

# Judicial Communications Office

26 November 2021

## COURT DISMISSES APPLICATION MADE BY DAITHÍ MCKAY AND JAMIE BRYSON

### Summary of Judgment

The Divisional Court<sup>1</sup> today refused an application made by Daithí McKay and Jamie Bryson by way of judicial review to quash the decision to commit them for trial on indictment in relation to a charge of conspiracy to commit misconduct in public office.

#### Factual Background

The applicants, Daithí McKay and Jamie Bryson, sought judicial review of their committal on 5 March 2021 for trial on indictment in relation to the charge of conspiracy to commit misconduct in public office. A third person, Thomas O'Hara, was also committed for trial on the same charge. He did not bring a judicial review but was a notice party to these proceedings.

The grounds upon which the applicants sought judicial review were:

- That the committal was procedurally unfair;
- That there was no evidence upon which the District Judge could have committed for trial in relation to the elements of the specific offence; and
- That committal for this offence was in breach of Article 7 and Article 10 of the European Convention on Human Rights (“the Convention”).

The arraignment of the three accused was listed for a date in April 2021 before the Crown Court but was held in abeyance pending these judicial review proceedings. A certificate for hearing before a judge alone rather than jury was issued and that decision is under separate legal challenge.

The prosecution arose out of events relating to the working of the Committee for Finance and Personnel (CFP) of the Northern Ireland Assembly in September 2015. At that time Mr McKay was a Member of the Legislative Assembly (MLA) and Chair of the Committee. The CFP conducted a review of the sale of the National Asset Management Agency (NAMA) property loan portfolio in Northern Ireland. This sale had become controversial with allegations that there was corruption in the sale and it was a matter of public interest. The National Crime Agency (NCA) was undertaking a parallel investigation into the NAMA process. The court said this was clearly in the mind of the CFP in constructing terms of reference for its inquiry given the risk of inadvertently prejudicing the criminal investigation by the NCA. The terms of reference stated that the CFP should undertake a fact finding review in relation to the operations of NAMA in Northern Ireland including the Project Eagle sale and related policy and regulatory issues that fell within the Department of Finance and Personnel remit. Key objectives would include establishing the factual position as regards the relationship between the Department and NAMA, the NAMA Northern Ireland Advisory

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<sup>1</sup> The panel was the Lady Chief Justice, Dame Siobhan Keegan, Lord Justice Treacy and Lord Justice Maguire. The Lady Chief Justice delivered the judgment of the court.

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Committee and matters relating to the sale of the NAMA property loan portfolio particularly where the Department had any involvement.

As part of this process Mr Bryson offered himself as a witness to the CFP. The CFP met on 3, 16 and 23 September 2015 to consider how his evidence would be taken. The minutes of the meetings record there was an anxiety among the Committee members as to whether or not his evidence should be taken in public or private session. The content of these meetings is outlined in paragraphs [9] – [12] of the court judgment.

On 23 September, Mr Bryson gave his evidence to the CFP during which he made various comments about alleged political influence in relation to the sale and alleged involvement of a specific politician in relation to a £7.5m success fee paid in relation to a specific part of the NAMA loan transaction sale.

It subsequently transpired that contacts had been made between Mr Bryson and Mr McKay and Mr O’Hara prior to this evidence being given. Other members of the Committee did not know this. The court summarised the salient parts of the exchanges in paragraphs [14] – [21] of its judgment.

On 17 August 2016, an assistant to Jim Allister MLA received an email from an account in the name of Mr Bryson. This contained a selection of Twitter private messages said to be between Mr Bryson and Mr McKay and Mr Bryson and Mr O’Hara. Mr Allister sent these to the police. Following from this, Mr McKay tendered his resignation as an MLA on 18 August 2016 and issued a public apology in which he acknowledged and accepted that his conduct with a witness to the CFP’s NAMA Inquiry in advance of his evidence was “inappropriate, ill-advised and wrong.” Thereafter criminal proceedings ensued.

On 24 December 2019, Mr McKay, Mr Bryson and Mr O’Hara were charged with conspiracy to commit an offence of misconduct in public office between 1 September 2015 and 24 September 2015, contrary to Article 9(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law. Mr Bryson requested a mixed committal and for the calling of various witnesses to give evidence. This took place between 1 and 5 March 2021. No issues of procedural unfairness were raised at the committal hearing. Upon considering the evidence, the District Judge determined that the test for committal was met and that the three accused should be committed for trial.

## Legal considerations

### *i. The Committal Test*

The committal stage is a pre-trial screening procedure the purpose of which is to ensure that there is sufficient evidence to commit the accused to trial. Article 37(1) of the Magistrates’ Courts (Northern Ireland) Order 1981 sets out the standard of proof which is required for a Magistrates’ Court to return an accused for trial. When determining whether there is sufficient evidence the test that applies is made pursuant to the case of *R v Galbraith* [1981] 1 WLR 1039.

### *ii. The Test on Judicial Review*

Committal decisions may be impugned in certain circumstances depending on the particular facts at issue. The Divisional Court can review committal for lack of evidence, but only in the clearest of cases where the only supporting evidence is inadmissible or, in exceptional cases, the admissible evidence is incapable of supporting the charge.

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## *iii. Alternative Remedy*

The requirement to utilise alternative remedies when specialist criminal courts are available is articulated in the decision in *R v DPP ex parte Kebeline* [2002] AC 326. The Divisional Court has a supervisory jurisdiction while the case is before the District Judge. However, even if there was a dispute about such a decision it is likely that it would be for the Crown Court to resolve the issue in the course of the trial.

## *iv. The ingredients of the offence*

The offence of conspiracy derives from Article 9 of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983. There are four elements to the common law offence of misconduct in public office to the effect that that it is committed where:

- A public officer acting as such;
- wilfully neglects to perform his duty and/or wilfully misconducts himself;
- to such a degree as to amount to an abuse of the public's trust in the office holder; and
- does so without reasonable excuse or justification.

## **Conclusions**

In setting out its conclusion, the court stressed that it is a supervisory court and not a court of merit:

“Whilst certain factual matters have been opened to us this court is not deciding the ultimate outcome in this case and forms no view on factual disputes.”

The first argument before the court related to alleged procedural unfairness at the committal hearing. This point was not raised at the committal hearing and none of the applicants asked to recall witnesses, adjourn or make further submissions. The court commented:

“In these circumstances we cannot see that there was any prejudice or unfairness caused. Any issue could have been corrected. Also, the terms of Article 37 of the [Magistrates’ Courts (NI) Order 1981] are clearly a strong contra indicator to this argument in that it empowers the District Judge to commit for trial for any indictable offence upon being satisfied that the evidence is sufficient. Overall, we do not believe that there is any merit in a procedural unfairness argument on the basis of how the case proceeded before the District Judge.”

In relation to the substantive challenge Counsel for both applicants maintained that there was no evidence upon which the committal could be based rather than a case of insufficient evidence. The court acknowledged that in such a scenario a decision is susceptible to judicial review but said the threshold is obviously high. The first point in support of the substantive argument was that the judge did not consider the seriousness element of the charge. Secondly, it was argued that the judge did not consider the reasonable excuse aspect of the charge which coincided with the case being made in reliance of Article 10 rights under the Convention. Article 7 of the Convention was also raised as it was argued that there was an absence of certainty within a charge of this nature. A

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subsidiary argument was that, in fact, the applicants were charged with the wrong offence because the Northern Ireland Act 1998 provides for an offence of non-registration of interests in Section 43.

The court considered these substantive arguments and said that in doing so it was mindful of the broad discretionary remit that a District Judge has when adjudicating upon committal for trial. The court said that an obvious difficulty with the substantive arguments was that they were based on a claim of no evidence:

“It follows that to succeed with this argument the District Judge must be found to have made an irrational decision. That is a high hurdle particularly in this area where a court is considering committal.”

The court did not consider that such an argument was sustainable for the following reasons.

- The applicants could not rely on the public office point as the charge was also one of conspiracy. The court said that given the undisputed factual background of the exchanges between the parties who were charged it could not be said that there was no evidence. It added that the interpretation to be applied to these is a matter to be determined at trial.
- The court concluded that there was sufficient evidence to meet the committal test that this charge would arguably offend the public. The court said that this offence may arise in a range of different circumstances. Whether or not it does is a factual issue to be examined at any trial taking into account all of the facts including consequences.
- The court accepted the point that there was no express Assembly rule prohibiting contact with a witness. It said, however, that it was obvious this case went beyond contact between committee members and witnesses into an alleged manipulation of the Committee process itself.
- The court was not attracted to the argument that because there was no direct precedent in relation to this type of behaviour which took place before a Committee of the Assembly that committal for trial on the charge was unsustainable. It said this was an area of law which is developing based as it is on common law.
- Counsel for Mr Bryson made the point that there was no direct reference to reasonable justification or excuse in the District Judge’s speaking note setting out his reasoning. However, the court, said that must be seen in context. It said that in real terms, certainly as regards to Mr McKay no reasonable explanation or excuse was given. In terms of the Article 10 Convention arguments, the court observed that this prosecution seemed to concern the method by which the information was imparted rather than anything said. In any event, the court considered that this Convention point, the Article 7 consideration and any other Convention points are eminently suitable for debate within a trial process.
- Finally, the court was not convinced that the potential of an alternative offence under the Northern Ireland Act was a persuasive point. It could only relate to Mr Mc Kay. The court said that it could not easily see that the alternative offence encompassed the entire course of alleged conduct at issue in this case and that even if available, it could not see that this would be an automatic bar to the conspiracy charge proceeding to trial.

The court concluded that none of the substantive points could succeed within the framework of judicial review. It considered there was enough to justify committing the applicants for trial applying the statutory test. The court held that any complaints or substantive arguments made in relation to the adequacy of the evidence and/or Convention rights could be accommodated within the criminal trial process. Applying the authority of *R v DPP ex parte Kebeline* it determined that a

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collateral challenge such as this, brought to the Divisional Court, was not appropriate when other options are available which are better suited to determination of issues within the specialist criminal framework:

“This court is a court of last resort. The applicants are not prejudiced by this outcome because they can bring pre-trial applications for No Bill or applications at trial including abuse of process and thereafter there are appeal rights embedded in the criminal law process. Also, there is nothing stopping the applicants raising any points of law in the Crown Court. The delay occasioned by this judicial review has not been in the interests of those charged or the public. It seems to us that this case has been an unnecessary distraction in a case which is important and which should now be brought to a conclusion before the relevant court which we consider to be the Crown Court.”

## Disposal

The court determined that it was not minded to quash the decision to commit the applicants for trial. It concluded that the argument that the committal could be quashed on the basis of no evidence was unsustainable and the applications were refused.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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