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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

BEFORE A DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION BY FEARGAL MARKEY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY A DISTRICT JUDGE DATED 7 MARCH 2024

Mr Larkin KC with Mr Forde (instructed by Tiernans Solicitors) for the Applicant
Mr McGleenan KC with Mr McNeill (instructed by the Public Prosecution Service) for the Respondent
Mr Thompson for the Notice Party, the District Judge

Before: Keegan LCJ and Fowler J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is a challenge by the applicant to his committal to the Crown Court on criminal charges. The applicant seeks leave to challenge two decisions taken by Deputy District Judge McStay ("the judge"), sitting at Belfast Magistrates' Court on 7 March 2024 to:

(a) the decision to grant a prosecution hearsay application and admit five statements of Sargeant Major Jeremy Decou ("M Decou") into evidence; and

(b) the decision to commit the applicant to the Crown Court on the foot of that application.

[2] On 7 March 2024 the applicant appeared before the judge charged with 32 offences pursuant to the Misuse of Drugs Act 1971, the Criminal Acts and Conspiracy (Northern Ireland) Order 1983 and the Proceeds of Crime Act 2002 and was committed for trial in the Crown Court. These charges arose as a result of the use of encrypted telephone handsets offered by a business called "EncroChat."

Factual background of EncroChat prosecutions

[3] Between 2016 and 2020 EncroChat offered telephonic devices which were "end to end" encrypted. The EncroChat handset allowed the user through a username to communicate with other users of the platform. In or about early 2020, the French and Dutch authorities, concerned with the criminal use of such technology, set up a Joint Investigation Team ("JIT") tasked with obtaining access to the encrypted EncroChat material. Gendarmerie Sargeant Major Jeremy Decou was placed in charge of the investigation.

[4] In 2020, the JIT gained access to the encrypted data within the EncroChat phones, which had enabled users across 122 countries to access encrypted data, facilitating organised crime and drug trafficking.

[5] On 1 April 2020, French law enforcement received authorisation from a Criminal Court in Lille to install a data collection mechanism on EncroChat devices. Until 13 June 2020, the JIT collected and stored data from the EncroChat system, which was shared across many jurisdictions. In the UK, the National Crime Agency ("NCA") was among those to receive data from the JIT.

[6] The mechanism accessed the EncroChat telephones so that the messages could be obtained by law enforcement. Thereafter, the de-encrypted messages were shared with law enforcement agencies across many jurisdictions including, of central relevance to this jurisdiction, the NCA.

[7] Following on from the above, the NCA launched Operation Venetic, which triggered criminal investigations into multiple organised crime groups. Flowing from this, evidence collected from EncroChat has been used in prosecutions across the UK.

[8] In the course of these prosecutions some questions concerning the reliability and admissibility of this data have been raised before various levels of courts across all three jurisdictions of the United Kingdom. Specifically, defendants have sought to question the admissibility or undermine the reliability of the EncroChat material. This has taken the form of different types of legal challenge none of which have been successful. A summary of the relevant cases is appropriate at this stage to set the context in which the instant case arises.

[9] In *R v A, B, C & D* [2021] EWCA Crim 128 the Court of Appeal in England & Wales dealt with issues arising as a result of the application of the Investigatory Powers Act 2016 code. In a nutshell, the legal point was that if the material was intercepted then it was inadmissible. If, however, it was "stored" material then, subject to a Targeted Equipment Interference Warrant, it was admissible. The Court of Appeal found that the material was "stored" information which was admissible.

[10] In *R v Atkinson* [2021] EWCA Crim 1447 the England & Wales Court of Appeal had to consider the admissibility of material from the JIT investigation referred to above. The central involvement of M Decou in the JIT and the material emanating from the JIT was the subject of several hearsay applications. In *Atkinson* it is recorded that French authorities maintained that M Decou would not be permitted to leave France and that any request for him to give oral evidence was "unreasonable." Having considered this position the material was admitted under the applicable hearsay rules which mirror our own in Northern Ireland.

[10] At the preparatory hearing in *Atkinson* which took place at first instance, Dove J ruled that the M Decou statements were admissible, and that the conditions of section 116(1) and 2(c) of the Criminal Justice Act 2003 (the applicable hearsay provisions in England & Wales) were satisfied. The court determined that the prosecution had exhausted all means possible of securing M Decou as a witness at trial. In his decision, Dove J applied the test set out in the case of *R v Riat* [2012] EWCA Crim 1509; [2013] 1 WLR 2592, which led him to conclude that the hearsay was admissible. He noted that the evidence M Decou gave was crucial to the prosecution's case. Moreover, he found that an appropriate safeguard for the appellants would be through judicial directions that could be given to the jury.

[12] One of the appellant's grounds of challenge in this appeal concerned Dove J's conclusion that the conditions of section 116(1) and 2(c) of the CJA 2003 were satisfied. On this issue, the Court of Appeal made the following finding:

> "Dove J was entitled to conclude that the requirements of section 116(1) and (2)(c) of the CJA were met, given the French authorities had provided a transparent and coherent explanation, which was clear and well-reasoned, for the refusal to permit Mr Decou to attend court to give evidence. The prosecution had used the appropriate channels to secure his attendance, and there was nothing else in a practical sense that the authorities could do to progress this request. On that basis, in our judgment Dove J had persuasively addressed the first of the steps in *Riat*." [para 49].

[13] Another issue in *Atkinson* was the reliability and credibility of M Decou's hearsay evidence. This was challenged on the basis that there were internal

inconsistencies within M Decou's evidence. Dove J concluded that these inconsistencies were insufficient to prevent admission of the evidence. He found that M Decou was a credible witness, with a strong background in law enforcement.

[14] The Court of Appeal upheld Dove J's decision on this, stating that:

> "The judge had a firm basis for concluding that this evidence from Mr Decou was apparently reliable. As Dove J set out, he had performed many years of service in the Gendarmerie, and he would have understood his obligation to the rule of law and to the integrity and credibility of the present investigation, for which he had critical coordinating responsibility. In those circumstances, the judge was entitled to determine that he is someone to be regarded as credible." [para 55]

[15] *Atkinson* is a highly persuasive authority from the England & Wales Court of Appeal which has been followed in this jurisdiction and which we see no reason to depart from in terms of the principles it establishes.

[16] A significant number of prosecutions have ensued in England & Wales and in Northern Ireland utilising evidence gathered from the JIT. In *R v Murray & others* [2023] EWCA Crim 282, the position in England & Wales is summarised as follows:

> "[4] To date, there have been 950 convictions connected to the use in evidence of EncroChat material, the majority on guilty pleas. About 1,800 defendants are awaiting trial in cases where EncroChat evidence is central to the prosecution case. Most are in custody. The substantial delay in dealing with these cases stems, in large part, from the resolution of points of principle in lengthy preparatory hearings. At their heart have been various arguments that the evidence harvested from the EncroChat server is inadmissible by virtue of the prohibition against the use of intercept evidence provided by the Investigatory Powers Act 2015."

[17] We also note for completeness sake that in *SF v NCA* [2023] UKIPTrib 3, the Investigatory Powers Tribunal ("IPT") was tasked with determining, *inter alia*, the lawfulness of the warrants and warrant types used by the NCA to obtain the EncroChat material and found the process to be lawful.

This case

[18] This applicant has been returned for trial in the Crown Court, however, he challenges the committal order made by the judge. Both the applicant and respondent are in agreement that the main, if not sole, evidence relied upon by the prosecution in this case is five statements from M Decou, who was the head of the digital crime unit which carried out the operation.

[19] At the applicant's committal hearing, the prosecution submitted a hearsay application to admit into evidence five statements from M Decou, intended to constitute evidence of the EncroChat material. The defence objected to the hearsay application both prior to and during the oral hearing by way of Form 88F pursuant to Rule 149AS (6) of the Magistrates' Courts Rules (Northern Ireland) 1984.

[20] The prosecution sought to admit the hearsay pursuant to Article 20(2)(c) of the Criminal Justice (Evidence) (NI) Order 2004 ("the 2004 Order"), which provides that a statement not made in oral evidence in the proceedings is admissible as evidence if:

> "The relevant person is outside the United Kingdom, and
> it is not reasonably practicable to secure his attendance."

In the alternative the prosecution application also submitted that under Article 18(1)(d) of the 2004 Order the hearsay should be admitted in the interests of justice.

[21] In support of the hearsay application, the prosecution provided a statement from Ms Holly Gallagher, dated 11 November 2020, with exhibits. Holly Gallagher is a solicitor from the Crown Prosecution Service ("CPS"), who had been acting as Liaison Prosecutor to France. The Holly Gallagher statements and supporting exhibits refer to a request sent by the CPS in England & Wales for M Decou to attend criminal proceedings in the jurisdiction. This statement was intended by the prosecution to illustrate the CPS's inability to secure M Decou's attendance, despite taking all the reasonable steps to do so.

[22] Thus, it was submitted that the Public Prosecution Service of Northern Ireland ("the prosecution") would also be unable to secure M Decou's attendance, given that circumstances have not changed since the CPS's requests for M Decou's attendance were made in November 2020. Put simply, the prosecution highlighted that M Decou is constrained by matters of French national security, and, therefore, cannot give evidence in criminal proceedings of this nature wherever they arise.

[23] For the court's ease, the prosecution provided a summary of the evidential documents on M Decou's position, and the engagement made internationally on this issue. They are summarised as follows:

(a) HG1: Ms Gallagher's email attaching a European Investigation Order ("EIO") to the French authorities on 23 September 2020.

(b) HG2: The attached EIO, which was issued by the UK dated 23 September 2020 and signed under the name K Matthews of the CPS, the authority which issued the EIO. The EIO asked for a statement to be taken from M Decou and confirmation that he is prepared to provide evidence in court.

(c) HG3: Ms Gallagher's email attaching a translation of the said EIO to the French authorities.

(d) HG4: The translated version of the EIO.

(e) HG5: An email from the Vice President of Investigations at the JIRS of Lille (Investigative Judge) to Ms Gallagher on 24 September 2020. Although untranslated, this is a formal response to the EIO agreeing that NCA officers could take a statement from M Decou.

(f) HG6: An email from Ms Gallagher dated 7 October 2020 to the French Vice-Prosecutor asking for formal confirmation that M Decou was prepared to give oral evidence before a UK court. Ms Gallagher included in the email her understanding of the position at the time.

(g) HG7: The response from the French Vice-Prosecutor on 7 October 2020. He stated that this request had not been clearly formulated before the NCA had come to Lille to take a statement from M Decou and he explained his reasons why he did not consider it a reasonable request.

(h) HG8: An email from Ms Gallagher to the Vice-Prosecutor in reply in which she asks whether the Vice-Prosecutor and his colleagues would be willing to discuss the matter directly with the Organised Crime Division prosecutors to explain the request and discuss potential measures that could be put in place to mitigate the concerns raised by the French authorities.

(i) HG9: An email from Ms Gallagher dated 20 October 2020 to the Vice-Prosecutor attaching:

   (i) HG10: A cover letter from Rose-Marie Franton, Head of CPS Organised Crime Division, formally explaining why it is important for M Decou to attend court in the UK to give evidence;

   (ii) HG11: A translation of HG10;

(iii) HG12: An EIO dated 15 October 2020 formally requesting M Decou's attendance in the UK (or alternatively by live link) to give evidence; and

(iv) HG13: a translation of HG12.

(j) HG14-18: Letters Ms Gallagher received from the investigative judge for the JIRS Lille and the Procureure de la Republique for Lille, refusing the request for M Decou to give oral evidence.

(k) HG19 is a translation of HG16, in which Sophie Aleksic, the Vice-President in charge of investigations at the JIRS of the Judicial Tribunal of Lille, explains the reasons why M Decou has been refused permission to give evidence to a court in the UK.

[24] In addition to the Holly Gallagher statements and exhibits, the prosecution also submitted a letter from French authorities, hereafter referred to as the "Lydia Pflug letter", dated 24 May 2023. Lydia Pflug is the Vice-President in charge of the investigation at Lille Judicial Court in France. The prosecution submitted that this letter was in response to the prosecution's international letter of request ("ILOR") under section 7 of the Crime (International Co-operation) Act 2003 seeking the attendance of M Decou at trials in Northern Ireland to give evidence.

[25] The responding letter from Lydia Pflug stated that permission for M Decou to attend trials in Northern Ireland was denied, since M Decou "is bound by French secrecy laws." Similar reasons had been sent to the CPS in England when requests for M Decou's attendance pursuant to an EIO were denied.

[26] The defence objected to both the Holly Gallagher statements and exhibits and the Lydia Pflug letter on the basis that there should have been hearsay applications served to ground them. The defence also took issue with the fact that the prosecution had not disclosed the ILOR sent to French authorities. The prosecution submitted that ILORs are confidential between states and are not typically produced at criminal proceedings.

[27] Upon hearing oral submissions on behalf of both the prosecution and defence, the judge granted the application. The applicant was returned to the Crown Court for trial, with his arraignment listed on 18 April 2024. On that date, the case was stood down to mention only and remains adjourned as the court was informed that an application for judicial review was being considered and required determination before the criminal case could proceed.

Grounds of challenge and relief sought

[28] The grounds of challenge are in summary:

(i) Illegality: Did the judge err in law by granting the prosecution's hearsay statement and admitting the statements of Jeremy Decou into evidence?

(ii) Immaterial considerations: Did the judge take into account immaterial considerations when making his decision, notably, that hearsay applications of a similar nature had been granted in other cases in the UK?

(iii) Did the judge provide adequate reasons?

[29] The relief sought by the applicant is as follows:

(i) An order of certiorari quashing the decision to grant the prosecution hearsay application.

(ii) An order of certiorari quashing the decision to commit the applicant for trial to the Crown Court.

(iii) A declaration that these two decisions are, and each of them is, unlawful, ultra vires and of no force or effect.

The legal framework

[30] In Northern Ireland the Criminal Justice (Committal Reform) Act (Northern Ireland) 2022 has set out a template for committal reform. At present not all parts of this legislation are operative however the necessity for oral evidence is removed. Save where cases are directly transferred to the Crown Court pursuant to Article 3 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 or Article 4 of the Children's Evidence (Northern Ireland) Order 1995 the Northern Ireland system still requires committal for trial. That means that in Northern Ireland the vast majority of cases remain in the magistrates' court until all of the papers have been prepared upon which the prosecution will rely at the Crown Court. At that stage the District Judge must determine whether there is a case fit for trial and if so, the accused must be committed to the Crown Court.

[31] The law in relation to committal proceedings and the test on judicial review of committal proceedings was discussed by the Divisional Court in *Re Bassalat's Application* [2023] NIKB 8 and *McKay and another's Application* [2021] NIQB 110. At paras [29]–[32] of *McKay & another* the committal test is set out as follows:

> "[29] The standard of proof which is required for a magistrates' court to return an accused for trial is statutory. It is contained in Article 37(1) of the Magistrates' Courts (Northern Ireland) Order 1981 which reads as follows:

> '37.—(1) Subject to this Order, and any other enactment relating to the summary trial of indictable offences, where the court conducting the preliminary investigation is of opinion after taking into account any statement of the accused and any evidence given by him or on his behalf that the evidence is sufficient to put the accused upon trial by jury for any indictable offence it shall commit him for trial; and, if it is not of that opinion, it shall, if he is in custody for no cause other than the offence which is the subject of the investigation, discharge him.'

[30] In *Re Hamill* [2017] NIQB 118 the Divisional Court considered the legal aspects to this test as follows. At paragraph [41] the court said this:

> '[41] 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 so that the question as to whether the accused is guilty or not guilty is determined at trial.'

[31] In *Re Mackin's Application* [2000] NIJB 78 the test to be applied when deciding on sufficiency of evidence was examined. 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. The *Galbraith* test enjoins a court to take the prosecution case at its height as follows:

> '(1) If there is no evidence that the crime alleged has been committed by the defendant, then there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence, but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

> (3) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (4) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.'

> [32] The test on judicial review of committal proceedings has been described as a high standard following from cases such as *Neill v Antrim Magistrates' Court* [1992] 4 All ER 846 and *R v Bedwellty Justices ex parte Williams* [1997] AC 225. These cases were examined by Carswell LCJ in the case of *Re Mackin* referred to above. That decision makes clear that 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."

[32] The need to consider alternative remedies also arises, see *R v DPP ex parte Kebeline* [2000] 2 AC 326. When examining the *Kebeline* principle in *McKay & another* the Divisional Court stated at para [36]:

> "[36] The requirement to utilise alternative remedies when specialist criminal courts are available is firmly articulated in *Kebeline* in the context of a prosecutorial decision. At page 389 H, page 390 A and B of his opinion Lord Hobhouse commented as follows:
>
> 'Disputed questions of fact and law which arise in the course of a criminal prosecution are for the relevant criminal court to determine. That is the function of the trial in the Crown Court and any appeal to the Court of Appeal. Inevitably, from time to time, the prosecutor

> may take a view of the law which is not subsequently upheld. If he has acted upon competent and responsible advice, this is not a ground for criticising him. Still less should a ruling adverse to the prosecution provide the defence with an opportunity to by-pass the criminal process or escape, otherwise than by appeal, other decisions of the criminal court.'"

[33] In *Re Haggarty's Application* [2012] NIQB 14 the Divisional Court when deciding that a judicial review was a collateral challenge of the type contemplated in *Kebeline* also made the following comments which are apt:

> "[24] … The Divisional Court has a supervisory jurisdiction while the case is before the District Judge but there is no decision of that court which is sought to be reviewed in this case. 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. In light of the extensive and careful arguments which were advanced in the course of the hearing in respect of the proper interpretation of paragraph 4.19 of Code E we have given our ruling but wish to make it clear that the principle in *Kebeline* also applies to that issue."

[34] The relevant law concerning the admissibility of hearsay statements is contained in the 2004 Order. The prosecution submitted a hearsay application to admit the evidence of M Decou pursuant to Articles 20(1) and (2)(c) and 18(1)(d) of the 2004 Order. Article 20 at paragraphs (1) and (2)(c) contains the grounds for admissibility in cases where a witness in unavailable. It states:

> "20.—(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—
>
> (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,
>
> (b) the person who made the statement ("the relevant person") is identified to the court's satisfaction, and
>
> (c) any of the five conditions mentioned in paragraph (2) is satisfied.

> (2) The conditions are—
>
> …
>
> (c) that the relevant person is outside the United Kingdom, and it is not reasonably practicable to secure his attendance."

[35] Pursuant to Article 18(1)(d) of the 2004 Order, hearsay evidence is also admissible as evidence if the court is satisfied that it is in the interests of justice for it to be admissible. Article 18(2) sets out the relevant factors the court must have regard to when deciding to admit evidence under Article 18(1)(d):

> "(2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant)—
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
>
> (b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
>
> (c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;
>
> (d) the circumstances in which the statement was made;
>
> (e) how reliable the maker of the statement appears to be;
>
> (f) how reliable the evidence of the making of the statement appears to be;
>
> (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
>
> (h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it."

[36] Furthermore, the prosecution submits that the Holly Gallagher statements and exhibits and the Lydia Pflug letter are admissible as business documents, pursuant to Article 21 of the 2004 Order. (Article 21(4)(b)(iii) applied at the time i.e. an order under Part 2 of the Criminal Justice (European Investigation Order) Regulations 2017).

Article 21 provides as follows.

> "21.—(1) In criminal proceedings a statement contained in a document is admissible as evidence of any matter stated if—
>
> (a) oral evidence given in the proceedings would be admissible as evidence of that matter;
>
> (b) the requirements of paragraph (2) are satisfied; and
>
> (c) the requirements of paragraph (5) are satisfied, in a case where paragraph (4) requires them to be.
>
> (2) The requirements of this paragraph are satisfied if—
>
> (a) the document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office;
>
> (b) the person who supplied the information contained in the statement ("the relevant person") had or may reasonably be supposed to have had personal knowledge of the matters dealt with; and
>
> (c) each person (if any) through whom the information was supplied from the relevant person to the person mentioned in sub-paragraph (a) received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office.

(3) The persons mentioned in sub-paragraphs (a) and (b) of paragraph (2) may be the same person.

(4) The additional requirements of paragraph (5) must be satisfied if the statement—

(a) was prepared for the purposes of pending or contemplated criminal proceedings, or for a criminal investigation, but

(b) was not obtained pursuant to—

(i) a request under section 7 of the Crime (International Co-operation) Act 2003,

(ii) an order under paragraph 6 of Schedule 13 to the Criminal Justice Act 1988, ...

(iii) or

(iv) an overseas production order under the Crime (Overseas Production Orders) Act 2019,

(all of which relate to overseas evidence).

(5) The requirements of this paragraph are satisfied if—

(a) any of the five conditions mentioned in Article 20(2) is satisfied (absence of relevant person etc), or

(b) the relevant person cannot reasonably be expected to have any recollection of the matters dealt with in the statement (having regard to the length of time since he supplied the information and all other circumstances).

(6) A statement is not admissible under this Article if the court makes a direction to that effect under paragraph (7).

(7) The court may make a direction under this paragraph if satisfied that the statement's reliability as

evidence for the purpose for which it is tendered is doubtful in view of—

(a) its contents,

(b) the source of the information contained in it,

(c) the way in which or the circumstances in which the information was supplied or received, or

(d) the way in which or the circumstances in which the document concerned was created or received."

[37] The applicant contends that the M Decou statements did not comply with Rule 39(1) of the Magistrates' Court (Northern Ireland) Rules 1984, namely, the statements were not recorded in Form 26. Rule 39(1) states as follows:

"39.—(1) Written statements of the evidence of a witness tendered in evidence to a magistrates' court at a preliminary inquiry shall be in Form 26."

[38] Further, the applicant submits the prosecution were required to submit a written hearsay notice to admit the Holly Gallagher statements and exhibits and the Lydia Pflug letter. This is pursuant to Article 149AS of the Magistrates' Courts Rules (Northern Ireland) 1984, which states:

"149AS.—(1) This Rule shall apply where a party wishes to adduce evidence on one or more of the grounds set out in Article 18(1)(a) to (d) of the 2004 Order and in this Rule, such evidence is referred to as 'hearsay evidence.'

(2) A prosecutor who wants to adduce hearsay evidence shall give notice in Form 88E."

[39] Moreover, the applicant contends that the result of non-compliance with Rule 149AS follows from Article 35(5) of the 2004 Order. The effect of this article is as follows:

"35.—(1) Rules of court may make such provision as appears to the appropriate authority to be necessary or expedient for the purposes of this Part; and the appropriate authority is the authority entitled to make the rules.

…

> (5) If a party proposing to tender evidence fails to comply with a prescribed requirement applicable to it—
>
> (a) the evidence is not admissible except with the court's leave;
>
> …"

[40] Thus, the applicant submits that the M Decou statements did not comply with Article 33(1) of the Magistrates' Court (Northern Ireland) Order 1981. The section at issue is 33(1)(b), and the remaining sections which set out the statutory declaration requirements. This states:

> "33.—(1) A magistrates' court conducting a preliminary inquiry may admit the statement of the evidence to be given by a witness ... if the following conditions are complied with, that is to say—
>
> (a) the statement shall be in writing,
>
> (b) the statement shall purport to be signed by the person who made it,
>
> (c) the statement shall contain a declaration by that person to the effect that—
>
> (i) it is true to the best of his knowledge and belief, and
>
> (ii) he made the statement knowing that, if it were tendered in evidence, whether at a preliminary inquiry or at the trial of the accused, he would be liable to prosecution if he wilfully said in it anything which he knew to be false or did not believe to be true,
>
> which declaration shall be endorsed with the signature of the person who recorded the statement, or to whom the statement was delivered by the maker of the statement for the purposes of the proceedings,
>
> (d) none of the parties objects to the statement being admitted in evidence upon a ground which would

constitute a valid objection to oral evidence to the like effect as the contents of the statement,

(e) if the statement is made by a person under the age of twenty-one, his age shall be set forth in the statement, and

(f) if it is made by a person who cannot read, it shall be read to him before he signs it and shall be accompanied by a declaration by the person who so read the statement to the effect that it was so read and that after it was so read the maker of the statement assented to it.

(2) Any document or object referred to as an exhibit and identified in a written statement tendered in evidence under this Article shall be treated as if it had been produced as an exhibit and identified in court by the maker of the statement.

(3) Nothing in this Article shall prevent the giving in evidence of any confession, or other statement, made at any time by the accused which is admissible in law against him."

[41] The prosecution submits that the applicant has an alternative effective remedy available to him in the Crown Court. This, the prosecution maintain, is the procedure under sections 39-43 of the Criminal Procedure and Investigation Act 1996. The relevant sections state:

"**39 – Meaning of pre-trial hearing.**

(1) For the purposes of this Part a hearing is a pre-trial hearing if it relates to a trial on indictment and it takes place—

(a) after the accused has been sent for trial for the offence, and

(b) before the start of the trial.

…

40 – Power to make rulings.

(1) A judge may make at a pre-trial hearing a ruling as to—

(a) any question as to the admissibility of evidence;
any other question of law relating to the case concerned.

(2) A ruling may be made under this section—

(a) on an application by a party to the case, or

(b) of the judge's own motion.

(3) Subject to subsection (4), a ruling made under this section has binding effect from the time it is made until the case against the accused or, if there is more than one, against each of them is disposed of; and the case against an accused is disposed of if—

(a) he is acquitted or convicted, or

(b) the prosecutor decides not to proceed with the case against him.

…"

where the trial judge will be expected to make a discretionary judicial determination as to whether the evidence should be admitted at trial. This case law supports the proposition that where the trial judge could reasonably admit the evidence the determination of that issue generally should not be removed from him at the committal stage."

Consideration

[42] The primary basis of challenge to this committal is alleged illegality on the basis that no formal application was made to admit the evidence of Holly Gallagher and Linda Pflug as per ground 5(i)(a) of the Order 53 Statement. As regards M Decou's evidence the challenge is not to substance but rather that his evidence was not provided in the prescribed form as per ground 5(i)(b) of the Order 53 Statement. Thus, this is a circumstance where the review is based upon an alleged lack of evidence, rather that the purported admissible evidence being incapable of supporting the charges.

[43] We can deal with the other claims made in the Order 53 statement in short compass at this point. Ground 5(ii) is directed to a claim of the judge taking into account "immaterial considerations" in that he considered similar cases in the

jurisdiction of England & Wales. This argument is entirely unmeritorious. We consider that the judge was very much entitled to consider existing case law when deciding upon this issue of law. While it is important to consider the specific facts of the case at hand, this case arises as a result of an international investigation and so unsurprisingly the facts were of striking similarity to those in England & Wales.

[44] In addition, we find the ground found at 5(iii) of the Order 53 Statement relying upon insufficiency of reasoning to be weak and divorced from the realities of practice in the magistrates' courts where many of these applications are dealt with a daily basis. The jurisdiction would not function if District Judges were expected to reserve and provide written decisions in every case. In any event we do not understand that the District Judge was asked to do so. We have a note of the decision made. Quite understandably it was given *ex tempore*. In our view it covers the main issues and is sufficiently clear in explaining the basis for the District Judge's decision.

[45] So, we turn to consider the purported illegality of the judge's decision. In doing so, we remind ourselves of the two main questions raised before the court in this application, namely:

(i) Was the District Judge wrong in law to allow the hearsay application and admit the statements of M Decou into evidence?

(ii) Was the District Judge wrong in law to commit the applicant to proceedings in the Crown Court on the foot of the hearsay application?

[46] As we see it, the illegality claim is largely based on alleged failures in procedure which will be discussed below but first we deal with the legislative requirements as follows. This is a leave hearing and so we must apply the standard of arguability and decide whether there is arguable case with a reasonable prospect of success, see *Ni Chuinneagain's Application* [2022] NICA 56.

[47] The core question in this analysis is whether it was reasonably practicable to secure attendance of a witness outside the United Kingdom. In *Maloney* [1994] Crim LR 525 Beldam LJ held that the "word practicable is not the equivalent to physically possible." The question is whether the witness can attend voluntarily. The court also took into account what efforts the party seeking to rely on the evidence of the witness took to secure the witness's attendance. The reasonableness assessment involves looking at what steps a party would normally take to secure the witness's attendance, having regard to the means and resources available to the parties. It was held that this is ultimately a question of fact for the judge.

[48] The Court of Appeal in England has addressed the relevant conditions for section 116(2)(c) of the Criminal Justice Act 2003 to be satisfied (the equivalent of our Article 20(1) and (2)(c)). The court ruled that whether the conditions are satisfied is a

question of fact. If they are satisfied, the hearsay is admissible, it does not depend on the exercise of judicial discretion - see *R v Rowley* [2012] EWCA Crim 1434, para [21].

[49] In this case it is clear that the form of M Decou's statements did not meet the requirements laid down by our rules. In the case of *Re JA's Application for Judicial Review* [2007] NIQB 64, the court considered the effect of failure to comply with the procedural requirements of the 2004 Order. The court held that a special measures application which failed to comply with procedural requirements in relation to the introduction of hearsay evidence, namely the service of a notice, did not invalidate the magistrate judge's order. In reaching this conclusion, Kerr LCJ considered that:

> "[36]… It could not have been the intention of Parliament that a failure to comply with the procedural provisions should result in the invalidation of a direction."

Furthermore, at para [37], Kerr LCJ stated:

> "[37] In this case the objective of ensuring that the defendant be made aware of the application and the reasons for it is amply fulfilled. Full argument was presented on his behalf to the resident magistrate. No submission was omitted or neglected as a result of the failure of the prosecution to serve the requisite notice. While we cannot approve of the failure of PPS to serve the necessary notice, we are firmly of the view that this failure should not invalidate the order."

[50] A similar point was considered in the case of *R v Crooks and Ors* [2012] NICC 25. His Honour Judge Lynch KC held that:

> "[21] Accordingly, I hold that the amendment to the rules means that unless oral evidence has been called by a party to the proceedings the party relying upon hearsay evidence does not need to comply with the notices as set out in the Rules."

[51] In alignment with other courts in this jurisdiction referred to above, we depreciate non-compliance with the rules. However, the ensuing question is whether the breach of rules in this case invalidates the decision to admit the evidence.

[52] The applicant's contention is that the statements of M Decou do not comply with Article 33(1) of the Magistrates' Courts (Northern Ireland) Order 1981. However, we note that whilst the statements of M Decou do not strictly comply with the rules, the statements were on official forms and contained formal declarations of

truth. Moreover, we note the prosecution's contention that the reality of practice is that hearsay statements are often not in the prescribed form required for committal proceedings in Northern Ireland.

[53] In *R v Soneji* [2005] UKHL 49 at paras [18]-[23] Lord Steyn discusses the practical implications of such a situation as follows:

> "[23] Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinctions and its many artificial refinements have outlived their usefulness. Instead, as held in Attorney Generals Reference No 3 of 1999, the emphasis ought to be on the consequences of non-compliance and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction…"

[54] Having considered the competing arguments we do not consider that Parliament would have intended this evidence to be rendered inadmissible for non-compliance with rules in the circumstances of this case. This was not an isolated prosecution but rather a prosecution in the context of a worldwide investigation where the same evidence was submitted in kindred cases. In this case the defendant was fully aware of the application and the reasons for it were plain and established in *Atkinson* in that M Decou's non availability applied to all EncroChat cases.

[55] Furthermore, full argument was presented on his behalf to the District Judge in advance by way of skeleton arguments and orally. Mr Forde on behalf of the applicant left no matter unaddressed. No submission was omitted or neglected as a result of the failure of the prosecution to serve the requisite notice. So, aligned to the view taken by Kerr LCJ in *JA,* while we cannot approve of the failure of the prosecution to serve the necessary notice, we are firmly of the view that this failure should not invalidate the order. This aspect of the challenge has no realistic prospect of success and so we refuse leave in relation to it.

[56] That leaves the last issue which is whether the prosecution needed to bring a formal application to have Holly Gallagher's statement and Ms Pflug's letter admitted and what the effect of any omission should be. We have considered the competing arguments and are particularly cognisant that the defence formally objected to this evidence in Form 88E.

[57] Given the formal objection referred to above it would have been preferable for the prosecution to make an application in relation to this evidence, even orally, if only to avoid the challenge that has arisen. That is because the hearsay application was expressly supported by evidence from Holly Gallagher and a letter from

Lydia Pflug, on behalf of French judicial authorities, that it was not reasonably practicable to secure the attendance of Mr Decou at the applicant's trial in Northern Ireland.

[58] In fact (without forming a definitive view) Holly Gallagher's evidence may not be so crucial in legal terms. That is because it was superseded by Ms Pflug's letter which is an official letter generated through a formal court process which confirms the position that M Decou will not be able attend court on national security grounds, a fact already known and recorded in *Atkinson*.

[59] Furthermore, while it is accepted that the Lydia Pflug letter contains numerous discrepancies, in our view, this does not affect the overall reliability of the evidence. The statement from authorities is clear that M Decou is denied access to attend trials in Northern Ireland as a witness. To our knowledge, he has not attended any trials in England & Wales as a witness. It has been confirmed on numerous occasions that M Decou is constrained by matters of national security. This is a sufficient and compelling reason for the absence of the witness which has already been accepted by the Court of Appeal in England & Wales after thorough examination.

[60] Replying to the applicant's submission that the Lydia Pflug letter is unreliable due to the number of discrepancies contained within, the prosecution contends that none of these errors cast any real doubt on its fundamental reliability. The prosecution also submits that these errors were raised before the District Judge, who, if there had been a formal hearsay notice for the letter, would have been required to consider them within the framework of Article 21(7). This did not actually happen since no formal hearsay notice was submitted.

[61] Properly analysed, we think that both sources of evidence (ie from Holly Gallagher and Linda Pflug) can fall within the category of business document under Article 21 of the 2004 Order as the prosecution submit. In particular, the statements and exhibits may satisfy requirements set out by Article 21(1) and (2). Moreover, the additional requirements set out by Article 21(5) need not be considered, since Article 21(4) is not engaged. The first statements, namely the Holly Gallagher statements and exhibits detailing responses to the CPS, were obtained pursuant to Part 2 of the Criminal Justice (European Investigation Order) Regulations 2017. The Lydia Pflug letter was obtained pursuant to section 7 of the Crime (International-Cooperation) Act 2003.

[62] We also find that the fact that the ILOR was not disclosed is neither here nor there in this case. We agree that applying *Re McIntyre's Application for Judicial Review* [2018] NIQB 79 an ILOR may be disclosable, and that the prosecution perhaps took too rigid a line on this. That is against the thrust of the prosecution argument that disclosure of the ILOR is confidential between requested and requesting states (*Abacha v NCA* [2016] EWCA Civ 760 at paras [36]-[44] and [48] and *ZXC v Bloomberg*

LP [2019] EWHC 970 (QB) at paras [19]-[23]). However, the exact terms of the request made in the ILOR could not have made a difference to the clear statement of facts in Lydia Pflug's response. Similarly, the erroneous reference by Ms Pflug to the request as an EIO, rather than an ILOR, does not change the substance of her reply.

[64] Another important consideration is the existence of alternative remedies. The jurisprudence we have discussed above consistently states that the Divisional Court is a court of last resort in criminal matters. Taking the applicant's case at its height we will accept for arguments sake that in this case a No Bill does not provide effective relief. However, to our mind the prosecution has offered a compelling argument as to the alternative route open to the applicant by way of sections 39-43 of the Criminal Procedure and Investigations Act 1996. This offers a pre-trial hearing which can deal with admissibility issues.

[64] Whether the prosecution's hearsay application is moved at the pre-trial stage or during trial, the applicant will have the ability to submit:

(a) That the requirements of the 2004 Order are not satisfied in this case;

(b) That the evidence should be excluded under Article 30 of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 or under Article 76 of the Police and Criminal Evidence 1989; or

(c) That the case should be stopped because it depends wholly or partly on hearsay evidence and that evidence is so unconvincing that, considering its importance to the case against the defendant, his conviction of the offence would be unsafe.

[65] The context of this case is critically important. When an overall view is taken what is exposed is that the circumstances provide no realistic prospect of success of judicial review based on any of the arguments made despite Mr Larkin's skill in advancing them. In truth, the claims made amount to criticisms of form over substance and cannot prevail in the circumstances of this significant prosecution. In addition, it simply cannot be said that insurmountable prejudice is occasioned to the applicant as the specialist criminal court has alternative mechanisms to protect his interests. Thus, we are not satisfied that the threshold is reached where a court would realistically quash this committal order.

[66] Furthermore, even if we had been minded to grant leave in this case we would not have been minded to grant relief given our view that if the committal were re-run with the procedural errors corrected, the conclusion could not have been anything other than to commit for trial given the fact that this prosecution is one within a large body of prosecutions that have been taken where M Decou's evidence has been admitted and accepted. The prosecution contends that the hearsay application to admit the evidence of M Decou under Article 20(1) and (2)(c) of the

2004 Order, and Article 18, was sufficient to found a committal order to the Crown Court. We agree.

Conclusion

[67] Accordingly, for all of the reasons provided above, the application for leave for judicial review is refused