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PETTY SESSIONS DISTRICT OF BALLYMENA

_____

PUBLIC PROSECUTION SERVICE

v

LEWIS BOYD

_____

RULING ON AN APPLICATION TO STATE A CASE

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DISTRICT JUDGE (MAGISTRATES' COURT) NIGEL BRODERICK

Introduction

[1] This is an application brought by Mr Lewis Boyd (the defendant) being dissatisfied with the decision of the court on a point of law involved in the determination of the proceedings, asks the court, pursuant to Article 146 of the Magistrates' Courts (Northern Ireland) Order 1981 (the 1981 Order) to state a case for the opinion of the Court of Appeal on the following points of law;

> (i) "Was I correct to grant the PPS' application for an order under Article 158A of the Magistrates' Courts (Northern Ireland) Order 1981 to vary the sentence imposed by the Magistrates' Court on 10th August 2021 to include a Compensation Order? In particular, in granting the application was I correct in law to determine that:
>
> > (a) Article 158A empowers the magistrates' Court to vary a sentence by imposing a compensation order, in circumstances where

a compensation order was not previously imposed?

(b) The purpose for which I purported to exercise the power under Article 158A was a lawful purpose, given the terms in which the power is conferred by Article 158A?"

[2] Upon receipt of the application on 14 September 2023 I raised two issues with the applicant and the PPS and namely:

(i) Was the application lodged in time in accordance with Article 146(2) of the 1981 Order?

(ii) Was the application "frivolous" as set out in Article 146(4) of the 1981 Order?

[3] I offered the defendant and the PPS an opportunity to address me on these two points. Ms Lara Smyth BL appeared on behalf of the defendant and Mr Philip Henry BL appeared on behalf on the PPS at a hearing on 2 November 2023. In advance of the hearing, I received written submissions from Mr Henry BL dated 1 November 2023. Subsequent to the hearing I received, at my request, an additional note from Ms Smyth BL dated 15 November 2023.

[4] I am thankful to both Ms Smyth and Mr Henry for both their written and oral submissions.

Background

[5] The defendant appeared at Ballymena Magistrates' Court on 7 January 2021 charged with three offences;

(i) Possessing an offensive weapon, namely a spanner, in a public place.

(ii) Common assault.

(iii) Criminal damage of a house belonging to Dawn McCartney.

The date of incident was 10 December 2020.

[6] Thereafter there were a number of reviews while the PSNI submitted a file to the PPS and a decision was taken to prosecute the defendant with the offences charged. On 20 May 2021 the defendant entered a "not guilty" plea to all three charges and the matter was fixed for a contested hearing on 28 June 2021.

[7] On the day of the contest the defendant changed his pleas to "guilty" in relation to all three charges and the matter was adjourned for sentencing to 10 August 2021 with the court directing the Probation Board of NI to prepare a Pre Sentence Report.

[8] On the day of sentence, the PPS outlined the facts. The most pertinent facts in the context of this application related to the charge of criminal damage and can be summarised as follows. The defendant had used a spanner to cause damage to the property located in Broughshane. Police had informed the house owner that the property had been damaged and had asked her to check if that was the case. Upon arriving at the property the owner found the house to be in a terrible state. The toilet upstairs was damaged, the wash hand basin had been almost removed, there were numerous tiles on the toilet floor that were cracked, the shower doors were hanging off the wall where they were positioned. The owner could see extensive water damage on the ceiling of the kitchen, which centred around the light fittings. The carpet on the upstairs landing was completely saturated and the wooden banister was broken at the top part. The water had appeared to have leaked through from the floor of the toilet and it was suspected that the tiles would need lifted for the water damage. In the kitchen which was directly below the toilet the floor was flooded. In her statement to police on 10 December 2020 house owner advised that she did not know how much the damage would cost to repair as the insurance assessor had not yet been at her property yet however she undertook to forward the estimate to police when she received it.

[9] Upon the above facts being outlined to me I enquired from the PPS as to whether they had received either an estimate for the cost of the damage caused or an invoice regarding any subsequent repairs that may have been carried out. The PPS representative advised the court that they had received no such estimate or invoice regarding the damage caused.

[10] I was satisfied that based on what had been outlined to me that substantial damage had been caused by the defendant however I had no evidence upon which to make an informed decision regarding the issue of compensation and how much compensation the defendant should be ordered to pay to the house owner. The PPS did not apply to me at this point to make an order for compensation and nor did they apply to have the case adjourned for an estimate or invoice to be obtained. I proceeded to sentence the defendant and imposed a Probation Order for a period of 12 months with two additional conditions attached to the order whereby the defendant must actively engage in any treatment programme of work recommended by his supervising probation officer and that he must not develop any intimate relationships without first notifying his probation officer. The defendant was also made subject to a Restraining Order for a period of two years regarding the victim of the common assault.

The Article 158A application

[11] On 6 April 2023 the PPS sent an email to the court office attaching an application pursuant to Article 158A of the 1981 Order and asked that the matter be listed for 2 May 2023.

[12] The application lodged by the PPS asked the court to vary the sentence made by the court on 10 August 2021 in respect of the Criminal Damage charge to include a compensation order of whatever amount the court deemed appropriate. The application stated that this was due to a response of the IO to the PDIR issued by the Directing Officer following conviction which was received after the Directing Officer had left the PPS and had only now come to light.

[13] Attached to the application was a statement from Constable Christian Blight dated 4 September 2021 stating that on 3 September 2021 the Constable printed a Damage Report provided to them by the owner in relation to an incident of criminal damage to a property in Broughshane on 10 October 2020. Also attached to the application was said damage report which summarised the damage to the property to be £9,313.93. An additional £1,397.09 was added to the cost of the damage in respect of "Preliminaries and Insurance's at 15%". VAT at 20% which equated to £2,142.20 was also added. That brought the total cost of damage to the building to a figure of £12,853.22. Contents were added at a cost of £440.00. There was an additional figure added regarding "Increased Electrical Costs" at £105.00 plus two months loss of rent at £600.00 per month. That gave a final valuation regarding the damage caused by the defendant to be £14,598.22.

[14] The application came before me on 2 May 2023 but there was no appearance by the defendant or his legal representative. Also, I required the original court papers which I understood were in storage. I was advised by the PPS that the figure of compensation being sought was £500.00 which equated to the excess incurred by the house owner after her insurance claim was paid out to her.

[15] There then followed a series of reviews while the court tried to establish if the defendant's original solicitors at the date of sentence, McIlhatton and Co., had authority to accept service of the application and thereafter to allow the defendant to make submissions to the Directing Officer of the PPS.

[16] On 22 August 2023 the defendant's solicitors McIlhatton and Co. lodged written objections to the application for a compensation order. They raised two objections which were as follows:

(i) The power of the Magistrates' Court to vary a sentence under Article 158A of the 1981 Order is clearly available to the court in cases of mistake, or where an order originally made could be considered invalid, for example, where a driver is disqualified until tested but the appropriate order would be a simple disqualification and a mistake was made on the part of the sentencing court. What the PPS wishes to do in this case is rectify an oversight on their behalf by

characterising it as a mistake which it clearly is not. The application is therefore wrongly grounded and the court has no option but to dismiss the application.

(ii) The appropriate mechanisms for the PPS to vary any sentencing order is under the "slip rule", and as has been repeatedly pointed out by our Court of Appeal, the time limits for any such application are strict and only in the most extreme circumstance are variations from these time limits allowed. The PPS has only 21 days to appeal any court's decision and the strict time limit is in order to ensure finality and closure in all criminal proceedings and to make the justice system as effective as possible. If, as in this case, the PPS wish to reopen cases years later they would create chaos. To deliberately try and rectify an oversight by using the wrong statutory application is a prima facie abuse of the court process and the court is well within its rights to dismiss any such application.

[17] The Directing Officer Ms Drummond replied to these written submissions from the defendant by email dated 29 August 2023 and made the following points;

(i) The PPS did not accept that there was a "mistake" in this case.

(ii) Following on from the District Judge's handling of the case on 10 August 2021 when the sentence was passed details were requested to enable the court to make a compensation order. The Directing Officer did this by way of PDIR on 31 August 2021. It was responded to on 7 September 2021 and further clarification was requested by the Directing Officer on 8 September 2021. That request was unfortunately not responded to by police until 19 October 2021, by which stage the Directing Officer had left the PPS and as the matter was no longer in the court listings it did not come to anyone's attention.

(iii) This was an unfortunate combination of circumstances and it is a matter which Article 158A seeks to address.

[18] The matter then came before me on 31 August 2023 when I received oral submissions from the PPS and the defendant's legal representative which were essentially a repetition of the written submissions referred to above.

[19] I considered the provisions of Article 158A of the 1981 Order, which was added by section 27 of the Criminal Appeal Act 1995, and its headnotes read:

> Power to rectify mistakes etc.
>
> Power of magistrates' court to re-open cases to rectify mistakes etc.
>
> "158A.–(1) A magistrates' court may vary or rescind a sentence or other orders imposed or made by it when dealing with an offender if it appears to the court to be in

> the interests of justice to do so; and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid which the court has power to impose or make."

[20] I also had regard to Article 14 of the Criminal Justice (NI) Order 1994 and in particular the following provisions;

> "14.–(1) Subject to the provisions of this Article, a court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may, on application or otherwise, make an order (in this Article and Articles 15 to 17 referred to as "a compensation order") requiring him to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence or to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road, and a court shall give reasons, on passing sentence, if it does not make such an order in a case where this Article empowers it to do so.
>
> (2) Compensation under paragraph (1) shall be of such amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the offender or the prosecution."

Also,

> "(9) In determining whether to make a compensation order against any person, and in determining the amount to be paid by any person under such an order, the court shall –
>
> Have regard to his means so far as they appear or are known to the court."
>
> And,
>
> (11) The compensation to be paid under a compensation order made by a magistrates' court in respect of any offence of which the court has convicted the offender shall not exceed £5,000.00 or, if the offender is under 18, £1,000.00."

[21] In the written submissions lodged by the defendant and in the reply received from the PPS the parties did not refer me to any relevant case law however from my experience I was familiar with the decision of Carswell LCJ (as he then was) in the case of *Re DPP* (2000) NI 49. In that case Mr McCloskey (as he then was) who appeared for the PPS, who were the applicant, referred the court to the judgment of Woolf LJ in *R v Leighton Buzzard Justices, ex parte DPP* (1989) 154 JP at 44 where he said:

> "Clearly, what is in mind, by the reference to 'other order' such as conditional discharge, a probation order or some sort which is akin to a sentence but not necessarily a sentence."

The court went on to say at page 6 of the judgment;

> "We respectfully agree with and adopt the meaning placed by Woolf LJ on the words "or other order."

The court also gave the following guidance for the assistance of any future cases;

> "The main purpose of Article 158A (1) is to enable Magistrates to remedy mistakes or to amend a sentence or order when they have imposed or made it under a misapprehension, and it is in the interests of justice that they should put matters right. In particular the provision allows them to impose a sentence or make an order within their jurisdiction if they have inadvertently exceeded their powers, without the necessity to come to this court to have the sentence quashed. It is not, however restricted to this and the court may vary rescind any sentence or order whenever it is in the interests of justice to do so. We do not feel that we should attempt to define the power any more closely".

I was also aware that the decision of Carswell LCJ and his reference to the comments of Woolf LJ were cited with approval by Morgan LCJ in the case of PPS and Milliken (2016) NICA 26 para 13.

[22] I took the view that the failure by the PPS to have before the court on 10 August 2021 the relevant information regarding the cost of the damage caused and specifically what financial loss the house owner had sustained as a result did amount to a "mistake". I also concluded that this was not an "oversight" as submitted by the

defendant in their written submissions. I accepted the explanation by the PPS as to why the relevant information was not before the court on the day of sentence. I also concluded that it was a mistake for the PPS not to have applied for a compensation order or alternatively it was a mistake for them not to have applied for an adjournment for them to obtain the relevant information which would enable them to properly make the relevant application. I also applied the "interests of justice" test and was conscious that the house owner had sustained a financial loss and that based on the facts as outlined to me she was not responsible for any delay in providing the details of the damage caused. I formed the view that she was entitled to compensation.

[23] I rejected the defence submission regarding "the slip rule" and the time limits they quoted. I formed the view that Article 158A was the statutory form of a "slip rule" in the Magistrates' Courts and there were no statutory time limits governing its application. I did consider their submissions regarding the delay in the PPS bringing the application and the need for finality in criminal cases however when I considered the extent of the damage and the financial loss incurred by the house owner I felt that when balancing those considerations that the balance fell in favour of the house owner.

[24] I was reminded by the PPS that although the total cost of the damage caused was nearly £15,000.00 their application related to the £500.00 insurance excess the householder had incurred as this was the amount deducted by her insurance company.

[25] The defendant's representative advised me that the defendant was unemployed and in receipt of state benefits.

[26] Taking all matters into consideration including the amount of damage caused, the direct financial loss incurred by the house owner and the limited means of the defendant I determined that the appropriate level of compensation to be paid by the defendant to the house owner in the form of a compensation order was £250.00. I allowed the defendant 26 weeks within which to pay the compensation.

The application to state a case

[27] On 14 September 2023 I received an application from the defendant as set out in Form 101. The application set out two points of law and these are set out in full at para 1 of this ruling.

[28] The procedure to be applied in relation to an application to state a case in the Magistrates' Court for the opinion of the Court of Appeal is set out 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.

(3) For the purpose of paragraph (2) the day on which the decision of the magistrates' court is given shall, where the hearing of the charge has been adjourned after conviction or under Article 51, be the day on which the court sentences or otherwise deals with the offender.

(4) If the magistrates' court is of the opinion that an application under this Article is frivolous, but not otherwise, it may, subject to paragraph (5) refuse to state a case, and, if the applicant so requires, shall give him a certificate stating that the application has been refused.

(5) The court shell not refuse to state a case if the application is made by the direction of the Attorney General.

(6) Subject to the proceeding provisions of the Article the magistrates' court, upon application made under paragraph (1), shall state a case within three months from the date of the application.

(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.

(8) Where an application for a case to be stated under this Article has been granted any other right of the applicant to appeal against the decision shall cease.

> (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.
>
> (10) Where two or more parties to the same proceedings apply under this Article to the court to state a case, the court shall, subject to paragraph (4) state a single case."

[29] As I set out above in para (2) I raised some preliminary issues with the defendant and the PPS and subsequently received both oral and written submissions.

The defendant's submissions

[30] Ms Smyth BL submitted firstly that the query raised by the court as to whether the application to state a case was lodged within the time limits as set out in Article 146(2) of the 1981 Order was essentially irrelevant and not a matter that the court should either take into consideration or adjudicate on as the only reason the court could refuse to state a case was if it was of the opinion that the application was "frivolous". See Article 146 (4).

[31] In relation to when the application to state a case was lodged by the defendant Ms Smyth advised the court that her instructions of the chronology of the events were as follows;

(i) 31 August 2023 – Court allows the PPS application under Article 158A and makes a compensation order directing the defendant to pay £250.00.

(ii) 14 September 2023 – Application to state a case in Form 101 is lodged with the court.

(iii) 15 September 2023 – Court office contacted the defendant's solicitor to advise that the relevant fee had to be paid by Tuesday 19 September 2023.

(iv) 19 September 2023 – The defendant's solicitor contacted the court and requested that the appropriate fee be deducted from the firm's ICOS account.

(v) 21 September 2023 – The defendant's solicitor notices that the fee has still not been deducted from the firm's ICOS account and contacts the court requesting that this is done.

(vi) 21 September 2023 – The fee of £130.00 is deducted from the defendant's solicitor's ICOS account and the Form 101 is stamped with the appropriate fee.

[32] The defendant accepted that the application to state a case had not been served on the PPS by 14 September 2023 which would have been fourteen days after the court's decision on 31 August 2023 (See Article 146 (2). The defendant noted that the PPS became aware of the application on 28 September 2023 but that to avoid any doubt the defendant's solicitor had posted a copy of the application on 2 November 2023, which was the day set aside for the parties to make oral submissions to the court in respect of the application.

[33] The defendant referred the court to the decision of Carswell LCJ in the case of *Wallace and Quinn* (2003) NICA 48. That was a case in which the Court of Appeal were asked to consider an appeal by way of case stated from the conviction of the defendant by a Deputy Resident Magistrate. The issue of compliance with the time requirements was argued before the court as a preliminary issue. The court considered the relevant authorities at paras 7–11 and concluded at para 12 as follows:

> "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."

[34] The defendant submitted that this court should adopt the rationale in Wallace and Quinn and not hold that the application is "out of time". Ms Smyth further submitted to the court that the only way in which this court could consider the time point was if the court arrived at the conclusion that the delay in serving the application on the PPS equated to the application being "frivolous".

[35] Dealing specifically with Article 158A(1) Ms Smyth made the following submission which I have reproduced in full for the sake of completeness:

> "In order to assist the court, the applicant would highlight that the following matters are implicit in the question of law posed at point 1(a) of the Form 101;
>
> Section 158A(1) of the 1981 Order empowers the court to vary or rescind a 'sentence', or alternatively, to vary or rescind an 'other order'.
> A sentence is, as a matter of law, distinct from an 'other order'.
> A compensation order is not a sentence, but an 'other order'.
> A court cannot vary a sentence by imposing an additional 'other order'.
>
> A court cannot as a matter of law vary an order that does not exist, that order never having previously been imposed or made by the court when dealing with the offender."

Submissions made by the PPS

[36] On behalf of the PPS Mr Henry advised the court that if there was any delay in the defendant paying the correct fee within the fourteen day period he was not taking the point, especially bearing in mind the delay caused by the PPS in bringing the Article 158A application.

[37] Mr Henry however did advise the court that there was a further problem with service of the application to state a case on the PPS.

[38] He advised that a copy of the application was not served on the PPS. The application came to the attention of the PPS when the court office emailed some comments from myself on 28 September 2023.

[39] Service on the respondent (as well as the court) is an essential requirement. It is required by article 146(2):

> "(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 ..."

[40] The submissions above refer to the potential to extend time in favour of a defendant under the authority of Article 6 of the ECHR, along with the authority which confirmed this was possible, namely *Wallace v Quinn*. However, in the same decision the Court of Appeal took a much stricter approach to the issue of service. An error in service could not be overlooked, notwithstanding Article 6 of the ECHR. The head note for the case summarises the distinction drawn by the court over the two requirements (see para 13 of the judgment in particular):

> **"Held –** The important question when there had been non-compliance with a procedural requirement laid down by statute or regulation was what the legislator should be judged to have intended should be the consequence of non-compliance, and in the majority of cases it provided limited, if any, assistance to inquire whether the requirement was mandatory or directory. If the requirements of art 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 art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). It was therefore necessary to construe the provision in a way which did not bring about such a result. The consequence (consistent with convention requirements) that Parliament may be supposed to have intended if the applicant for a case stated failed to observe the time limits, was that the provision might be regarded as sufficiently complied with if the appellant had served the requisition within a reasonable time. The length of time which might be so regarded would depend on the facts of the case, and in particular on the degree of prejudice which the delay in service might have caused to the respondent. However, where an applicant for a case stated had completely failed to serve the requisition, with the consequence that the respondent was unaware until later that a case stated had been sought and prepared and had had no opportunity to make representations on its terms, as in the instant case,

> that could not be regarded as substantial compliance, and it was the legislative intention that almost, if not completely, invariably in such cases the appeal would be barred. Accordingly, the appellant had failed to comply with art 146, with the consequence that the time requirement should not be waived and the appeal would be dismissed."

[41] The PPS only learned of the application to state a case because the DJ invited submissions on it. Prior to that, the prosecution was unaware. Service was defective. The defendant has therefore failed with both requirements within Article 146. The time requirement of itself would not prove fatal, given that the application was only one day late, but when combined with the more serious service failure, the defendant cannot be said to have *substantially complied* with the provisions in order to overcome any shortcomings. His application therefore has no jurisdiction.

[42] In relation to the defendant's submission that Article 158A did not empower me to impose a compensation order Mr Henry submitted the following.

[43] Firstly, the prosecution agreed that the purpose of Article 158A is to correct mistakes and errors. The title of the provision itself makes it clear that is its purpose, as do the various authorities. However, the oversight by the PPS was a mistake, as was the decision to allow the compensation issue to go unresolved prior to the end of the proceedings. The proceedings should have adjourned to enable the compensation issue to be finalised.

[44] The compensation order, although badly delayed, was not completely new to the defendant. This speaks to the issue of finality of sentencing. At sentencing the court queried what the IP's insurance policy excess was with a view to considering making a compensation order. The PPS said it would find out and the court said it could bring the matter back when it did. In hindsight, the case should have been adjourned for that purpose. The failure to adjourn meant the proceedings were no longer live. In those circumstances, the only tool open to the PPS was to bring the case back using Article 158A. That would have been necessary whether the issue was brought back to the court's attention in 2021 or 2023.

[45] In response to the defence submission that the prosecution should have used the "slip rule", the PPS observed that Article 158A is the slip rule in the Magistrates' Court. It was the appropriate provision to use.

[46] The PPS submitted that the crux of the defence submission is that the court did not have the power to do what it did. If it is established that the court did have the necessary authority then the application to state a case falls away on merit, irrespective of any issues with service and time. If it has no merit, the application is "frivolous".

[47] Mr Henry then proceeded to deal with his submissions regarding the application of Article 158A of the 1981 Order.

[48] The title of the provision makes it clear its primary purpose is to correct mistakes.

[49] Further, Article 158A(1) expressly refers to varying or rescinding sentences or other similar orders. That is what was done in this case.

[50] Its core feature is the reference to the "*interests of justice*" in Article 158A(1). That is what determines whether a DJ should exercise their powers provided by this provision.

[51] In *Re DPP* [2000] NI 49 Lord Carswell provided some guidance on the scope of Article 158A(1). The defence tried to use it to set aside a conviction, relying on the reference to "other order" therein. The court ruled that it was not intended to extend that far; only applying to sentences and orders akin to sentence. In doing so Carswell LCJ agreed with Woolf LCJ's decision in *R v Leighton Buzzard JJ, ex p Director of Public Prosecutions* (1990) 154 JP 41 at 44*:*

> "It was contended by Mr McCloskey on behalf of the applicant that the power of rescission conferred by para (1) extends only to sentences or other orders, but not to convictions. As to the meaning of the words 'or other order' he cited the judgment of Woolf LJ in *R v Leighton Buzzard JJ, ex p Director of Public Prosecutions* (1990) 154 JP 41 at 44, where he said:
>
> > 'Clearly what is in mind, by the reference to "other order", is an order such as a conditional discharge, a probation order or some sort of order of that sort which is akin to a sentence but not necessarily a sentence.'
>
> He pointed to the contrast between convictions on the one hand and sentences or orders on the other which appears in the wording of paras (2), (4) and (5) of art 158A and called in aid the wording of the headnotes to the article.
>
> We agree with the propositions put forward by counsel for the applicant, notwithstanding the arguments ably advanced by Mr Larkin on behalf of the magistrate. We consider that on the true construction of art 158A(1) the court can vary or rescind a sentence or other order previously imposed, but not a conviction. We respectfully

> agree with and adopt the meaning placed by Woolf LJ on the words 'or other order'."

[52] DJ Broderick clearly had power to vary the Order Book to include a compensation order as part of the sentencing process.

[53] In *R v Williamson* [2012] EWHC 1444 the Divisional Court in England and Wales considered their equivalent provision, namely section 142 of the Magistrates' Court Act 1980. While *Williamson* was concerned with a dispute about using the provision to deal with a verdict rather than sentence or ancillary order, it provided the following guidance on the provision generally:

> "31. The purpose of section 142 as originally enacted was to enable the Magistrates' Court itself to correct mistakes in limited circumstances to avoid the need for parties to appeal to the Crown Court, or to the High Court by way of case stated, or to bring judicial review proceedings. In our judgment the introduction of the section 142 power was designed to deal with an obvious mischief: namely the waste of time, energy and resources in correcting clear mistakes made in Magistrates' Courts by using appellate or review proceedings. …"

[54] If the PPS had not used Article 158A, its only remedy would have been judicial review (a case stated appeal application would have been incurably out of time).

[55] Mr Henry then proceeded to address whether the court should conclude that the application is "frivolous" and dismiss the application to state a case. See Article 146(4) of the 1981 Order.

[56] In *Murphy v Murphy* [2018] NICA 15, Stephens LJ (as he was then) dealt with what amounted to something being "frivolous, vexatious or unreasonable" for the purpose of Article 146 (the Court of Appeal was dealing with a County Court decision but the operative provision is identical to that which applies in the Magistrates' Court).

> "[10] If the county court judge is of opinion that an application to state a case is frivolous, vexatious or unreasonable she may refuse to state a case, see Article 61(4) of the 1980 Order. In *McClenagh (Chief Inspector) v Maxwell* [2000] NIJB 109 this court considered what constituted a "frivolous" application. Carswell LCJ referred to the passage in the judgment of Lord Bingham LCJ in *R v Mildenhall Magistrates' Court, ex parte Forrest Heath District Council* (1997) 161 JP 401 at 408 where Lord

> Bingham stated that `**what the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic.'** Carswell LCJ stated `the test is that of hopelessness or academic nature as set out by Lord Bingham LCJ.' The question arises as to whether the word `unreasonable' should be construed applying the `same kind' rule (ejusdem generis rule) so that an unreasonable application to state a case would be of the same kind as a frivolous or vexatious application. Mr Lannon submitted that the word unreasonable should have its ordinary meaning and he relied on *Dyer v Secretary of State for Employment* [1983] Lexis Citation 1359 EAT 183/83, which involved a consideration of a rule in a different area namely employment law. We have not heard full argument in relation to what constitutes an `unreasonable' application but tend to the view that there is a kind or group in Article 61 so that an `unreasonable' application is construed as an application of the same kind as a frivolous or vexatious application. We tend to that view as a litigant would not be acting unreasonably if a judge misapprehends the law within the meaning of the other words in Article 61(4). **There is no exercise of discretion in relation to the application of correct legal principles and there is no discretion to get the law wrong. A challenge to what is perceived to be an incorrect legal ruling could not be termed unreasonable unless it was futile, misconceived, hopeless or academic."** (my emphasis)

[57] In this case the applicant's challenge is focused entirely on whether DJ Broderick had jurisdiction (statutory authority) to impose a compensation order using Article 158A(1) at some remove after the defendant was sentenced. As explained above, it is clear that he did have such authority. In those circumstances the application to state a case is hopeless and can therefore be classed as "frivolous".

Discussion

[58] Firstly, dealing with the query raised by the court as to whether the application was lodged within the time limits as set out in Article 146(2). I accept the submissions made by Ms Smyth on behalf of the defendant in so far as the court can only refuse to state a case on the time point if the court concludes that the delay equates to being "frivolous". While I note the time limits as set out in Article 146 (2) I do not read into that statutory provision a power to refuse to state a case on the basis that the application has been lodged or served beyond the fourteen days. I remind myself of the explicit wording of Article 146 (4) which states in clear terms:

> "If the magistrates' court is of the opinion that an application under this Article is frivolous, *but not otherwise*, (my emphasis), it may, subject to paragraph (5) refuse to state a case…"

[59] If I am wrong about that I have also considered whether the application was lodged with the court in time.

[60] The application was lodged with the court on 14 September 2023 which was within the fourteen day period set out in Article 146(2). The fact that the court fee was not deducted from the defendant's solicitors ICOS account until 21 September is in my view not fatal. Applying the rationale in the case of Wallace and Quinn (see para (33) above) I do not consider a delay on seven days in the fee being stamped on the application as unreasonable. That is especially so when it is clear that the court office advised the defendant's solicitor that the fee had to be paid by 19 September. This appears to have been an error on behalf of the court office. The defendant's solicitor asked that the fee be deducted from their account on 19 September 2023 which was only five days after the application was lodged with the court on 14 September. To refuse the application on this basis would in my view be disproportionate and would constitute a breach of Article 6(1) of the Convention.

[61] I have also considered whether the application to state a case should be refused because the PPS were not served with the application within the fourteen day period as submitted by the PPS. I note that the defendant accepted that the application had indeed not been served on the PPS within the fourteen day period. I also note that the PPS became aware of the application on 28 September 2023 which represented a delay of fourteen days. Mr Henry was in my view not able to demonstrate any prejudice to the PPS by virtue of the fourteen day delay. He referred the court to the decision in Wallace and Quinn however while I accept that every case is fact sensitive it was significant I believe that the delay the court was dealing with in that case was where the applicant for the case stated had completely failed to serve the requisition, with the consequence that the respondent was unaware until later that a case stated had been sought and prepared and had no opportunity to make representations on its terms. It is unsurprising therefore that the court in Wallace and Quinn held that the time requirement should not be waved and the appeal was dismissed. I believe I can distinguish the facts of this case from those as set out in the Wallace and Quinn decision. I do not consider a delay of fourteen days to be unreasonable and again to refuse the application to state a case on that basis would I believe be disproportionate and would constitute a breach of Article 6 (1) of the Convention.

[62] Mr Henry referred the court to the decision of Stephens LJ (as he then was) in the case of Murphy and Murphy (2018) NICA 15 in which the court set out the test to be applied when determining if an application to state a case is "frivolous". It should be noted that the court in that case were considering a refusal of a County Court Judge

to state a case. Article 61(4) of the County Courts Order (NI) 1980 differs slightly from Article 146 of the Magistrates' Court (NI) Order 1981 in so far as the former provides that a judge can refuse to state a case if they consider the application to be "frivolous, vexatious or unreasonable". The latter simply refers to "frivolous".

[63] While I accept that the test identified in the Murphy case involved consideration of the additional elements of "vexatious and unreasonable" that does not in my view differ substantially from the concept of "frivolous" as set out in the 1981 Order. I would fear that to seek to apply a narrower test when considering applications in the Magistrates' Court as opposed to those involving the County Court would be unwarranted. I see no significant distinction between the concepts of what would amount to "frivolous" as opposed to "vexatious" as opposed to "unreasonable".

[64] I have considered Ms Smyth's submissions that a compensation order is not a sentence, but an "other order" and that a court cannot vary a sentence by imposing an additional "other order". Further, that a court cannot as a matter of law vary an order that does not exist, that order never having previously been imposed or made by the court when dealing with the offender.

[65] While I commend Ms Smyth for the succinctness of her submission, I cannot however accept same. I believe that such an interpretation is far too narrow when one considers the wording of Article 158A and the guidance contained in the judgment of Carswell LCJ in the Re DPP case set out at para 12 of the judgment and reproduced herein at para 21 above.

[66] At the heart of this case was a mistake by the PPS in not properly making an application for a compensation order on the day when the court was sentencing the defendant. The PPS, the defendant and the court were aware of the issue of compensation. The PPS did not have the relevant information on which to base an application for a compensation order. They did not apply to adjourn the case in order for them to obtain such information. The court did not have any details of how much damage was caused in financial terms and was unable to make an informed decision as to what the appropriate level of compensation should be. Had that information been available then it is clear that such an order would have been made after having taken into account the means of the defendant and an assessment of his ability to pay any order made. Taking all those circumstances into account and applying the "interests of justice" test as provided for in Article 158A I conclude that the court did have the power to make a compensation order as provided for under Article 14 of the Criminal Justice (NI) Order 1994. Having concluded therefore that the court did have the power to make a compensation order I concur with the PPS submission that in those circumstances the application to state a case is hopeless and can therefore be classed as "frivolous".

Conclusion

[67] For the reasons set out above I am of the opinion that this application to state a case is frivolous and accordingly I refuse the application pursuant to Article 146 (4) of the 1981 Order.

[68] I attach Form 102 to this ruling confirming the decision of the court.

30 November 2023