explain this freestanding statement in the court's judgment.

[11] Furthermore, it seems to me of prime importance that in this application for leave to apply for judicial review, the court is concerned *only* with the legality of the decision of a District Judge to adjourn a summary prosecution. Questions of guilt or innocence plainly lie outwith the purview of this court, which exercises a supervisory jurisdiction only. Per Lewis (*op. cit.*), paragraph 6-016:

> "*Judicial review is a supervisory not an appellate jurisdiction. The court can only ensure that a decision has been reached lawfully and, if not, quash the unlawful decision.* ***The court cannot substitute an alternative decision for that of the decision maker***".

[My emphasis].

This application also points up the fundamental distinction between a quashing order and an Order of Mandamus. While the present Applicants do not seek mandatory relief, it seems improbable, in the abstract, that this court would be empowered to order a court of summary jurisdiction to acquit a Defendant. This analysis is reinforced by Lord Bingham's pithy statement that judges who exercise the judicial review jurisdiction of the High Court are "*auditors of legality: no more, but no less*" [The Rule of Law, p. 61]. In my view, it would be constitutionally impermissible for the High Court, in the exercise of its supervisory jurisdiction, to grant a remedy which would effectively terminate a live summary prosecution duly brought, *intra vires* and not an abuse of the lower court's process.

[12] The true character of the jurisdiction which the High Court exercises in judicial review proceedings involving challenges to summary prosecutions features prominently in ***R –v- Hereford Magistrates Court, ex parte Rowlands*** [1998] QB 110. There, the two Applicants were charged with offences of assaulting police constables in the execution of their duty and a related public order offence. In circumstances where there had been a history of adjournments, the justices concerned refused an application to adjourn the trial, based on the unavailability of two defence witnesses. The trial proceeded and the Applicants were convicted. They challenged their convictions by an application for judicial review. At the outset of the judgment of the Divisional Court, Lord Bingham CJ observed:

> " "*As is well known, the magistrates' courts are the work-horses of the criminal justice system in England and Wales. They handle the vast majority of criminal cases, and for most citizens they represent the face of criminal justice. Given their central role, it is of obvious importance that*

> *magistrates' courts should, so far as possible, interpret and apply the law correctly and reach sound factual decisions. It is also important that proceedings in them, as in other courts, should be regularly and fairly conducted by an independent and unbiased tribunal with appropriate regard to the requirements of natural justice.*
> *The business of magistrates' courts is in the main handled according to the highest standards, but, as in all other courts, errors may be made and procedural lapses and irregularities may occur. ".*

The Lord Chief Justice then observed that Parliament has created two rights of appeal, which are designed to protect convicted Defendants against the possibility of injustice. The first is a right of appeal against conviction or sentence (to the Crown Court), and the second is an appeal by case stated on a point of law (to the High Court), under Sections 208 and 111 respectively of the Magistrates Courts Act 1980. I would observe that the same two rights of appeal, with some procedural differences, exist in Northern Ireland: see Articles 140 and 146 of the Magistrates Courts (NI) Order 1981.

[13] The judgment in ***Ex Parte Rowlands*** then examines the important question of whether, given these rights of appeal, an application for judicial review to the High Court is also available, as a third possible remedy. Lord Bingham continues, at p. 120:

> "*For most of this century at least, certiorari has provided the usual if not invariable means of pursuing challenges based on unfairness, bias or procedural irregularity in magistrates' courts. The cases which show this are legion.*"

Following an extensive review of the authorities, the Lord Chief Justice concluded (at p. 125):

> *"While we do not doubt that* ***Ex parte Dowler*** *[1997] Q.B. 911 was correctly decided, it should not in our view be treated as authority that a party complaining of procedural unfairness or bias in the magistrates' court should be denied leave to move for judicial review and left to whatever rights he may have in the Crown Court. So to hold would be to emasculate the long-established supervisory jurisdiction of this court over magistrates' courts, which has over the years proved an invaluable guarantee of the integrity of proceedings in those courts. The crucial role of the magistrates' courts, mentioned above, makes it the more important that that jurisdiction should be retained with a*

view to ensuring that high standards of procedural fairness and impartiality are maintained."

The following paragraph is also of some importance:

> *"Two notes of caution should however be sounded. First, leave to move should not be granted unless the applicant advances an apparently plausible complaint which, if made good, might arguably be held to vitiate the proceedings in the magistrates' court. Immaterial and minor deviations from best practice would not have that effect, and the court should be respectful of discretionary decisions of magistrates' courts as of all other courts. This court should be generally slow to intervene, and should do so only where good (or arguably good) grounds for doing so are shown. Secondly, the decision whether or not to grant relief by way of judicial review is always, in the end, a discretionary one. Many factors may properly influence the exercise of discretion, and it would be both foolish and impossible to seek to anticipate them all. The need for an applicant to make full disclosure of all matters relevant to the exercise of discretion should require no emphasis. We do not, however, consider that the existence of a right of appeal to the Crown Court, particularly if unexercised, should ordinarily weigh against the grant of leave to move for judicial review, or the grant of substantive relief, in a proper case."*

In these latter passages two major themes are readily detected. The first is that the jurisdiction of the High Court in cases of this nature is of a supervisory character. The second is that the grant of relief in judicial review proceedings is discretionary.

[14] In considering Mr. Fahy's submission, I have also reflected on Section 21 of the Judicature (NI) Act 1978, which provides:

> *"Without prejudice to section 18(5), where on an application for judicial review-*
> *(a) the relief sought is an order of certiorari; and*
> *(b) the High Court is satisfied that there are grounds for quashing the decision in issue,*
> *the court may, instead of quashing the decision, remit the matter to the lower deciding authority concerned, with a direction to reconsider it and reach a decision in accordance with the ruling of the court or may reverse or vary the decision of the lower deciding authority.".*

I have given some consideration to the question of whether recourse to *this* power could have the practical effect of securing the acquittal of a Defendant in summary

proceedings. It is appropriate to observe that the court did not have the benefit of argument on this discrete issue. In the MacDermott Report (Cmnd. 4292), which gave birth to the Judicature (NI) Act 1978, there is no substantive reference to the subject matter of what was later enshrined in Section 21.

[15] It seems likely that the stimulus for Section 21 of the 1978 Act was, at least, twofold. Firstly, it had the valuable effect of increasing the powers of the High Court, which were previously restricted to the prerogative remedies. It formed part of the modernisination and simplification mechanisms which the Act introduced. Furthermore, it is the court's recollection that following the introduction of the Prosecution of Offences (Northern Ireland) Order 1972 (a historic piece of legislation, being the first Order in Council made for Northern Ireland at the beginning of almost thirty years of direct Westminster government), the newly established Office of the Director of Public Prosecutions for Northern Ireland made representations supporting the incorporation in the anticipated new Judicature Act of a provision such as Section 21. Representations of this kind also formed the background to the inclusion of what became Section 25. The argument was that in certain cases involving judicial review of Magistrates Courts' decisions, it would be more appropriate for the High Court to remit with directions than to quash by Certiorari. The second identifiable factor quite clearly in the background was a recommendation in an earlier report of the English Law Commission, the rationale whereof was that, in certain cases, a power of this nature would be appropriate as it would obviate the need for recommencement of the underlying process or proceedings [see "Remedies in Administrative Law", Law Com. No. 73, Cmnd. 6407, paragraph 53].

[16] As observed in Lewis (*op. cit.*, paragraph 6-019) a remittal order, in appropriate circumstances, may have the practical benefit of avoiding a fresh application to the decision making authority concerned. I would observe that such an order also places emphasis on the need for reconsideration and a fresh decision and the desirability of reasonable expedition. Furthermore, a remittal order serves to focus attention on the guidance and education to be derived from the judgment of the High Court. Such an order may also be a suitable remedy in a case where the only defect in the impugned decision is a failure to provide adequate reasons.

[17] In some future case, the opportunity may arise for more detailed examination of the question of whether the second and third powers enshrined in Section 21 viz. to *reverse* or *vary* the impugned decision could properly be exercised in a challenge such as the present – and, if so, to what effect. I would add only that the exercise of these two powers is extremely rare in this jurisdiction. Moreover, the first of the Section 21 powers viz. the power of remittal with directions is, conventionally, sparingly exercised in this jurisdiction. The few examples provided in Anthony (*op. cit.*, paragraph 8.16) are both well scattered in time and remote from the present context.

[18] Some further contribution to this interesting subject is provided by the reflection that, in recent years, superior courts have debated the question of whether *any* court is empowered to declare an accused person innocent. The essential characteristics of the remedy of a declaration in public law are examined *in extenso* in The Declaratory Judgment (Zamir and Woolf, 3rd Edition). I can find nothing in this valuable treatise in support of the proposition that, in a challenge of the present *genre,* the High Court is empowered to effectively declare the innocence of a Defendant charged with a summary criminal offence. As emphasized by the authors at the outset [paragraph 1.02]:

> "*A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs*".

I am reinforced in my view that the High Court has no power to do so by the statement of Lord Steyn in ***R (Mullen) –v- Secretary of State for the Home Department*** [2005] 1 AC 1:

> "***A workable interpretation***
>
> ***55*** *Schiemann LJ observed, at p 1007, para 43, that our criminal law system "does not provide for proof of innocence". Sometimes compelling new evidence, e g a DNA sample, a forensic test result, fingerprints, a subsequent confession by a third party who was found in possession of the murder weapon, and so forth, may lead to the quashing of a conviction. The circumstances may justify the conclusion beyond reasonable doubt that the defendant had been innocent. Sometimes the Court of Appeal makes it clear (see* ***R v Fergus*** *(1994) 98 Cr App R 313, 325) and sometimes it can be inferred from the circumstances. The interpretation which I have adopted is therefore perfectly workable. That is why France adopted it and why the committee of experts felt able to put it forward as the correct interpretation of article 3 of the Seventh Protocol. (See para 48, supra.)"*

And see further per Lord Bingham, at paragraph [9]:

> *"(6) It is, in my opinion, an objection to the Secretary of State's argument that courts of appeal, although well used to deciding whether convictions are safe, or whether reasonable doubts exist about the safety of a conviction, are not called upon to decide whether a defendant is innocent and in practice very rarely do so."*

There is no suggestion in these passages that there is any power invested in the High Court, in an application for judicial review (or, indeed, *any court*), to declare an accused person innocent. In essence, the House of Lords did not seriously challenge one of the principal reservations of the Court of Appeal, namely their conclusion that, as a matter of law, a declaration of innocence, in the context of a criminal prosecution, is unknown to United Kingdom law.

[19] Furthermore, I consider that some assistance is derived by reflecting on the jurisdiction of a criminal court, exercised in exceptional cases only, to stay an accused person's trial on the ground of abuse of process. Such an order does not equate with either an acquittal or a finding of innocence. This reflection, in tandem with the well established principles considered above, suggests strongly to me that this court has no power to declare that the Applicants should be acquitted *or* to declare them innocent. Insofar as such power does exist, I am in no doubt that there is no warrant for its exercise in the present case. Furthermore, insofar as the Applicants could secure their acquittal from this court by an Order of Mandamus or an order pursuant to Section 21 of the Judicature Act, which will require detailed argument in some appropriate future case, I would decline to grant such relief in the present context.

[20] In making the aforementioned conclusions, I bear in mind that this is an application for leave to apply for judicial review. It is trite that the threshold for the grant of leave is of limited elevation – for example, in the words of Kerr J in ***Re Morrow and Campbell's Application*** [2001] NI 261, it poses a "*modest hurdle*". In a well known passage, Lord Diplock stated that leave should be granted where "*… on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case*": ***Regina –v- IRC, ex parte National Federation of Self Employed and Small Businesses*** [1982] AC 617, at p. 644A. Conversely, it has been stated that leave should be refused where the case appears to be "*manifestly untenable*": see ***Matalulu –v- Director of Public Prosecutions*** [2003] 4 LRC 712 (a fairly recent authority of the Privy Council). The application of the leave threshold will inevitably depend on the context of the particular case: "*In law, context is everything*", as Lord Steyn famously stated in ***Regina –v- Secretary of State for the Home Department, ex parte Daly*** [2001] 2 WLR 1622, paragraph [28].

[21] As appears from the analysis above, I am of the opinion that even if ultimately successful, the first form of relief sought by the Applicants – an Order of Certiorari quashing the impugned decision – could not, realistically, provide them with any practical and effective remedy, for the reasons given. My second conclusion is that the further relief sought by the Applicants – a declaration that they are to be acquitted of the charges preferred against them – is not, as a matter of law, available. In the alternative, I would decline to grant this remedy in any event. On the present state of the law, it is doubtful whether the High Court in judicial review proceedings would ever grant this remedy – whether in the form of a declaration, an Order of Mandamus or an order pursuant to Section 21 of the Judicature (NI) Act

1978. Thus I conclude that the threshold for the grant of leave to apply for judicial review has not been overcome.

IV ADJOURNMENT OF SUMMARY TRIALS: THE CORRECT APPROACH

[22] In deference to the submissions of both counsel and in light of the suggestion, canvassed in argument, of a live debate on the question of whether, in daily practice, District Judges are directing themselves correctly in acceding to prosecution applications for the adjournment of summary trials, I would add the following.

[23] The power to adjourn a summary prosecution is a statutory one, enshrined in Article 161(1) of the Magistrates Courts (Northern Ireland) Order 1981 in the following terms:

> "*A Magistrates Court may at any time adjourn proceedings before it*".

Prior to the advent of the Human Rights Act 1998 and Article 6 ECHR, the most comprehensive guidance on the exercise of this statutory power was probably to be found in ***Ex Parte Rowlands*** (supra). Per Lord Bingham CJ, at p. 127E:

> *"The power to adjourn a trial is conferred upon justices by statute: see section 10(1) of the Magistrates' Courts Act 1980. There is no shortage of examples demonstrating that this court will intervene where defendants have been deprived of a fair opportunity to present their case either because of their own unavoidable absence (see, for example, Reg. v. Bolton Magistrates' Court, Ex parte Merna; Reg. v. Richmond Justices, Ex parte Haines [1991] Crim.L.R. 848) or the inability to call witnesses whose evidence went to critical issues of fact: see Reg. v. Bradford Justices, Ex parte Wilkinson [1990] 1 W.L.R. 692 and Reg. v. Bristol Magistrates' Court, Ex parte Rowles [1994] R.T.R. 40. The decision whether to grant an adjournment does not depend upon a mechanical exercise of comparing previous delays in those cases with the delay in the instant applications. It is not possible or desirable to identify hard and fast rules as to when adjournments should or should not be granted.* ***The guiding principle must be that justices should fully examine the circumstances leading to applications for delay, the reasons for those applications and the consequences both to the prosecution and the defence. Ultimately, they must decide what is fair in the light of all those circumstances.***"

[My emphasis].

In the following paragraph, one finds a strong emphasis on *fairness* (at p. 127H):

> *"This court will only interfere with the exercise of the justices' discretion whether to grant an adjournment in cases where it is plain that a refusal will cause substantial unfairness to one of the parties. Such unfairness may arise when a defendant is denied a full opportunity to present his case. But neither defendants nor their legal advisers should be permitted to frustrate the objective of a speedy trial without substantial grounds. Applications for adjournments must be subjected to rigorous scrutiny. Any defendant who is guilty of deliberately seeking to postpone a trial without good reason has no cause for complaint if his application for an adjournment is refused…".*

The delicate exercise of balancing expedition and fairness and the challenge which this presents to the court of trial emerge clearly in the next passage (at p. 128B):

> *"In deciding whether to grant an adjournment justices will bear in mind that they have a responsibility for ensuring, so far as possible, that summary justice is speedy justice. This is not a matter of mere administrative convenience, although efficient administration and economy are in themselves very desirable ends. Delays in bringing summary charges to trial are, unfortunately, not infrequent; last minute adjournments deprive other defendants of the opportunity of speedy trials when recollections are fresh. The difficulties adjournments cause give rise to a proper sense of frustration in justices confronted with frequent such applications: see* Ex parte Rowles *[1994] R.T.R. 40, 45E-F,* per *Farquharson L.J. It is important that in those cases where this court is compelled to intervene, its rulings should not be seen to be inhibiting justices from refusing repeated applications for adjournments where it is appropriate to do so."*

I would observe that the sentiments clearly identifiable in these passages apply equally to applications for adjournments made by both the prosecutor and the Defendant.

[24] Article 161 must now be viewed through the prism of Sections 3 and 6 of the Human Rights Act 1998 and Article 6 ECHR. In short, every Magistrates Court is a public authority and it is unlawful for any public authority to act in a manner incompatible with any of the protected Convention rights. The specific Convention right in play in the context of the adjournment of summary proceedings is that aspect of Article 6 ECHR which protects every Defendant's right to be tried within a reasonable time. Both the Privy Council and the House of Lords have given clear

guidance on the correct approach to be adopted in cases where an asserted infringement of this discrete right is canvassed. Firstly, in the majority decision of the Privy Council in ***Dyer –v- Watson*** [2004] 1 AC 379, Lord Bingham stated:

> *"It is a powerful argument that, if a public authority causes or permits such delay to occur that a criminal charge cannot be heard against a defendant within a reasonable time, so breaching his Convention right guaranteed by article 6(1), any further prosecution or trial of the charge must be unlawful within the meaning of section 6(1) of the 1998 Act. Not surprisingly, that argument has been accepted by highly respected courts around the world. But there are four reasons which, cumulatively, compel its rejection. First, the right of a criminal defendant is to a hearing. The article requires that hearing to have certain characteristics. If the hearing is shown not to have been fair, a conviction can be quashed and a retrial ordered if a fair trial can still be held. If the hearing is shown to have been by a tribunal lacking independence or impartiality or legal authority, a conviction can be quashed and a retrial ordered if a fair trial can still be held. If judgment was not given publicly, judgment can be given publicly. But time, once spent, cannot be recovered. If a breach of the reasonable time requirement is shown to have occurred it cannot be cured. It would however be anomalous if breach of the reasonable time requirement had an effect more far-reaching than breach of the defendant's other article 6(1) rights when (as must be assumed) the breach does not taint the basic fairness of the hearing at all, and even more anomalous that the right to a hearing should be vindicated by ordering that there be no trial at all."*

Lord Bingham further observed that the threshold of proving a breach of the reasonable time requirement enshrined in Article 6 is an elevated one: see paragraph [52]. The enquiry to be conducted by the court will focus predominantly on the complexity of the case, the conduct of the Defendant and the manner in which the case has been handled by the relevant administrative and/or judicial authorities.

[25] Still more extensive guidance was provided by the House of Lords in ***Attorney General's Reference No. 2 of 2001,*** which was primarily concerned with the reasonable time guarantee. Lord Bingham's opinion formulates the following guiding principles:

> *"24. If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section*

> *8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant.* ***The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances.*** *The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time."*

[My emphasis].

The clear association between the principles which govern an application to stay a prosecution on the ground of abuse of process and those in play in deciding whether to exercise the discretionary power of adjournment is clear from these passages. In the next succeeding paragraph, Lord Bingham addressed expressly the extended abuse of process doctrine declared by the House in ***Bennett***:

> *"[25] The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by* ***R v Horseferry Road Magistrates' Court, Ex p Bennett*** *[1994] 1 AC 42, but Mr Emmerson contended that*

> *the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which Darmalingum v The State [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (**Martin v Tauranga District Court** [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right."*

Accordingly, through the prism of Article 6, the principles to be applied in both types of case (viz. "mere" delay and executive manipulation) are the same.

[26] In Northern Ireland, the Divisional Court availed of the opportunity to provide guidance in two successive cases in which the Director of Public Prosecutions applied for judicial review of decisions of the Magistrates Court refusing an application by the prosecution for adjournment of a summary trial. In the first of these decisions, ***Re DPP's Application (No. 1)*** [2007] NIJB 271, the Lord Chief Justice stated:

> *"**[10]** In Attorney General's reference (No 3 of 1999) [2001] 2 AC 91, 118, in what has become a well known passage, Lord Steyn described the various interests at stake in criminal proceedings as follows: -*
>
> > *'The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.'*
>
> ***[11]** All judges and magistrates need to keep this range of interests closely in mind whatever may be the decision as to the disposal of proceedings that they are called on to make. A conclusion, for instance, whether to accede to an application for an adjournment or whether to dismiss charges because of the absence of witnesses cannot properly be reached unless*

> *each of these interests (insofar as it may impinge on the decision) is taken into account and accorded appropriate weight."*

The Court then noted the decision of the English Divisional Court in ***R –v- Enfield Magistrates Court, ex parte DPP*** [Volume 153 JP, p. 415] whereby a decision of the Justices to refuse a prosecutor's application for an adjournment was successfully challenged.

> *"[13] It is unsurprising that this decision was quashed for it cannot be right to refuse an application for an adjournment where there has been no fault on the part of the prosecuting authorities for the absence of witnesses and no compelling reason that the matter should not be adjourned. The case is significant in the present context principally because of its recognition that the question of the fault (or the lack of it) on the part of the prosecution in bringing about the state of affairs that a necessary witness is absent is plainly germane to the question whether an adjournment should be granted. In the present case, the resident magistrate had no basis on which he might reasonably have concluded that the prosecution was to blame for the absence of the witness."*

The court then quoted with approval the statement of Mann LJ in ***R v Hendon Justices ex parte DPP*** [1967] 1 QB 167 at 174C, where he said:

> *"… the duty of the court is to hear informations which are properly before it. The prosecution has a right to be heard and there is a public interest that, save in exceptional circumstances, it should be heard."*

Acceding to the Director's application for judicial review, the Divisional Court provided the following general guidance:

> *"**[17]** In any case where the prosecution applies for an adjournment, it is the duty of the judge or magistrate to ensure that he or she has been sufficiently appraised of all relevant matters before reaching his decision. He or she is, of course, entitled to expect that the prosecutor will put such matters before him or her in a lucid and comprehensive fashion but he or she cannot be relieved of their obligation to obtain all material information by the default of the prosecutor.*

> ***[18]*** *Having ensured that all relevant information is available to him, the magistrate must take into account the interests that are at stake in deciding whether to accede to an application to adjourn and have regard to the probable consequences of a refusal of such application.*
>
> ***[19]*** *In the present case the magistrate made no inquiry of the prosecutor as to whether the witness had indicated a willingness to attend to give evidence. He asked merely whether there was an explanation for her failure to attend. He made no inquiry as to the steps taken by the police to ascertain Mrs McGurk's whereabouts. He did not ask if the defendant had contributed to adjournments in the past nor whether a short adjournment would have allowed the matter to proceed without substantial delay. He does not appear to have addressed the question whether the prosecution was in any way responsible for the non-attendance of the witness.*
>
> ***[20]*** *One may take the view that the prosecutor should have volunteered this information to the magistrate but, as we have said, the failure of the prosecution to bring relevant material to the magistrate's attention cannot excuse an omission to seek it. All of the factors outlined in the preceding paragraph were plainly relevant to the decision whether to adjourn the prosecution. The magistrate's failure to make appropriate inquiry about these matters led inevitably to his not having all relevant material necessary for him to reach a proper conclusion on the application for an adjournment. We are confident that, if he had obtained that information, he would have acceded to the application.*"

Properly analysed, it appears to me that the *ratio decidendi* of this decision is a finding that the Magistrates Court failed in its duty of inquiry. In short, where seised of an application by a prosecutor to adjourn, it is the duty of the court to conduct a proper inquiry, with a view to making a fully informed decision. A failure to properly discharge this duty is likely to give rise to the well established public law misdemeanour of failing to take into account all material facts and considerations.

[**27**] Soon thereafter, this subject was revisited by the Divisional Court in ***Re DPP's Application (No. 2)*** [2007] NIQB 10 where, firstly, the court endorsed the approach espoused by the English Divisional Court in ***Crown Prosecution Service –v- Picton*** [2006] EWHC 1108 (Admin):

> *"In* ***Essen*** *this court considered the relevant law and it considered in particular the judgments of Lord Bingham in* ***R v Aberdare Justices ex parte Director of Public***

Prosecutions *(1990) 155 JP 324 (then as Bingham LJ) and in* ***R v Hereford Magistrates' Court ex parte Rowlands*** *[1998] QB 110 (then as Lord Bingham CJ). The following points emerge:*

(a) A decision whether to adjourn is a decision within the discretion of the trial court. An appellate court will interfere only if very clear grounds for doing so are shown.

(b) Magistrates should pay great attention to the need for expedition in the prosecution of criminal proceedings; delays are scandalous; they bring the law into disrepute; summary justice should be speedy justice; an application for an adjournment should be rigorously scrutinised.

(c) Where an adjournment is sought by the prosecution, magistrates must consider both the interest of the defendant in getting the matter dealt with, and the interest of the public that criminal charges should be adjudicated upon, and the guilty convicted as well as the innocent acquitted. With a more serious charge the public interest that there be a trial will carry greater weight.

(d) Where an adjournment is sought by the accused, the magistrates must consider whether, if it is not granted, he will be able fully to present his defence and, if he will not be able to do so, the degree to which his ability to do so is compromised.

(e) In considering the competing interests of the parties the magistrates should examine the likely consequences of the proposed adjournment, in particular its likely length, and the need to decide the facts while recollections are fresh.

(f) The reason that the adjournment is required should be examined and, if it arises through the fault of the party asking for the adjournment, that is a factor against granting the adjournment, carrying weight in accordance with the gravity of the fault. If that party was not at fault, that may favour an adjournment. Likewise if the party opposing the adjournment has been at fault, that will favour an adjournment.

(g) The magistrates should take appropriate account of the history of the case, and whether there have been earlier adjournments and at whose request and why.

> *(h) Lastly, of course the factors to be considered cannot be comprehensively stated but depend upon the particular circumstances of each case, and they will often overlap. The court's duty is to do justice between the parties in the circumstances as they have arisen."*

The Lord Chief Justice, having cited this passage, continued:

> *"**[21]** We consider that this provides a useful checklist of matters to be taken into account by magistrates in deciding whether to grant an adjournment but we would reiterate the learned judge's warning that it is impossible to devise an exhaustive set of rules to be applied to every case and that the particular features of the individual case must be reflected in the decision to be taken. Having said that, we should make clear that the essential triangulation of interests which have been identified by Lord Steyn and which underlie all these considerations should always be taken into account. Thus, the impact on the accused of a decision to grant an adjournment must not be given undue weight at the expense of the victim and vice versa. And regard must always be had to the overarching interest of the public in the enforcement of the criminal law."*

The outcome was an Order of Certiorari quashing the decision to refuse the adjournment *and* the allied decision to dismiss the charge, coupled with an order that "*... the matter proceed to trial in the normal way ... with all due expedition*": see paragraph [28]. As appears from paragraphs [16] and [28] of the judgment of the Lord Chief Justice, the decision under challenge in those proceedings was, properly analysed, a decision to dismiss the charge, consequential upon (or in the context of) a rejection of the prosecutor's application for an adjournment of the hearing.

[28] Giving effect to the doctrine of precedent, whereby the Divisional Court is bound by its earlier decisions, both of the decisions in ***Re DPP,*** are binding on this court. Furthermore, this court is bound by ***Attorney General's Reference No. 2 of 2001*** and treats ***Ex Parte Rowlands*** as a decision of compelling and persuasive authority, giving effect to what Lowry LCJ stated in ***Re McKiernan's Application*** [1985] NI 385, at p. 389C:

> "*Although decisions and dicta of the Court of Appeal in England do not bind the courts in this jurisdiction, they traditionally, and very rightly,* ***are accorded the greatest respect,*** *particularly when the same, or identically worded, statutes fall to be construed*".

[My emphasis].

I have considered whether the present challenge raises any new question of principle. In my judgment, it does not. I am of the opinion that the authorities rehearsed in the foregoing paragraphs provide comprehensive guidance on the correct approach to be adopted by a Magistrates Court seised of an application by either party to adjourn a summary trial.

[29] The exercise in which this court has engaged will, hopefully be of some utility, since, in my opinion, it is essential that practitioners and courts alike evaluate the decision in ***Ex Parte Rowlands,*** the two Divisional Court decisions in ***Re DPP*** and those of the Privy Council and House of Lords in ***Dyer –v- Watson*** and ***Attorney General's Reference No. 2 of 2001*** as a unified, complementary whole. This exercise also serves to highlight the interlocking nature of the principles which govern applications to stay a prosecution as an abuse of process on the ground of delay and applications to adjourn a prosecution. There is a strikingly close association between the governing principles in each of these contexts.

[30] The overarching general principle which emerges is that it is in the public interest that every person charged with a criminal offence should *normally* be tried: a prosecution should *usually* result in an adjudication of guilt or innocence and should not *ordinarily* be concluded in any other way. This, in my view, is properly characterised a strong general rule. General principles of this nature are the bedrock of both the common law and the jurisprudence of the European Court of Human Rights. As they are general principles, as opposed to immutable rules, they are not universally applicable in every case. However, the effect of the jurisprudence in this sphere suggests to me that the general principle in play can properly be displaced only in exceptional cases. What qualifies as a truly exceptional case will be a matter for the district judge concerned, subject to the supervisory jurisdiction of the High Court. In my view, the jurisprudence of the House of Lords, the Privy Council and the Northern Ireland Divisional Court, all of which is binding on District Judges (and this court), exhorts a careful, conservative approach to any course of action which would result in the dismissal of a summary charge without any adjudication on the merits thereof. This, in my opinion, represents the current state of the law.

A Criminal Cause or Matter

[31] Both parties, sensibly and co-operatively, consented to the hearing of this application by a single judge, whatever the court's determination of whether this constitutes a criminal cause or matter. The mechanism for thus consenting is enshrined in Order 53, Rule 2(6) of the Rules of the Court of Judicature. The tests to be applied are contained in a recent majority decision of the Divisional Court, ***Re JR 27's Application*** [2010] NIQB 12, paragraph [20] and following. The court cannot avoid determining this issue, having regard to the differing rights of appeal which ensue: see paragraph [19] of ***Re JR 27***. Applying the governing principles to the present context, it is clear that as a direct consequence of the impugned decision the

Applicants are the subject of continued prosecution and, hence, are exposed to penal consequences. The conclusion that this is a criminal cause or matter seems to me to follow inexorably.

Postscript

[32] On the basis of the evidence before the court, it seems to me unlikely that the District Judge committed any error of law in making the impugned decision. That said, it is self-evidently of supreme importance that the trial of the Applicants proceed without further interruption.