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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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BEFORE A DIVISIONAL COURT

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IN THE MATTER OF AN APPLICATION BY GRAHAM SKINNER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF NEWTOWNARDS MAGISTRATES' COURT

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Mr Larkin KC with Mr Devine (instructed by McConnell Kelly Solicitors) for the Applicant
Mr Henry KC with Ms Pinkerton (instructed by the Public Prosecution Service (PPS)) for the Notice Party, the PPS
The Respondent was not represented

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Before: Keegan LCJ and Scoffield J

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

Introduction

[1] This is an application for leave to apply for judicial review in a criminal cause or matter concerning committal for trial to the Crown Court. The Order 53 statement filed by the applicant is dated 31 January 2025. It challenges the decision of the District Judge (Magistrates' Court), Mr Mark Hamill ("the district judge"), sitting in the division of Newtownards on 9 January 2025, to commit the applicant for trial to the Crown Court on a charge of unlawful assembly.

[2] The impugned decisions are framed as follows in para [3] of the Order 53 statement:

"(i) The Respondent decided that he had no jurisdiction to consider issues concerning the compatibility of the common law offence of 'unlawful assembly' (with which the Applicant was charged) with the Applicant's rights pursuant to Article 7 ECHR of the European Convention on Human Rights;

(ii) The Respondent decided that, as he was only involved in a 'screening procedure' (per *Hamill* [2017] NIQB 118 [41]), he was prohibited and/or inhibited from considering the arguments advanced obo [sic] the Applicant in respect of whether the charge of unlawful assembly was compatible with the Applicant's convention rights pursuant to the ECHR;

(iii) The Respondent determined that the Applicant's convention rights were not engaged as the applicant was 'not in peril of being convicted';

(iv) The Respondent determined that he was entitled to return the Applicant to the Crown court as: Firstly, the Applicant's behaviour might have represented 'some type of criminality'; and/or, Secondly, there was 'no prospect of this [i.e. the Applicant's behaviour] being ruled to be devoid of criminality' he was entitled to return him for trial on the charge of unlawful assembly;

(v) The Respondent determined that he had no jurisdiction to consider the Applicant's arguments in respect of the legality of the charge of 'unlawful assembly' as the court considered that there were '… disputed question[s] of fact and law were for the Crown Court to determine';"

[3] The grounds of challenge set out at para [5] of the applicant's Order 53 statement repeat and elaborate upon the complaints inherent within the characterisation of the district judge's decisions set out above. The grounds are predicated upon alleged illegality on the basis that the judge erred in deciding that he had no jurisdiction to consider the applicant's arguments at the committal hearing. Procedural unfairness is also alleged in that it is argued that the district judge failed to give reasons for his decision and/or failed to explain which definition of the offence of unlawful assembly he had applied to the facts of the case. A further claim is made of irrationality in the *Wednesbury* sense in that it is alleged that the

evidence against the applicant was not capable of rationally sustaining the charge (whatever approach to the offence the judge adopted). Finally, a claim is made under the auspice of breach of statutory duty as the applicant contends that the impugned decision is vitiated by the proposed respondent's failure to comply with the court's statutory duty as a public authority under section 6 of the Human Rights Act 1998 to act in a Convention complaint way (on the basis that the applicant's rights under article 7 of the European Convention on Human Rights (ECHR) were violated).

[4] Article 7 ECHR concerns punishment without law and reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

[5] Interim relief is not now sought as an arraignment which was pending in the Crown Court has been adjourned and will await the decision of this court. The district judge did not take any active role in these proceedings on the basis of the principle found in *Re Darley* [1997] NI 384. Therefore, the arguments against the grant of leave were made on behalf of the notice party, the PPS.

Factual background

[6] The structured outline of case prepared by the police/PPS includes a case outline which has been replicated in the affidavit filed by the applicant for these proceedings dated 31 January 2025. It reads as follows:

> "On Thursday 6th April 2023 at approximately 20:15 hours a large group of around 50-60 males entered the area of Weavers Grange, they had walked from Jubilee Road through an alley to Circular Road before climbing over the border fence of Weavers Grange. A number of males were masked but a large number had their faces easily visible. This group proceeded to remove South East Antrim UDA banners, attached to residential gable walls, from three different sites within the estate. They

moved as an organised group from house to house, carrying ladders, and appeared to be under the direction of several individuals who led in directed actions.

One of these gable walls was at 35 Weavers Grange, the home of William McCabe. Mr McCabe was present at the front of the house along with a Brett Sutcliffe. Both made verbal allegations to police of being threatened and intimidated by the crowd at the front of the property. Brett Sutcliffe made a witness statement evidencing this.

Police implemented an evidence gathering approach utilising officer body worn video, evidence gathering camera and drone which recorded the occurrence.

The police position is that this represents a concerted 'show of strength' with the objective of intimidating Weavers Grange residents to make them leave the area.

From the evidence gathering operation police have formally identified a number of individuals who have subsequently been arrested.

Defendant William McCormick can be seen in the footage climbing a border fence to enter the residential area of Weavers Grange. The defendant then holds a set of ladders at the side of the first and third properties to assist the removal of the signage. The defendant moves with the large group to the three properties where signage is removed in the same manner.

Defendant Ryan Turley can be seen in the footage arriving at Weavers Grange carrying a set of ladders. The defendant then proceeds to position the ladders on the second property in Weavers Grange, climb the ladders and use a claw hammer to remove signage.

The defendant continues to move with the large group to further properties where signage is removed in the same manner.

Defendant Graham Skinner can be seen in the footage arriving at Weavers Grange in the large group. He remains present for the removal of the signage and is front and centre in the crowd during the events."

[7] This document goes on to summarise police interviews in relation to the suspects. The applicant provided a 'no comment' interview. He was originally charged with the common law offences of affray and unlawful assembly, however, when preliminary enquiry (PE) papers were served on 9 May 2024, the only charge was one of unlawful assembly in the following terms:

> "That you on the 6th day of April 2023, assembled with others, in an assembly of three or more persons, to achieve a law [sic] or unlawful object in such a way as to cause reasonable and courageous persons in the vicinity to apprehend a breach of the peace, contrary to Common Law."

The committal hearing

[8] The affidavit of the applicant avers that, after several adjournments, the PE was eventually heard on 9 January 2025 by the district judge. In advance of the hearing on 9 January 2025, the judge circulated to all counsel an authority of *Re Markey* [2024] NIKB 111. The applicant also points out that counsel on his behalf had filed submissions dated 9 September 2024, and additional written submissions were before the court filed by a co-accused, Mr Harry Murray, by Mr Andrew Moriarty of counsel.

[9] During the course of the leave hearing, we asked whether the prosecution had filed written submissions also, as these were not in the bundle of papers before us. In fact, the prosecution did file submissions dated 18 October 2024, prepared by Ms Natalie Pinkerton of counsel, which we have also now seen and considered.

[10] It is within this context that the district judge considered the case, armed with legal submissions from both sides. We have also received a rough 'transcript' of the hearing given that there is no written ruling from the judge, and one was not requested. Since proceedings in the magistrates' court are not electronically recorded, no reliable transcript is available. The record with which we have been provided is really an amalgam of various notes taken during the hearing by persons present (including legal representatives and a journalist), supplemented by some later media reporting of the hearing. The most detailed note is that of a journalist whose notes have been made available through the applicant's solicitor. What we are referring to as the 'transcript' demonstrates that the case was dealt with based on the written submissions, that this was a contested PE, and that the district judge heard submissions from Mr Devine and Mr Moriarty who represented another of the 14 accused who were before the court.

[11] The written submissions from Mr Moriarty on behalf of the co-accused are expansive and deal in large measure with the question of Convention compatibility of the charge and whether it satisfies the ECHR requirement inherent within article 7 ECHR of legal certainty. Incidentally, we note that Mr Moriarty also raised

compliance with article 10 and article 11 rights, however this is not something that we need to deal with in this application as there was no complaint that these matters required to be resolved at the committal stage. The focus of Mr Larkin KC's submissions were on the twin issues of alleged failure to properly resolve the objection based on article 7 ECHR and the insufficiency of the evidence to return the applicant on the charge.

[12] The submissions of Mr Devine on behalf of this applicant at the committal were much more succinct. However, it is instructive to note that at para [4] of his submissions he argued as follows:

> "The defence submit that there is not sufficient evidence and as such the court should discharge her [sic]. The test to be applied as to whether there is a prima facie case is the same test that is applied as whether there is a case to answer at Trial see *R v Mackin* [2000] NIJB 78."

[13] These submissions also replied upon, without repeating or reciting them, the submissions filed on behalf of the co-accused Murray in relation to article 7 ECHR. Thereafter, having summarised the background, the submissions from paras [17]-[28] focused upon alleged inadequacies in the PPS case as follows:

> "17. One of the difficulties for the Crown is that all of the activity occurred whilst police were in close proximity and clearly monitoring all activity.
>
> 18. This would have been obvious to any 'reasonable and courageous person in the vicinity.'
>
> 19. So, the Defendant arrived and 'remained present.' That's it.
>
> 20. Those present even explicitly stated that they 'were not there for trouble.'
>
> 21. The Court benefits from the 'unlawful assembly' jurisprudence set out extensively in the submission filed on behalf of Murray.
>
> 22. The imaginative use of 'unlawful assembly' to 'capture' activity shown on the video evidence simply falls short.
>
> 23. It does not have the qualities of unlawful assembly required. For example: "…in all of which the necessary circumstances of terror are present in the

assembly itself, either as regards the object for which it is gathered together, or in the manner of its assembling and proceeding to carry out that object…"

24. Neither was he 'armed in warlike like manner.'

25. He was not doing "… some unlawful act with violence, and that unlawful act must be *malum in se* and not *malum prohibitum*."

26. There was no "intent to do any unlawful act with force or violence."

27. There was no "terror and alarm" excited."

[14] The closing salvo in Mr Devine's argument was that the court was invited to examine the defendant's precise behaviour and uphold his rights and decline to return him to the Crown Court. It can be seen that the meat of these written submissions was a focus on the facts, comparing them against some of the more demanding tests set out in authorities (cited by Mr Moriarty) for the common law offence of unlawful assembly.

[15] Next, we turn to Ms Pinkerton's submissions on behalf of the PPS. She set out the law on committal proceedings. She then referred to the charge of unlawful assembly and says this at paras [4]-[7] of her submissions:

"4. There is no definitive wording for the offence of unlawful assembly and various definitions can be found from previous cases. However, the most common characteristics that could be identified are that the offence required three or more persons who, by being or coming together, caused an actual breach of the peace *or* caused a firm and courageous person in the vicinity to apprehend a breach of the peace.

5. Those involved must either have intended to cause a breach of the peace by the acts of violence they intended to use, or to do acts which they knew were likely to cause a breach of the peace. A threat to the peace is apprehended by a person of reasonable firmness. Those involved do not have to take any steps towards achieving their objectives, nor do they need a common purpose:

the offence is concerned with persons acting together rather than pursuing a common purpose.

6. However, the nature of an unlawful assembly is that it involves a gathering of three or more persons with intent to commit a crime by force or to carry out a common purpose (whether lawful or unlawful) in such a manner or in such circumstances as would in the opinion of firm and rational men endanger the public peace or create fear of immediate danger to the tranquillity of the neighbourhood.

7. As the court is aware, police officers are also members of the public and their observations of a situation are relevant considerations, particularly in a case of this nature."

[16] Ms Pinkerton then sets out the factual background in some further detail drawing on the depositions before the court, particularly the accounts of witnesses and the body worn video on which the prosecution relied. She also refers to the interviews of the accused, most of which were 'no comment', including that of the applicant. She deals with the defence submissions, and addresses the article 7 legal certainty point as follows:

"24. When the factual matrix of what occurred is considered the circumstances a jury could consider are:

(i) A large number of males gathered and worked together (50-60). There is a joint purposing from the males who are clearly organised and being directed by a few.

(ii) They proceeded together in their numbers, to a small residential area.

(iii) A number had their faces covered to conceal their identity. An inference available to a jury would be that one would only do this if going to engage in behaviour that you would not want to be identified doing.

(iv) Verbal abuse was shouted as heard by police.

(v) Threats made as heard by Mr Sutcliffe.

(vi) The group spilled out on the roadway as well as walking on footpaths.

(vii) The group did not do as instructed by police.

(viii) This incident followed public disorder in the area (page 77).

(ix) Mr Sutcliffe was in fact intimidated and scared.

25. There is a case currently before Belfast Crown Court with regards to unlawful assembly *Lammey and Matthews* which relates to a highly publicised incident in Pitt Park in February 2021, and in 2019 *Morrow, Majury and Moore* also proceeded in Belfast Crown Court. However, because an offence is not often before a court is not a basis to say an offence cannot proceed, nor is ignorance of the law a defence. If Mr Murray is suggesting he is unaware of what the law is surrounding an unlawful assembly, then that is something he will provide evidence on in due course, one would imagine. Whether this was an unlawful assembly is a matter for the tribunal of fact, however what a court at committal is considering is whether there is sufficient evidence that a properly directed jury *could* convict."

[17] Some of the comments attributed to the judge during the hearing expose his reasoning as follows (with 'AM' referring to Mr Moriarty who appeared for the co-accused Murray):

"Judge: Is your submission to me, as the resident district judge here in Ards and aware of the background with this feud, deadly ongoing and that's even on Mr S's description of events, taken at its height, is your submission that there is no criminality at all here?

AM: I'm not here to argue criminality. What I am here to argue is that this court has to comply with the Convention as a public authority.

Judge: I will give you my interpretation of events and as I said at the very start of the proceedings that context is everything and the bare minimum of this behaviour is clearly a breach of the peace. That is my interpretation and that is my take on the papers. There is a bare minimum of criminality and the only way you can avoid being returned for trial is to persuade me that there is no criminality.

AM: No, I do not agree with that. That is not the test.

Judge: I am afraid that is my interpretation of it.

AM: This court has to act in compliance with the Convention. What I have tried to say is that this offence has been resurrected from antiquity and is not Convention compliant.

Judge: My interpretation is that if there is no potential criminality then that has to be resolved in the Crown Court. That is my interpretation. You can choose to accept that or go before the Lady Chief Justice. This is not a court of trial and the authorities are clear, crystal clear, and these issues are for the trial judge, not for me."

[18] When pressed further by counsel on the requirement of the court to act in compliance with the Convention, the district judge additionally said this:

> "Issues of fact and law that arise during the course of a criminal procedure are for the relevant criminal court to determine and that is the trial in the Crown Court and even [appeal] to the Court of Appeal."

[19] The further exchanges indicate that the district judge invited Mr Moriarty to make or renew his submissions before "the judge" (meaning the Crown Court judge). Mr Moriarty said, "I'm trying to" (meaning that he was trying to develop his written submissions before the district judge). The district judge responded:

> "You have got the wrong judge. Tell the trial judge. This is a triable issue but that goes before the trial judge."

[20] We take from these exchanges that the district judge considered the legal submissions being made to raise a triable issue, capable of being addressed to and by the trial judge (and, indeed, more appropriate for determination by the judge presiding over the Crown Court trial). Reading the exchanges as a whole, it appears to us that the judge was not declining jurisdiction to deal with a clear legal point. Rather, he had reached the view that there were triable issues of both fact and law but, taking the Crown case at its height in both respects, there was enough evidence to return the accused to the Crown Court to face trial where, properly directed (without himself deciding at this stage what the proper direction would in due course be), a jury could convict on it.

Relevant legal principles

[21] As the Divisional Court said in the case of *McKay and Bryson* [2021] NIQB 111, the test on judicial review of a decision to commit for trial was established in *Neill v Antrim Magistrates' Court* [1992] 4 All ER 846 by the House of Lords and further discussed by the same court in *R v Bedwellty Justices ex parte Williams* [1997] AC 225. The standard of review is high and exacting; however, committal decisions may be impugned in certain circumstances depending on the particular facts at issue.

[22] The committal test is contained in Article 37(1) of the Magistrates' Courts (Northern Ireland) Order 1981 and 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."

[23] As is well-known, in *Re Hamill* [2017] NIQB 118 the Divisional Court reminded practitioners of the nature of the committal test at para [41] as follows:

> "[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."

[24] When determining whether there is sufficient evidence the test which applies flows from *R v Galbraith* [1981] 1 WLR 1039. The *Galbraith* test enjoins the court to take the prosecution case at its height and provides the following guidance:

"'(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 height, 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."

[25] The case of *Re Mackin* [2000] NIJB 78 (which was highlighted to the district judge in Mr Devine's submissions) is a Divisional Court case from this jurisdiction which is frequently cited and remains good law. In particular, the judgment of Carswell LCJ recognises that the circumstances where the High Court should intervene in relation to committal are "strictly limited" (at 81f). He referred to two categories of cases which had been addressed by the courts, namely where it was asserted there was no admissible evidence or where it was asserted there was insufficiency of evidence.

[26] Carswell LCJ cited with approval Lord Cooke of Thorndon in the *Williams* case, in which he said this:

"My Lords, in my respectful opinion, it would be both illogical and unsatisfactory to hold that the law of judicial review should distinguish in principle between a committal based solely on inadmissible evidence and a committal based solely on evidence not reasonably capable of supporting it. In each case, there is in truth no evidence to support the committal and the committal is therefore open to quashing on judicial review.

> Nonetheless, there is a practical distinction. If justices had been of the opinion on admissible evidence that there is sufficient to put the accused on trial, I suggest that normally on a judicial review application a court will rightly be slow to interfere at that stage. The question will, more appropriately, be dealt with on a no case submission at the close of the prosecution evidence, when the worth of that evidence can be better assessed by a judge who has heard it, or even on a pre-trial application grounded on an abuse of process. In practice, successful judicial review proceedings are likely to be rare in both classes of case and, especially rare in the second case."

[27] *R v DPP ex parte Kebeline* [2000] 2 AC 326 is an important case in this context given the submissions made by Mr Henry KC on behalf of the PPS. It was a challenge to a prosecutorial decision; however wider points of principle were established which have been applied in criminal law judicial reviews in this jurisdiction such as *Re Bassalat's Application* [2023] NIKB 8 and *McKay & Bryson's Application* (supra). Specifically, the need to consider the role of the specialist criminal courts as providing alternative remedies is plain. At page 389H, through to page 390B, Lord Hobhouse in his opinion 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."

[28] At page 371H, Lord Steyn also made the following well-known comments in relation to judicial reviews arising from criminal proceedings, even after the advent of the Human Rights Act 1998:

> "While the passing of the Human Rights Act 1998 marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to

> open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be permitted in our criminal justice system. In my view the Divisional Court should have dismissed the Respondents' application."

[29] In *Re Haggarty's Application* [2012] NIQB 14, at para [24], Morgan LCJ found that the judicial review was a collateral challenge of the type contemplated in *Kebeline* and stated as follows:

> "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 *Kebilene* also applies to that issue."

Our analysis

[30] Applying the legal principles discussed above we reiterate what previous Divisional Courts dealing with criminal matters such as this have said. First, the committal stage is a pre-trial screening procedure. Second, the statutory test is to ensure that there is sufficient evidence to commit the accused to trial (and it is to the sufficiency of the evidence that the *Galbraith* decision speaks). Third, the question whether the accused is guilty or not is not determined at the committal stage, as the committal decision is not final. Fourth, the Crown Court as the court of trial provides a range of options to an accused to challenge the case being brought against him; not only to defend the case in substance at trial but also before the trial begins by mounting a 'No Bill' application or abuse of process application. Finally, the principle which flows from *Kebeline* is that there is a need in this jurisdiction, as in other jurisdictions, to avoid satellite litigation before a Divisional Court where a specialist criminal court can deal with the substantive issues. That is to avoid delay; and to ensure an orderly development of the criminal law by the courts (the criminal courts) with primary responsibility for interpreting, applying and developing that law.

[31] With all of the above said, each case will depend on its own facts. We understand the points raised by Mr Larkin that *Kebeline* deals with prosecutorial decisions. *Markey* deals with an issue concerning the *admissibility* of evidence. *Bassalat* deals with which court should examine allegations of entrapment. However, all of the recent cases from the Divisional Court reiterated the points of

principle which apply in judicial reviews concerning criminal matters. Amongst other things, the *Markey* decision referred to the relatively summary nature of committal proceedings in the magistrates' court, the facilities available in the Crown Court (in advance of the trial proper) to determine complex disputed issues and the general desirability of such matters being resolved within the trial process. We consider any criticism of the judge for reminding the parties of the *Markey* decision in advance of committal hearing to be unfair.

[32] The *McKay and Bryson* decision is closely on point, because that case dealt with a challenge to committal proceedings. Two sections of the decision in *McKay and Bryson* bear repeating, as follows. First, at para [56] the Divisional Court reiterated the "broad discretionary remit" that a district judge has when considering committal for trial in the following terms and that "… the elements of an offence must be established at a prima facie level without a final determination being made."

[33] Second, at para [65] of *McKay and Bryson*, the Divisional Court also said this:

> "[65] Whilst we have considered the merits of the arguments made in the foregoing paragraphs, we come back to the fact that the *Kebeline* principle is clearly engaged in this case. Any complaints or substantive arguments made in relation to the adequacy of the evidence and/or Convention rights can very well be accommodated within the criminal trial process. This court considers that a collateral challenge such as this brought to the Divisional Court is not appropriate when other options are clearly available. This court is a court of last resort. The specialist criminal framework is better suited to determination of these types of issues. The applicants are not prejudiced by this outcome because they can bring pre-trial applications for No Bill or applications at trial including abuse of process and thereafter there are appeal rights embedded in the criminal law process. Also, there is nothing stopping the applicants raising any points of law in the Crown Court."

It is of note that issues were also raised in the above case as to article 7 ECHR (see para [55] of the Divisional Court decision).

[34] True it is, in this case, that we do not have a written decision of the district judge. However, it must be remembered that the magistrates' court is a summary jurisdiction which deals with busy lists and very many cases. It would hamper the administration of justice if formulated, written reasons were required in all cases of this nature. It is an unfortunate feature of this case that the judge was not asked to even provide a paragraph as to his reasoning (nor was the usual pre-action correspondence sent under the Judicial Review Pre-Action Protocol, which might

have allowed for some elucidation of the district judge's reasoning, because of the judicial nature of the proposed respondent). We venture that if the judge had been invited to express his reasoning in writing, even briefly, this case may not have been brought, or at least not on all of the presently proposed grounds. In any event, we do now have a record of the hearing (see paras [9] and [16]-[18] above) which assists us as we can infer some of the judge's reasoning from that. We also bear in mind that this is an experienced judge who has been resident in the division of Newtownards for a considerable period of time and so is familiar with the territory.

[35] We can infer from the transcript summarised above that the judge felt there was sufficient evidence to raise a prima facie case of unlawful assembly and that he thought that any of the arguments raised could be mounted at the Crown Court. Whilst this position could have been more clearly expressed, there is nothing inherently wrong with that assessment. In our view it is a stretch too far to suggest that the district judge was refusing jurisdiction altogether in this case or that he has fallen into some procedural error. The judge was aware of the arguments, which had been set out in detail in writing, and had had an opportunity to consider the written submissions and all of the evidence.

[36] We also note that the applicant's case at one and the same time asserts that the district judge refused to consider or rule upon the Convention arguments yet also criticises him for a conclusion in respect of those arguments (namely that no violation of the applicant's article 7 rights would occur by reason of committal, given that return for trial itself did not amount to a conviction on an insufficiently defined offence and did not deprive the applicant of pursuing this argument in advance of any verdict).

[37] The judge was quite right to say that his screening role was to determine whether there was sufficient evidence to justify placing the defendant on trial. In addition, there can be no argument that if there is a significant factual dispute about what happened or a legal issue, provided the judge believes there is sufficient evidence, resolution of any disputes of law or fact are matters for the Crown Court, the court of trial, not the screening court as per *Kebeline* discussed at para [27] above and *Mc Kay & Bryson* discussed at para [33] above. There is no error of law in relation to that assessment. Whilst some legal issues, particularly relating to the admissibility of evidence, sound directly upon the sufficiency of evidence in the case, the legal issue raised in this case was not of that character.

[38] Furthermore, the article 7 issue was well addressed in Ms Pinkerton's argument. It was not unreasonable for the district judge to consider that this issue should be determined by the Crown Court and that this should not be an impediment to committal. Ms Pinkerton's argument refers to other cases before the Crown Court where a charge of unlawful assembly has been proffered, the evidential basis for the charge and the ingredients of the charge. These are also contained in the extract from *Archbold's Criminal Practice* (1985 edition), with which we have been provided. (This is a text which deals with the approach to the

unlawful assembly offence at common law before it was abolished in England and Wales by section 9 of the Public Order Act 1986).

[39] This text supports the continued existence of the common law offence in terms materially similar or identical to those charged in this case (also reflected in the practitioners' text published by Mr Barry Valentine). There was enough for the judge to conclude that this was an issue which should properly be left to the Crown Court judge. The claim of procedural unfairness also fails in circumstances where the judge had written submissions from both parties, where committal no longer requires oral evidence in our jurisdiction by virtue of committal reform, and where he was not requested to provide anything more by way of reasoning.

[40] In addition, there is absolutely no principled basis upon which a claim of *Wednesbury* irrationality can be made out. The high threshold for a claim of this nature is not met in that the judge has not strayed outside the reasonable remit of a judge dealing with an application of this nature in terms of his assessment of the evidence.

[41] The interesting point raised in relation to reform of the law in England and Wales cannot win the day for obvious reasons. It is correct that the material provided to us highlights the fact that in England and Wales the offence of unlawful assembly has been replaced by other public order offences. It is also correct that the Northern Ireland Policing Board has recorded that the Northern Ireland situation needs to be examined carefully to consider human rights compliance. However, this material is not determinative of the law, and we must apply the law as it stands. The fact that the law has changed in England and Wales is not a reason to disapply the law in Northern Ireland currently in force. Moreover, we accept the force of Mr Henry's submission that the abolition of a common law offence would be expected to take effect by clear words; and that the decision not to follow the 1986 Act in England when the Public Order (Northern Ireland) Order 1987 was introduced (otherwise modelled on the 1986 Act) appears to have been a conscious legislative choice. This common law offence of unlawful assembly is an ancient offence, just as affray is in our jurisdiction.

[42] Mr Larkin's argument that the legislation was in effect amended by the amendments, savings, transitional provisions and repeals contained in article 28 of the 1987 Order carries no traction whatsoever and added nothing to this debate. That is because to our mind a change to this area of law would require legislation as happened in England and Wales.

[43] As to the Article 7 argument which featured in this case, we are satisfied that the Convention compliance of the maintenance of the offence of unlawful assembly at common law, and the question of whether it is sufficiently defined to meet Convention 'quality of law' standards, can and should be determined in the course of the criminal proceedings themselves.

[44] To summarise, we must apply the law to the particular facts of this case. In doing so, we have concerns that many, if not all, of the arguments mounted by the applicant do not enjoy a realistic prospect of success on judicial review which is the test that we apply in this jurisdiction: see *Ni Chuinneaghain's Application* [2022] NICA 56.

[45] In any event, we also find that this challenge is impermissible satellite litigation applying the *Kebeline* principle. The applicant has alternative means of pursuing his complaints in the Crown Court which he can engage at an early stage including an abuse of process application (contending that it is unfair to put him on trial in relation to the unlawful assembly offence) and/or a No Bill application (contending that there is insufficient evidence to do so). No demonstrable injustice arises. The arraignment should now proceed without further delay.

[46] Finally, a brief word as to the applicant's reliance on the recent *McAleenon* case [2024] UKSC 31 in relation to alternative remedies in criminal law. We do not consider that the principle against satellite litigation in criminal proceedings is simply an element of the more general doctrine that effective alternative remedies must first be exhausted. Rather, it is a free-standing principle applied to cases of a criminal nature. The *McAleenon* case does not discuss the *Kebeline* principle and concerns subject matter which is substantially different from that which arises here. By the same token, *Kebeline* did not simply address the issue in that case as one of alternative remedy. We are not persuaded that the *McAleenon* authority provides any real assistance in this case or that it was intended to dilute the principle against satellite litigation in criminal proceedings. The criminal trial process is entirely different, with the committal and Crown Court stages being part of the one process rather than different processes involving different parties and different issues where the element of choice arises which the Supreme Court considered in *McAleenon*.

[47] Given our assessment of the merits in this case, we are not minded to grant leave for judicial review. Even if there is an arguable point of law, we do not consider it sufficiently exceptional to depart from the usual approach that such issues should be determined in the course of the criminal trial process itself (or on appeal).

Conclusion

[48] Accordingly, we refuse leave for the reasons we have given. We will hear the parties as to costs.